



**Fontana Limited v Okumu (Appeal E027 of 2023)  
[2025] KEELRC 1574 (KLR) (23 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1574 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
APPEAL E027 OF 2023  
AN MWAURE, J  
MAY 23, 2025**

**BETWEEN**

**FONTANA LIMITED ..... APPELLANT**

**AND**

**WYCLIFFE WAISAKWA OKUMU ..... RESPONDENT**

*(Being the Appeal of the Judgment and Decree of the Chief  
Magistrate's Court at Nakuru by Honorable K. I Orenge, Principal  
Magistrate, dated 23rd November 2022 in CMELRC No. 57 of 2020)*

**JUDGMENT**

1. The Appellant, being dissatisfied by the judgment and decree of the Honourable Principal Magistrate K. I Orenge, filed this appeal vide a Memorandum of Appeal dated 12<sup>th</sup> October 2023 on the grounds that: -
  1. The learned Magistrate erred in law and fact and/or applied wrong principles and parameters by finding and holding that the Claimant/Respondent's dismissal was unfair and unlawful.
  2. The Learned Magistrate failed to consider the Respondent/Appellant's evidence and/or misapprehended the law in arriving at a decision that the Claimant/Respondent was unlawfully and unfairly terminated from employment.
  3. The Learned Magistrate erred in law and fact and/or applied wrong principles and parameters by finding and holding that the Claimant/Respondent was unfairly terminated from employment and that the termination was unlawful and unfair
  4. The Learned Magistrate erred in law and fact and/or applied wrong principle and parameters by awarding the Claimant/Respondent Kshs.14,401.10 1 months' pay in lieu of notice.



5. The Learned Magistrate erred in law and fact and/or applied wrong principles and/or failed to consider the evidence adduced by the Respondent/Appellant and parameters by awarding the Claimant/Respondent Kshs. 172,813 as leave days or any amount thereof.
  6. The Learned Magistrate erred in law and fact and/or applied wrong principles and/or failed to consider the evidence adduced by the Respondent/Appellant and parameters by awarding the Claimant/Respondent Kshs. 172, 271.45 as compensation for 12 months or any amount thereof.
  7. The Learned Magistrate erred in law and fact and/or applied wrong principles and/or failed to consider the evidence adduced by the Respondent/Appellant and parameters by awarding the Claimant/Respondent Kshs. 226,451.05 as underpayment or any amount thereof.
  8. The Learned Magistrate erred in law and/or applied the wrong principles in awarding the Claimant/Respondent interest and costs.
2. The Appellants prays for:
- a. The Appeal be and is hereby allowed with cost to the Appellant, the Judgment of the Chief Magistrate's Court be reviewed and the Claimant/Respondent's claim be dismissed in its entirety with costs.
  - b. This Honourable Court be pleased to review the judgment of the Learned Magistrate to disallow and/or dismiss the Claimant/Respondent's claim for payment for 1 month in lieu notice.
  - c. This Honourable Court be pleased to review the judgment of the Learned Magistrate to disallow and/or dismiss the Claimant/Respondent's claim for payment of leave days.
  - d. This Honourable Court be pleased to review the judgment of the Learned Magistrate to disallow and/or dismiss the Claimant/Respondent's claim for compensation.
  - e. This Honourable Court be pleased to review the judgment of the Learned Magistrate to disallow and/or dismiss the Claimant/Respondent's claim for underpayment.
  - f. Any other orders as the Honourable Court may deem fit and just.
3. Parties canvassed the appeal by way of written submissions.

### **Appellant's written submissions**

4. The Appellant submitted that in the Learned Magistrate's judgment he stated that the Respondent was dismissed unfairly and wrongfully under Section 45 of the [Employment Act](#), due to failure in following requisite procedures before termination. The decision was made despite evidence showing that the Respondent did not return to work after release from police custody and only presented a resignation letter upon his return.
5. The Appellant submitted that the Respondent voluntarily resigned and in the Black's Law Dictionary 9<sup>th</sup> Edition defined resignation as "formal notification of relinquishing an office or position". The Appellant also submitted that the Learned Magistrate's judgment on unfair termination disregarded critical evidence, including a letter from the Respondent requesting assistance in accessing NSSF savings, which signaled an intent to leave employment. Despite the Respondent's resignation letter resolving the desertion issue, the Learned Magistrate focused on the Appellant's alleged failure to seek the Respondent's whereabouts. This misplaced procedural burden contradicted evidence that



the Respondent neither proved being locked out nor provided evidence of termination, making the judgment flawed and prejudicial.

6. The Appellant relied on the case of *Cheruiyot Kipkemoi Joel V Tirgaga Tea Factory Co. Limited* [2017] KEELRC 96 (KLR) the court held that the Respondent had successfully demonstrated lawful termination through evidence of the Claimant's resignation, while the Claimant failed to substantiate his case for unlawful termination. Consequently, the court held that the termination was lawful and dismissed the claim with costs.
7. The Appellant submitted that the Respondent voluntarily resigned, disposing of the need for disciplinary procedures and argued that there was no termination of employment thus making claims of unfair termination unfounded. The Appellant relied on the case of *Deloraine Estates Limited V Shikuku* [2025] KEELRC 342 (KLR) where the court stated that since the Claimant had resigned from employment, the sole issue was whether she was entitled to the relief sought. It concluded that she was not entitled to the prayers sought. In *Joel V Tirgaga Tea Factory Company Limited* [2022] KECA 651 (KLR), the Court of Appeal held that the appellant voluntarily resigned, making the issues of unlawful or unfair termination irrelevant. The appellant was deemed not entitled to salary in lieu of notice, compensation, or damages under Section 49 of the *Employment Act*. Having signed an employment release agreement confirming payment of terminal dues, the court found no merit in the appeal and dismissed it.
8. The Appellant submitted that the Respondent is not entitled to the relief sought including notice pay, leave pay, underpayment and cited the cases of *Kisero V Wabwire* [2025] KEELRC 176 (KLR), *Kenya Union of Domestic, Hotel Educational Institutions and Hospital Workers V Shivanga Secondary School* [2022] KEELRC 12837 (KLR) in support of that proposition. The Appellant also submitted that it is an Agricultural farm and wages in terms of employment of its employment is regulated under the Regulations of Wages (Agricultural Industry) Order.
9. The Appellant urged this Honourable Court to allow the appeal as prayed by setting aside the Judgment of the Learned Magistrate dated 20<sup>th</sup> January 2023 with costs.

### **Respondent's written submissions**

10. The Respondent submitted that being the first appeal relied on the case of *Selle and another V Associated Motor Boat Company and others* (1968) EA 123 Sir Clement De Lestang stated as follows:

“An appeal to this court from a trial by High court is by way of retrial, and the principles upon which this court acts in such appeal are well settled. Briefly, put, they are that this court must reconsider the evidence, evaluate it itself and draw its conclusions through it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect.”
11. The Respondent submitted that the trial court held that his termination was unfair, contravening Sections 36 and 41 of the *Employment Act*. The Respondent also submitted that substantive justification and procedural fairness must be adhered citing the cases of *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR, *Mary Chemweno Kiptui V Kenya Pipeline Company Limited* (2014) eKLR and *Pamela Nelima Lutta V Mumias Sugar Co. Ltd* (2017) eKLR in support of that proposition.
12. The Respondent further submitted that upon his acquittal of the criminal charges levelled against him, he reported to work as directed by the Appellant. However, the Respondent was locked out of the gate by the Appellant's manager, who informed him that his services were not required and so



according to him a fair hearing to comply with the law before terminating him was not done. On the other hand, the Appellant's defence was that he deserted work and it is well-settled in law that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice that termination of employment was being considered as it was settled in the case of *Evans Ochieng Oluoch V Njimia Pharmaceutical Limited* (2016) eKLR. In *Felista Acheha Ikatwa V Charles Peter Otieno* (2018) eKLR, where the court held as follows:

“The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the least, the employer is expected to issue a notice to the deserting employee that termination on the grounds of desertion is being considered.”

13. The Respondent submitted that the Appellant failed to follow up on the Respondent's whereabouts, which did not substantiate the claim of desertion. Additionally, the Respondent stated that the Appellant claimed he resigned from his job by submitting a letter dated 25<sup>th</sup> October, 2018, but there was no evidence that this letter was acknowledged. The Respondent further contended that he was verbally terminated and locked out of the company when he reported for work after his acquittal, making his termination both unfair and unlawful.
14. The Respondent submitted that he is entitled to the relief sought, including notice pay, leave pay, underpayment, 12 months' compensation for unfair termination, and 21 days worked and not paid in September 2018.
15. The Respondent urged this Honourable Court to dismiss the appeal with costs as it has no merit.

### **Analysis and determination**

16. The court has carefully gone through the record of appeal together with the submission by both counsels, the issue for determination is whether the appeal brought forth before this Honourable Court is merited.
17. Section 45(2) of the *Employment Act* provides as follows:
  - “A termination of employment by an employer is unfair if the employer fails to prove—
    - (a) that the reason for the termination is valid;
    - (b) that the reason for the termination is a fair reason—
      - (i) related to the employees' conduct, capacity or compatibility; or
      - (ii) based on the operational requirements of the employer; and
    - (c) that the employment was terminated in accordance with fair procedure.”

18. In *Beatrice Nyambune Mosiria v Judicial Service Commission* [2019] eKLR, the Court of Appeal held as follows:

“In employment matters, the employer has to prove both valid reason and fair procedure.”

19. In *Walter Ogal Anuro V Teachers Service Commission*(supra) the court held as follows:

“For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with the



establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

20. In *Mary Chemweno Kiptui V Kenya Pipeline Company Limited* (supra), the court held as follows:

“Section 41 of the *Employment Act* is couched in mandatory terms.

Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing ... The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognisance of the fair hearing principles as well as natural justice tenets.”

21. In *Pamela Nelima Lutta V Mumias Sugar Co. Ltd* (supra), the court held as follows:

“What constitutes fair termination is a matter that is now well settled by the wealth of Jurisprudence of this court and the Court of Appeal. There are two elements that must be satisfied by the employer, fair procedure and valid reason.”

22. In this instant appeal, there is no dispute that the Respondent was arrested and charged in criminal case No. 2728 of 2018, and he was later acquitted. The Appellant apparently requested that the Respondent report to work immediately but was met with hostility at the Appellant’s place of work by the Manager, stating that he was terminating him. The Appellant failed to prove that the Respondent had resigned or deserted work. At the same time, the procedure was not followed, and the reasons for terminating him were not stated either.

23. There should be a procedure where an employee should be interdicted or suspended when faced with criminal charges to cure this epidemic of unfairly terminating an employee on the grounds of criminal charges. The court is of the view that the Appellant has not proved its case on a balance of probability as laid out in Sections 107, 108 and 109 of the *Evidence Act*, which provides as follows:

“107.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

24. The alleged letter of resignation is not addressed to any particular person and it has no reference. To authenticate it the Appellant should have put his stamp or in any way acknowledged the same. The Appellant who had the upper hand being the employer had a duty to keep his employees’ records including a properly acknowledged letter of resignation. Section 74 of the *Employment Act* in particular mandate an employer to keep records of the employee. Section 74(m) provides as follows: -



- (m) any other particulars required to be kept under any written law or as may be prescribed by the Minister.

It is a failure on the part of the employer that he never kept the records of a letter duly stamped and acknowledged of the employee's resignation. That seems suspect.

25. The employer did not get in touch with the Respondent at any time since his arrest and no more communication is produced between the Appellant and the Respondent from the time of arrest.
26. The court under the circumstances agrees with the trial court that the Appellant did eject the Respondent from employment after he was acquitted of the criminal charges.

The Appellant failed to take the Respondent through disciplinary hearing as provided in Section 41 of the Employment Act. The said Section 41 provide as follows:-

41.

- (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

27. The Appellant provided no written letter of termination of the Respondent on any valid reasons for such termination. This was in contravention of Section 45 of the Employment Act which provides as hereunder: -

45.

- (1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove—
- (a) that the reason for the termination is valid;
- (b) that the reason for the termination is a fair reason—
- (i) related to the employees conduct, capacity or compatibility; or
- (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.
- (3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.
- (4) A termination of employment shall be unfair for the purposes of this Part where-



- (a) the termination is for one of the reasons specified in section 46; or
  - (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.
- (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Industrial Court shall consider-
- (a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
  - (b) the conduct and capability of the employee up to the date of termination;
  - (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
  - (d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and
  - (f) the existence of any previous warning letters issued to the employee.

28. This court holds that the Appellant failed in the test provided in employment cases on termination of an employee which mandates substantive justification and procedural justification: This is as provided in many authorities, among them WALTER OGAL ANURO V TEACHERS SERVICE COMMISSION (Supra) which was earlier cited herein.

29. Flowing from the foregoing this court agrees with the trial court that the Respondent was unfairly and unprocedurally terminated. The court therefore finds the appeal is not justified as pertains to the Respondent's termination. The appeal is therefore dismissed as it lacks merits.

30. Having found and agreed with the trial court that the Respondent was unfairly terminated the court nevertheless finds the reliefs awarded were excessive.

The court therefore replaces the trial court's awards as follows:-

1. One month salary in lieu of notice is upheld .....Kshs.14,401/10
2. September 2018 salary.....Kshs.6,930/=
3. Leave days is not granted since the Respondent did not present evidence that he applied for leave for those 7 years and was denied.
4. Compensation for 12 months is allowed as Respondent had worked for the Appellant for quite a long time.....Kshs.172,813.20
5. Under payment is not proved and there is no basis to grant the same – so Kshs.226,451/05 is declined.

The costs of the lower court are granted to the Respondent as well as the costs of this appeal.

Total awarded therefore is .....Kshs.194,144.30 plus costs and interest at 14% per annum from this date till payment.



Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 23<sup>RD</sup> DAY OF MAY, 2025.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

