



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kotecha Wholesellers v Ochieng (Appeal E063 of 2023)
[2025] KEELRC 1398 (KLR) (14 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1398 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E063 OF 2023**

JK GAKERI, J

MAY 14, 2025

BETWEEN

KOTECHA WHOLESSELLERS APPELLANT

AND

CALEB OCHIENG RESPONDENT

*(An appeal against the Judgment of K. Cheruiyot, SPM delivered
on 1st November, 2023 in Kisumu CMELRC No. E004 of 2021)*

JUDGMENT

1. This is an appeal against the Judgment of K. Cheruiyot, SPM delivered on 1st November, 2023 in Kisumu CMELRC No. E004 of 2021; Caleb Ochieng V Kotecha Wholesalers Ltd.
2. The brief facts of the case are that the appellant employed the respondent as a driver on 2nd February, 2016 at a salary of Kshs.17,526.00 per month, which later rose to Kshs.19,600.00.
3. The respondent's case was that he served the appellant well from the date of employment until 2nd December, 2020 when his employment was terminated without just cause.
4. The respondent claimed salary in lieu of notice, untaken leave days, damages for unlawful termination, damages for loss of employment, overtime, public holidays, exemplary damages costs of the suit and interest, total, Kshs.649,600.00.
5. By a response filed on 4th February, 2021, the appellant admitted that the respondent was its employee but alleged that he absconded duty on 2nd December, 2020 and did not return and was therefore not summarily dismissed.
6. It was the appellant's case that the respondent absented himself from work frequently and sought dismissal of the suit.



7. Three witnesses testified, two for the respondent, Mr. Caleb Ochieng and Mr. Elly Agundo Wata and Mr. Michael Odiwuor Omwa on behalf of the respondent.
8. After considering the evidence placed before him and submissions by counsel, the learned trial magistrate found that the appellant had not proved that the respondent absconded duty and held that termination of the respondent's employment was unlawful, unprocedural and awarded the respondent Kshs.649,600.00 as prayed in the memorandum of claim.
9. This is the Judgment appealed against.
10. The Judgment of the trial court is faulted on 6 grounds, that the learned trial magistrate erred in law and fact by:
 1. Making a finding that termination of the respondent's employment was unfair against the weight of the evidence and the law applicable.
 2. Failing to consider and find that there was a valid reason for the appellant to terminate the respondent's employment.
 3. Awarding the respondent Kshs.649,600.00 as compensation which was excessive in the circumstances.
 4. Finding that there was no proof that the respondent absconded duty without analysing the evidence on record and parties submissions against the weight of the evidence.
 5. Failing to consider the parties submissions, specifically on the quantum and disregarding the authorities cited.
 6. Arriving in his decision in a speculative and cursory manner unguided by principles and failed to exercise discretion in accordance with principles of assessment of damages.
11. The appellant prays that:
 - a. The appeal be allowed.
 - b. The Judgment of the trial court be set aside and the suit dismissed.
 - c. In the alternative, the court re-assesses the quantum of damages and award costs.

Appellant's submissions

12. As to whether the respondent's absconding of duty caused termination of his employment, counsel submitted that the respondent did not appear to have had an intention of returning to the place of work and did not inform the appellant and was thus not dismissed. Counsel urged that the absconding of duty amounts to summary dismissal and the provisions of the *Employment Act*, were thus inapplicable and the appellant had no business terminating the respondent's employment.
13. Counsel further submitted that the respondent did not discharge the burden of proof under Section 47(5) of the *Employment Act*.
14. Reliance was placed on the decisions in *Ann Njoroge V Topez Petroleum Ltd [2013] eKLR* and *Eastern Produce (K) Ltd V John Lumumba Mukosero Eldoret Civil Appeal No. 25 of 1998* to contend that the respondent's conduct amounted to gross misconduct.
15. Concerning entitlement to the reliefs sought, counsel submitted that the respondent was not entitled to any as his employment was not terminated, leave had been paid for, he absconded duty and thus



no compensation or damages was payable, did not work on any public holiday, worked from 8:00am to 5:00pm, salary for November 2020 was paid and the *Employment Act* did not envision exemplary damages.

16. Reliance was also placed on the decisions in *David Getare Nyangau V Houseman General Contractors Ltd* [2013] eKLR, *John Mutsumi David V Delta Guards Ltd* [2016] eKLR and *John Kebaso Mose V Uchumi Supermarket* [2018] eKLR on the burden to establish claims and reliefs.

Respondent's submissions

17. On termination of employment counsel for the respondent submitted that contrary to Mr. Michael Odiwuor's evidence of the respondent absconding duty, the letter to the labour office dated 23rd December, 2020 was written after the appellant received a demand letter from the respondent's advocates and was thus an afterthought as the letter was received on 18th December, 2020 and RWI admitted as much on cross-examination.
18. Counsel submitted that the appellant's contention that the respondent absconded duty was unsustainable as it was not supported by any facts.
19. That in his statement the respondent stated that after his release from Luanda Police Station he reported to the workplace several times but was denied entry and Mr. Elly Watta confirmed that fact in court.
20. As regards the burden of proof under Section 47(5) of the *Employment Act*, counsel submitted that the respondent had proved his case that his employment was unlawfully terminated.
21. On reliefs, counsel submitted that the respondent was entitled to the reliefs as prayed as the appellant's witness admitted that he had no evidence to prove that the salary for November 2020, leave, overtime and holidays were paid.
22. Counsel prayed for dismissal of the appeal.
23. In the court's view, the trial court's Judgment is faulted on the court's appreciation and consideration of the evidence on record, as well as the applicable principles of law and submissions by the appellant.
24. Being a first appellate, the duty of this court is as was exquisitely captured by the Court of Appeal in *Selle and another V Associated Motor Boat Co. Ltd* [1968] EA 123 that:

...This court is not bound necessarily to accept the findings of fact by the trial court. An appeal to this court ... is by way of a retrial and the principles upon which this court acts in such an appeal are well settled.

Briefly put, they are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

See also *Peters V Sunday Post* [1958] EA 424, *Mursal & another* (suing as the Legal Administrator of *Dalphine Kanini Manesa* [2022] KEHC 282 (KLR) *Mativo J* (as he then was) among others.

25. Granted that the salient ground of appeal is the trial courts appreciation and consideration of the evidence placed before it by the parties, it becomes inevitable to critically re-evaluate the evidence.
26. First things first, strangely, the respondent filed two witness statements, one dated 8th July, 2021 and another dated 4th November, 2022 which are remarkably different, particularly in detail and specificity of times and places, and most significant, the introduction of another witness, one Mr. Elly Watta who



- thumb printed the witness statement on 24th November, 2022 and had no national identity card during the hearing to enable the appellants counsel and the court ascertain his identity, other than being the respondent's cousin as styled in his statement.
27. The dramatic metamorphosis of the respondent's witness statement almost 2 years after the initial witness statement, in the court's view implicates the witness's credibility.
 28. Notably, the signatures in the two statements are distinctively different. That is the far I will go for now.
 29. Other than the reliefs prayed for by the respondent, the only other issue for consideration by the court was whether the respondent's employment was unlawfully or unfairly terminated or he absconded duty as alleged by the appellants. Parties adopted contrasting positions.
 30. While the appellant contended that respondent absconded duty on 2nd December, 2020 and never turned back, the respondent maintained that his employment was unfairly terminated by the appellant.
 31. While the appellant relied on its attendance muster roll for the month of December 2020 among other documents, the muster roll clearly shows that the respondent was not at work from 2nd December, 2020, its letter to the respondent's advocate dated 21st December, 2020, 23rd December, 2020 and to the Ministry of Labour dated 23rd December, 2020, the respondent relied on the oral evidence of his cousin and himself adduced in court that he and the turn boy were carjacked on 1st December, 2020 at an undisclosed place at 5:30pm by unknown people who took away the vehicle and the goods and abandoned in Ebuyangu area Vihiga County and the respondent reported the same at Luanda Police Station and on the basis of the complaint he was arrested on 4/12/2020 and detained at the police station for one day and released on 5th December, 2020 and was not allowed in at the place of work and that became the routine until he gave up and consulted an advocate on 14th December, 2020, who wrote to the Luanda Police Station for information and a demand letter to the appellant.
 32. According to RWI, the motor vehicle the respondent was driving was abandoned at Dago along Daraja Mbili – Kiboswa road on 2nd December, 2020 and neither the respondent nor the turn boy was traceable and the truck was taken to the police station and police visited the scene and the respondent was unreachable on phone but showed up two days later claiming to have been carjacked.
 33. Based on the evidence presented by the witnesses, it is surmisable that there may or may not have been any carjacking incident but whatever the circumstances, the appellant's motor vehicle registration number KBK 138J in the custody of the respondent was abandoned somewhere either by the respondent or the alleged carjackers.
 34. It is also clear that it is the appellant who reported the incident to the police and which according to the respondent occasioned his arrest on 4th December, 2020.
 35. From the evidence, the respondent could not account for 2 days namely; 2nd and 3rd December. This is because his statement made no reference to their being held in communicado by the alleged carjackers and for unexplained reasons, the respondent and his turn boy did not report the incident to the employer or the police after the ordeal which in the court's view sounds suspicious. It is surprising that he was arrested after the appellant reported the matter to the police.
 36. On cross-examination, the respondent testified that he reported the matter to the police but could not recall the OB number and the case was pending.



37. Whereas the respondent's absence from the place of work on 2nd and 3rd was unexplained, his absence after release from arrest by the police appear to have been genuine as typically employers are hesitant to welcome back an employee who has been arrested at the employer's instigation.
38. Notably, all the letters relied upon by the appellant as evidence of the respondent's desertion were written after the respondent contacted his advocate and letters were dispatched, a fact RWI admitted during cross-examination with respect to the letter to the County Labour Officer.
39. Strangely, the appellant took no verifiable step to ascertain the whereabouts of the respondent on 2nd and 3rd December, 2020. RWI provided no evidence on the cell phone number he tried to reach the respondent or any message sent.
40. He was still their employee and his whereabouts and safety ought to have been of concern to the appellant and by the 2nd day, the appellant ought to have contacted the respondent's next of kin.
41. Intriguingly, event after the respondent's absence from the place of work from 2nd December, 2020, the appellant made no effort to officially notify him in writing that termination of his employment on the ground of his absence was being considered. A notice to show cause ought have effortlessly shown that the appellant took the respondents absence seriously as he was still its employee.
42. No doubt absconding duty or desertion are forms of gross misconduct and if demonstrated, meet the threshold for the summary dismissal of an employee.
43. In *Odhiambo V Siri Gudwara Ramgarhia Railway [2023] KEELRC 2587 KLR*, this court cited the sentiments of *Ndolo J in Ronald Nyambu Daudi V Tornado Carriers Ltd [2019] eKLR* that:

Desertion of duty is a grave administrative offence, which if proved would render an employee liable to summary dismissal..."

See also *Mwangi Odhiambo Duncan V Crest Security Services Ltd [2019] eKLR*.
44. The jurisprudence emerging from this court is that when an employer alleges that an employee deserted the workplace or absconded and did not return, the employer is required to demonstrate the reasonable steps the employer took to ascertain the whereabouts of the employee and why the employee was not reporting to the workplace. It was so held in *Felistas Acheha Ikatwa V Charles Peter Otieno [2018] eKLR*. (See also *Simon Mbithi Mbane V Inter Security Services Ltd [2018] eKLR* and *Joseph Nzioka V Smart Coatings Ltd [2018] eKLR*).
45. Significantly, the employer is also required to at the very least issue a notice to show cause to the employee to put him or her on notice that termination of employment on account of the desertion or absconding of duty was being considered and in the event of the absence of a response or the employee does not resume duty or explain his or her circumstances, termination of employee ought to ensue.
46. The foregoing is necessary because as long as an employer has not taken any positive step to terminate an employee's of employment or taken reasonable and verifiable steps to demonstrate that it is unable to contact the employee and or secure a response or his resumption of duty, the employment relationship remains unclosed for purposes of the employer's records which the employer is obligated to maintain.
47. Being a contractual relationship an employment relationship must come to an end one way or another. In other words, there must be closure.
48. It does not suffice for an employer to aver and submit that an employee absconded duty or deserted or dismissed himself or herself and disciplinary action could not be taken.



49. Reasonable steps must have been taken to bring the relationship to an end and the notice to show cause served to the employee's regular or the last known address, including electronically via email or WhatsApp is indispensable.
50. As adverted to above the contention that the employee's absence militated against his or her being subjected to a disciplinary process cannot suffice. This is because the provisions of the *Employment Act* require that an employee must be subjected to a fair disciplinary process before separation even in cases of desertion. The notice to show cause is unavoidable.
51. In *Judith Atieno Owuor V Sameer Agricultural and Livestock* [2002] eKLR Maureen Onyango J expressed herself as follows:
- Further, even if she had absconded she is by law entitled to a fair disciplinary process as set out in Section 41 of the *Employment Act* 2007. No evidence was availed to the court to support there having been a disciplinary process or notice issued prior to the termination. It is the duty of the respondent to show this court it did accord the claimant a fair hearing prior to termination”.
52. And even where an employee does not appear or respond to the notice to show cause or invitation for a hearing, the employer must adduce evidence to show that it accorded the employee an opportunity to respond or explain themselves or be heard.
53. In the instant case, the appellant did not avail evidence of having written to the respondent to put him on notice that termination of his employments in account of the alleged absconding of duty was being considered.
54. The respondent's testimony and that of Mr. Elly Watta that he reported to the appellant's premises severally, including, 5th December, 2020, and 22nd December, 2020 in the company of Mr. Elly Watta was uncontroverted.
55. Mr. Michael Odiwuor Omwa did not deny that the respondent reported at the premises on 22nd December, 2020 and was denied access, allegedly on instructions from the Director, which he communicated to the respondent.
56. Having been named by the respondent as the one who conveyed the instructions to the respondent, it was incumbent upon RWI to respond to this allegation. He did not.
57. The provisions of Section 41, 43, 44, 45 and 46 and 47(5) of the *Employment Act* lay it bare that for a termination of employment to pass muster, it must be proved that the employer had a valid and fair reason to terminate the employee's employment and conducted the termination in accordance with a fair process.
58. In *Walter Ogal Anuro V Teachers Service Commission* [2013] eKLR Ndolo J stated:
- ...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 establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination”.
59. In the instant case, the appellant failed to establish that the respondent indeed absconded duty or that he was subjected to a fair disciplinary process as by law required. The fact that the respondent was absent does not constitute desertion or absconding duty. It denotes that the employee was away



- without the employer's authority. Desertion as alleged by the appellant must be demonstrated, that the employee had manifested his intention not to return to the work place.
60. See the South African decision in *Seabolo V Belgravia Hotel* [1997] 6 BLLR 829 (CC MA) on the distinction between absence without leave and desertion.
 61. In either case, a notice to the employee to show cause why disciplinary action should not be taken against the him or her is a critical ingredient.
 62. Finally, the foregoing analysis finds support from the sentiments of Ndolo J in *Mwangi Odhiambo Duncan V Crest Security Services Ltd* (supra) that:

What is clear is that the respondent has failed to establish a case of desertion against the claimant. In the converse, the claimant's claim that his dismissal was wrongful has not been dislodged".
 63. In the end, the appellant may have had a valid and fair reason to dismiss the respondent but failed to do so as by law required and must shoulder the consequences of its inaction.
 64. The trial court cannot be faulted for not having considered the evidence before it or arriving at an erroneous finding on termination of the respondent's employment.
 65. I will now proceed to examine the appropriate reliefs to the respondent. Surprisingly, in awarding the reliefs as prayed for in the memorandum of claim, the trial court made no attempt to justify how it arrived at the decision that each relief and the amount claimed were merited.
 66. The absence of reasons for each relief is undoubtedly discomfoting as it comports with the appellant's desire to challenge the decision, if not for anything else. Similarly, it implicates the exercise of discretion by the court.
 67. As regards salary in lieu of notice, clause 9 of the contract of employment dated 1st February, 2016 provided for one (1) month's written notice or salary in lieu of notice.
 68. Having failed to exercise either option, the claim for salary in lieu of notice was merited, Kshs.19,600.00.
 69. Concerning the salary for the month of November 2020, although the appellant's payroll showed that the respondent's salary was paid, RWI admitted that he had no evidence to prove that it was actually paid.
 70. The respondents' assertion that it was not paid is credible to the extent that the appellant availed the payroll summary for December 2020 showing that the respondent received a net salary of Kshs.19,600.00 yet he was not at work.
 71. The prayer was merited, Kshs.19,600.00.
 72. The claim for overtime for the entire period of employment was patently unmerited on account that the respondent adduced no evidence to controvert the appellants evidence assertion that he worked from 8:00am to 5:00pm, 6 days a week as evidenced by copies of the must roll on record.
 73. Even if the respondent worked overtime, it is unclear as to how many hours he worked and when, for the sum of Kshs.50,000.00 in about 5 years.
 74. The prayer was not proved.



75. A similar argument or reasoning applies with respect to the claim for holidays worked for the entire period which public holidays and when was the respondent at work?
76. Similarly, the appellants Muster Roll shows the public holidays and the respondent was away the entire Easter weekend 2020 (Friday to Monday) and January 1st 2020.
77. The claim was unmerited.
78. As regards damages for loss of employment, and as correctly submitted by the appellant's advocate, no such remedy exists under the [Employment Act](#) or the [Employment and Labour Relations Court Act](#).
79. The prayer was unmerited.
80. Concerning pay in lieu of untaken leave days, the court is satisfied that the prayer was unmerited on account that the respondent tendered no evidence to prove the number of leave days outstanding and unpaid for the sum of Kshs.40,000.00 in 4 years.
81. More significantly, the appellant availed evidence showing that:
- i. The respondent proceeded on annual leave, (21 days) for 2019 – 2020.
 - ii. The respondent was paid in lieu of untaken leave days for 2016/2017, Kshs.13,280.00, 2017/2018 Kshs.10,028 and 2018/2019 Kshs.10,555.00.
82. Based on the evidence on record, the respondent had no outstanding leave days.
83. The claim was unmerited.
84. The claim for exemplary damages was not prosecuted and in any case the respondent was not entitled to any and no award was made by the trial court.
85. Finally, having found that termination of the respondent's employment by the appellant was unfair and unlawful, the trial court awarded 12 months compensation, Kshs.235,200 without assigning any justification for the maximum compensation.
86. These findings demonstrate a case for interference with the exercise of discretion by the trial court has been made, as dictated by judicial authorities, such as Price and another V Hilder [1996] KLR 95 and the sentiments of Madan JA (as he then was) in United India Insurance Co. Ltd, Kenindia Insurance Co. Ltd and Oriental Fire and General Insurance Co. Ltd V East African Underwriters (Kenya) Ltd [1985] eKLR.
87. Having affirmed the finding of the trial court on termination of the respondent's employment it behooves this court to determine the quantum of compensation on the basis of the relevant factors under Section 49(4) of the [Employment Act](#).
88. Considering that the respondent was an employee of the respondent for about 41/2 years, which is not long, did not express his wish to remain in the appellant's in writing and did not appeal the appellant's decision.
89. And further considering that the respondent had a warning letter dated 1st September, 2020 over absenteeism and apologised for his conduct vide letter dated 3rd September, 2020, the court is satisfied that the equivalent of three (3) months gross salary is fair, Kshs.58,800.00.
90. Accordingly, the appeal is partially successful to the extent that:
- a. The award for untaken leave days for 4 years is set aside.



b. The award of damages for loss of employment is set aside.

c. The award for overtime, and holidays is set aside.

Total award Kshs.98,000.00

d. As the appeal is partially successful, each party shall bear own costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 14TH DAY OF MAY 2025

DR. JACOB GAKERI

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 15th March 2020 and subsequent directions of 21st 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 *Civil 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.

DR. JACOB GAKERI

JUDGE

DRAFT

