



**Ogayo v Zhejiang Chengjian Construction Africa Limited (Appeal E042 of 2023) [2025] KEELRC 1342 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1342 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E042 OF 2023**

**JW KELI, J  
MAY 9, 2025**

**BETWEEN**

**PAUL OOKO OGAYO ..... APPELLANT**

**AND**

**ZHEJIANG CHENGJIAN CONSTRUCTION AFRICA  
LIMITED ..... RESPONDENT**

**JUDGMENT**

1. Paul Ooko Ogayo, being dissatisfied with Judgment of the Chief Magistrate's Court at Nairobi (Hon. C.K Cheptoo (P.M)) delivered on 3<sup>rd</sup> March 2023 in Cause CMELRC NO. E988 of 2021 filed memorandum of appeal dated 28<sup>th</sup> March 2023 seeking for the following Orders:-
  - a) This appeal against the said decision be allowed.
  - b) The decision of the Honourable and Learned Magistrate dated 3/3/2023 be set aside on its entirety.
  - c) Costs of the lower court and of the appeal be borne by the Respondent.
  - d) That this Honourable court do issue such orders and directions as it may deem fit and just to grant to meet the ends of justice.

**Grounds Of The Appeal**

2. That the learned Magistrate erred in law and in fact by dismissing the Claimant's case and finding that the Claimant was lawfully terminated.
3. That the learned Magistrate erred in fact and in law by finding that the Appellant absconded from employment by only relying on the oral evidence of the Respondent that the Appellant had disappeared from employment and switched off his phone and had proceeded upcountry-without



informing the Respondent and returned after four months, with the expectation that he would be taken back by the Respondent, without applying the principles that govern cases of desertion and or abscondment and thereby arrived at a wrong decision by ignoring the provisions of the Employment Act, 2007, especially sections 41, 43, 45 and 47 and precedents set by the Honourable Court.

4. That the learned Magistrate erred in fact and in law by not awarding the Claimant/appellant herein the remedies sought/prayed as against evidence and facts presented before the Honourable Court.

### **Background To The Appeal**

5. The appellant/ claimant alleging unfair termination filed memorandum of claim dated 1<sup>st</sup> March 2021 before the subordinate court seeking for the following reliefs:-
  - a. A declaration that he termination of the claimant by the respondent was unfair and unlawful.
  - b. An Order compelling the respondent to pay the claimant her terminal benefits amounting to Kshs. 1,419,769.66.
  - c. Costs of the suit.
  - d. Interests on a) b) and c above at court rates from the date of the filing of sui till payment in full. (at pages 3-6 of ROA was the claim)
6. The claim was filed together with witness statement of the appellant of even date, claimant's list of documents of even date and the bundle ( all at pages 8-15 of ROA).
7. The claim was opposed by the respondent who entered appearance and filed Statement of Response dated 15<sup>th</sup> November 2021, witness statement of Benard Onchuru Kibwage dated 19 January 2022, a list of documents dated 2<sup>nd</sup> February 2022 and the bundle(all at pages 16-33 of ROA)
8. The claimant filed reply dated 8<sup>th</sup> February 2022 to the statement of response.(pages 34-35 of ROA).
9. The appellant's/ claimant's case was heard on the 17<sup>th</sup> October 2022 where he testified on oath, adopted his witness statement dated 1<sup>st</sup> March 2021, and produced the filed documents. He was cross examined by counsel for the respondent , Kihara and re-examined by his counsel, Rakoro .
10. The respondent's case was heard on even date where Benard Onchuru testified on oath as respondent's witness(RW). He adopted his witness statement and produced the documents filed by the respondent under list dated 2<sup>nd</sup> February 2022. (Trial court proceedings at pages 88-94 of ROA)
11. The parties filed written submissions after close of defence case.
12. The trial court delivered judgment On the 3<sup>rd</sup> March 2023 where it found no merit on the claim and dismissed the same with costs(Pages 96-100 of ROA).

### **Determination**

13. The appeal was canvassed by way of written submissions. Both parties complied.
14. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123 that:- "The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts 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. In particular the court is



not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

15. The court on first appeal is further guided by the principles on appeal decisions in *Mbogo v Shah* [1968] EA De Lestang V.P (as he then was) observation at page 94: "I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

### **Issues for determination**

16. The appellant identified the following issues for determination in the appeal:-
- 1) Did the Appellant abscond duty and if yes, was he fairly terminated?
  - 2) Should the Appellant have been awarded all the reliefs claimed in the memorandum of claim?
17. Conversely, the Respondent submitted on the following issues in the appeal:-
- A. Whether the learned Magistrate erred in dismissing the Appellant's claim by finding that he was lawfully terminated and that he had absconded from employment.
  - B. Whether the learned Magistrate erred by not awarding the Appellant the reliefs sought in his Memorandum of Claim
18. The court found the parties were in agreement on the issues to be addressed on appeal by the court and paraphrased the same to be:-
1. Whether the trial court erred in its findings on the claim for unfair termination
  2. Whether the appellant was entitled to the reliefs sought in the claim

### **Whether the trial court erred in its findings on the claim for unfair termination**

19. The trial court found that the claimant had failed to prove he was terminated from employment. The appellant contended that the appeal was against the decision of the Court, dated 3/3/2023 more so where the court said:-

"The Claimant in his evidence told the court that he was arrested together with his workmates and taken to the police station for interrogation. He further stated that after leaving the police station, he travelled up country and was caught up in the lockdown that came during the Covid 19 pandemic. That he was back to work on 19.3.2020 and was verbally informed to go home and that the company would communicate. He stated that he went up country and returned on 13/7/2020 and he went to the site where he was dismissed. The Claimant did not call any witness who was present at the time of his verbal termination. It is also clear from his testimony that he went up country without informing his employer and returned after four months with the expectation that he would be taken back by his employer. The employer on their part stated that the claimant disappeared and switched off his phone after being arrested and taken to the police station. According to the respondent, the claimant has never gone back to his place of work a clear indication that he absconded duty.



From the evidence tendered before me, I find that the claimant herein has failed to prove on a balance of probability that he was terminated from employment. No evidence of the names of the persons involved in his termination was stated in the claimant's witness statement. It is hard for this court to believe his evidence.

In conclusion, this court finds that the claimant has failed to prove that he was verbally terminated from employment.”

### **Appellant's submissions**

20. In his Witness Statement dated 1/3/2021, (See pages 8-9 of the Record of Appeal) which was adopted as his evidence in Chief, the Appellant had told the lower Court that:

“On 23/1/2017, I was employed by the Respondent as a scar folder on wages of kshs.800/= per day amounting to kshs. 24,000/= per month. My reporting time was 7:30 am up to 5:30 pm that is from Monday to Sunday without no off days. I used to work during public holidays without payment of overtime and had no annual leave.

I worked well until on 18/3/2020 when the Respondent complained that a machine got lost at the site which was at Chiromo opposite Kempiski Hotel. I was with three of my colleagues at the said site.

The Respondent called police officers from Parklands Police Station who came and interrogated us. Some officers did the investigations while others took statements from us at the Police Station.

On 19/3/2020 my three workmates and I reported to work. We were told to go home and wait for the communication from the Respondent. I waited for about four days and went up country due to covid-19 pandemic issues and I got locked down there.

On 13/7/2020 I came back to Nairobi and went to the site. I was told that there was no job and was dismissed him. I was not told why I was dismissed as there was no notice, no show cause letter, no disciplinary hearing, no payment of my terminal benefit, no certificate of service.”

21. The appellant submitted that It is now settled that it is desirable that upon realizing that an employee is no longer reporting at work the employer should formally require the employee to resume duty immediately and warn such employee of the risk of disciplinary action if he fails to. If the employee persists in his absence, it is desirable that the employer issues the employee with a formal notice to justify why he should not be terminated for unsanctioned absenteeism. Desertion being a unilateral act of abandonment of the contract cannot operate to bring a contract of service to a close until the employer acts on it. In *James Okeyo v Maskant Flower Limited* [2015] CKLR, the court observed as follows on the issue: -

“.....the employee who deserts employment does not dismiss himself, so to speak. The decision to formally end the employment relationship should come from the innocent party.”

It is up to the employee to show up to explain his absence from duty. It is possible that he may have been prevented from reporting on duty for justifiable reasons such as incapacitating sickness or natural calamities.



If the employee: fails to resume duty or respond to the notice to show cause; or is not traced by the employer despite diligent effort; or responds to the employer but the reasons for his absence are considered unjustifiable, then the employer may proceed to terminate such employee for unauthorized absenteeism. These principles are well articulated in a series of decisions by this court including *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR and *Julius Kyalo Malonza v Ruth Osolo t/a Eraeva Catering Services* [2021] eKLR.

The essence of this procedure is to ensure that the employee is terminated in a manner that meets the requirements of section 41 of the *Employment Act* as read with articles 41 and 47 of *the Constitution*. It must be demonstrated that the employer had a justifiable ground to terminate the employee and that he accorded the employee the procedural safeguards guaranteed under the law in the process leading to the termination.

The implication of the foregoing is that absent evidence that the Respondent followed the procedure aforesaid in handling the Appellant's absenteeism the Respondent cannot lawfully plead abandonment of employment by the Appellant as a way of closure of the employer-employee relation between them." That the Courts have dealt with these issues and the said principles can be summarized as follows;

1. It is not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must prove efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration. In *Ronald Nyambu Daudi v Tornado Carriers Limited* [2019] the court held that desertion of duty is a grave administrative offence, which if proved, would render an employee liable to summary dismissal. The court went further to state show that it is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration (see *Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited* [2016] eKLR).
2. The law as currently designed does not appear to contemplate closure of employment contracts through unilateral abandonment of the parties' obligations under a contract of service. The contract can only be brought to closure as a result of the eventualities contemplated in sections 40 and 41 of the *Employment Act* (redundancy, incompetence, physical incapacity or gross misconduct) or through resignation or mutual agreement with or without notice under sections 35 and 36 of the Act or upon the insolvency of the employer under section 66 and 67 of the Act. Desertion being a unilateral act of abandonment of the contract cannot operate to bring a contract of service to closure until the employer acts on it.

In the matter of *Milano Electronics Limited v Dickson Nyasi Muhaso* [2021] eKLR, the court said;

"This evidence established a prima facie case for unfair termination within the meaning of section 43 of the *Employment Act*. The burden of proof shifted onto the Appellant to justify the termination. That the Appellant elected to offer a flat denial of the alleged termination



by pleading abandonment of the contract by the Respondent through absconding duty did not discharge the burden of proof placed on it by sections 43 and 47 of the *Employment Act*.

Indeed, my view is that the Appellant had an obligation, if it believed that the Respondent had absconded duty, to lawfully bring the contract of service to closure by invoking the provisions of section 44 of the *Employment Act*. The section permits an employer to terminate an employee who has absconded duty on ground of gross misconduct.

The law as currently designed does not appear to contemplate closure of employment contracts through unilateral abandonment of the parties' obligations under a contract of service. The contract can only be brought to closure as a result of the eventualities contemplated in sections 40 and 41 of the *Employment Act* (redundancy, incompetence, physical incapacity or gross misconduct) or through resignation or mutual agreement with or without notice under sections 35 and 36 of the Act or upon the insolvency the employer under section 66 and 67 of the Act."

22. The appellant further submitted that desertion being a unilateral act of abandonment of the contract cannot operate to bring a contract of service to closure until the employer acts on it. In *James Okeyo v Maskant Flower Limited* [2015] eKLR the court observed as follows:-

"..... the employee who deserts employment does not dismiss himself, so to speak. The decision to formally end the employment relationship should come from the innocent party."

23. That the Respondent was therefore obligated to invoke the provisions of section 44 to bring the relationship to closure. The trial magistrate in his view rightly relied on the case of *Godfrey Anjere v Unique Suppliers Limited* [2015] eKLR where the court said in cases where an employee is alleged to have deserted duty, it was necessary for the employer to show that it had taken steps to indicate to him that his employment could be terminated for unauthorized absenteeism. It was not open to the Appellant to simply say that the Respondent had abandoned work as a basis of justifying the separation. The court expressed itself in the following way on the issue:-

"In a dismissal on account of absconding duties, the employer is required to show what steps it took to inform the employee that his or her dismissal would result if they did not report back to work. This is necessary to avoid any injustice to an employee who may be away from work for lawful or reasonable excuse such as illness or circumstances beyond their control and yet unable to communicate to the employer in good time." That . George Ogembo in his publication titled "Employment Law Guide to Employers, 2016" offers further useful insights on how to handle an employee who is alleged to have absconded duty. He says thus: -"The fact that the employee has absconded work or has advanced unsatisfactory explanation [for his absence] does not waive his right to be availed the fair process or procedure before termination of his contract of employment. The employer must make several attempts to inform the employee of his intention to terminate his service and invite the employee to a disciplinary hearing."The above provisions and issues, which the Respondent flouted and or did not adhere to, were addressed In the matter of; *National Bank of Kenya - vs - Samuel Nguru Mutonya* (2019) eKLR, where the court said;

"With regard to issue number one (1), since it is not disputed that the employer/ employee relationship subject of this appeal was subject to the prerequisites of the Act, the procedure the Bank ought to have followed when terminating the respondent's employment is what is



set out in sections 41, 43 and 45 of the Act. In Janet Nyandiko versus Kenya Commercial Bank Limited [2017] eKLR, the Court summarized those procedures as follows:-

"Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.

The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize 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. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.

Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer."In the matter of Owudu-v-Digital-Sanitation Services Limited (Appeal E109 of 2023) [2024] KEELRC 917 (KLR) (18 April 2024) (Judgment), the court said;

"First, an employee does not terminate his employment in a case of alleged abscondment. When faced with an employee who fails to attend work, the employer must issue notice to the employee to render an account over his misconduct. Where the employee persists and fails to abide by such directions, the employer is required to issue notice terminating employment or summary dismissal through the last known address of the employer."

24. The appellant further submitted that under Section 18(5) (b) of the Act, where the employer-cannot trace the employee, notice must be issued to the Labour Officer and any terminal dues deposited in such office. Then, the employer has undertaken its legal duty to properly end employment.
25. Relying on the foregoing authorities the appellant submitted that the Respondent did not make any efforts to trace and or find out the Appellants whereabouts from 1/3/2020, to 13/7/2020 or prove that it did. The Respondent did not issue the Appellant with a notice to show cause asking why he was not at work from 19/3/2020 and was not informed through any notice that his employment was at risk on account of his abscondment-from-duty-from-19/3/2020. The Appellant was not given a letter of termination of service on account of desertion from duty The Appellant was-not-paid-his-terminal benefits. The Respondent did not comply with the provisions of Section 18(5) (b) of the Act, where if the employer cannot trace the employee, notice must be issued to the Labour Officer and any



terminal dues deposited in such office. Based on the foregoing, this court should therefore return that the Appellant was unfairly terminated for want of a valid reason and want of substantive legal process.

### **Respondent's submissions**

26. Conversely the Respondent submitted that it is trite law that he who alleges must prove and this is indeed supported by Section 107 of the Evidence Act, Cap 80 Laws of Kenya which provides as follows:

‘Burden of proof

- (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. Section 109 of the Evidence Act further provides as follows:

“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.” The above principles of law have further been inculcated under Section 47 (5) of the Employment Act, 2007 which provides as hereunder: -

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer”

6. My Lady, it was the Appellant's case that he was unlawfully terminated from employment sometime in 19th March 2020 when he was purportedly terminated orally from employment together with three (3) other colleagues. As rightfully noted by the learned Magistrate in her Judgement, the Appellant did not produce any evidence whatsoever nor call any of the three colleagues as witnesses to give evidence in support of his allegation of verbal termination of employment. Furthermore, the Appellant failed to specify on the name, rank and designation of the Respondent's employee who allegedly terminated him verbally, thereby leaving the trial court and the Respondent to speculate on the identity and authority of the said individual (if any).
27. That the Appellant further contradicted himself during cross-examination when he stated that immediately after recording his statement with the police at Parklands Police Station on 18th March 2020 in respect to suspicion of theft, he travelled upcountry without informing the Respondent and that he did not return until sometime in July 2020 due to the Covid-19 pandemic.
28. That it is only after prove of unfair termination from employment by his/her employer that the employer is expected to justify reasons for such termination. That this burden was not discharged by the Appellant. Nonetheless, the Respondent's witness, Mr. Bernard Kibwage testified before the trial court and stated that the Appellant deserted his official duties on 18th March 2020 and never set foot in any of the Respondent's work sites since. He further testified that the Appellant could not be reached on his phone number, which was the only contact information he had provided in his contract, as he had not disclosed any physical or postal address through which he could be reached. At no point during the trial did the Appellant controvert the fact that his phone was offline since 18th March 2020. It was also the Respondent's witness' oral testimony before the trial court that work continued normally despite the COVID-19 outbreak.



29. In support of the above submissions the respondent relied on the decision in Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR in which decision the Court of Appeal in Nairobi held as follows: -

‘Section 47(5) of the Act provides for the procedure to be followed in matters of complaints of unfair termination... So that, the appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): "to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45."15. We have carefully examined the testimony of the appellant in relation to the discharge of his evidential burden but we are afraid it does not lay the necessary foundation to require the employer’s response under section 43.”

30. The respondent further relied on the decision in Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] eKLR in which decision Manani, J held as follows: -

“Section 47(5) of the *Employment Act* sometimes presents a challenge regarding how to navigate the aspect of the burden of proof in addressing disputes arising from terminations. It does suggest two burdens: the employee has the burden of proving the unlawfulness of the termination; and the employer has the burden of justifying the termination.

The interpretation given to the section by courts is that all the employee needs to do in order to discharge the burden of proof on him/her is to place before the court prima facie evidence suggesting that a termination has occurred and that the said termination lacks a substantive justification and or is procedurally flawed. Once the employee makes a prima facie case, the burden of proof shifts onto the employer to justify the termination. In Josephine M. Ndungu & others v Plan International Inc [2019] eKLR, the court said this of the foregoing:

“Under section 47(5) of the *Employment Act*, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the four corners of the legal threshold set out by section 45 of the Act.”

31. The Respondent contended that from the facts and evidence presented in the lower court, there is absolutely no doubt that: -

- a) The Appellant absconded his official duties upon being questioned as a suspect in the theft of the Respondent’s machine. In his own admission he stated that he travelled upcountry without informing the Respondent immediately after recording a statement with the police on 18th March 2020 and did not return until sometime in July 2020 (allegedly).
- b) The Appellant was thus not unfairly terminated on 19th March 2020 as alleged. He did not mention the name of the Respondent’s staff who orally terminated him from employment nor present as witnesses the three other colleagues who were allegedly present when the said termination took place.
- c) The Respondent made reasonable efforts to trace the Appellant but the same proved futile since the Appellant had switched off his phone. This fact was not controverted.” The Respondent further cited the case of Solvit Security Solutions Limited v Masase [2023]



KEELRC 2300 (KLR) (See Page 17 of the Respondent's List and Bundle of Authorities) in which decision Mbaru J held as follows: -

“...the employer who pleads desertion of duty must prove. Further, the employer must demonstrate what efforts were taken to have the subject employee alleged to have absconded duty attend and make his representations.” That from the foregoing the learned Magistrate made a correct finding in holding that the Appellant had failed to discharge the burden of proving that he was unfairly terminated from employment by the Respondent.

## Decision

32. The trial court found there was no prove of termination of the employment. The appellant had stated that he was arrested at work site by police on the 18<sup>th</sup> March 2020 where recorded a statement. This position was not in dispute. He told the court that he had gone back to the office with workmates who he had not called as witnesses. In his witness statement he wrote that on 19<sup>th</sup> March 2020 together with the three workmates they reported dot work and were told to go home and await communication. That he waited for 4 days then left for upcountry where he got locked down due to COVID 19. That on 13<sup>th</sup> July 2020 when returned to Nairobi and went to site he was told there was no job and he was dismissed. That he did not receive notice to show cause.
33. The Respondent submitted that the appellant had not met the burden as stated in section 47(5) of *Employment Act*. That the trial court was right to find no prove of termination and dismiss the case. The Respondent cited several authorities which the court noted as outline above.
34. The court found the reason of termination was absconding as advanced by the employer through RW. Absconding refers to a situation when an employee does not report to work for consecutive days without authorization. The court agreed with the authorities cited by both parties. The Appellant placed reliance on the case of Solvit Security Solutions Limited v Masase [2023] KEELRC 2300 (KLR) by Mbaru J held as follows: -

“...the employer who pleads desertion of duty must prove. Further, the employer must demonstrate what efforts were taken to have the subject employee alleged to have absconded duty attend and make his representations.”

The Respondent submitted that their evidence in pleadings that the claimant absconded duty and switched off his phone was not controverted. The court perused the reply to the response and noted that statement was not controverted.

The appellant submitted that the employer ought to have complied with the provisions of section 41 and 44 of the *employment act* by bringing the employment relationship to an end as follows:-

1. The Respondent did not make any efforts to trace and or find out the Appellants whereabouts from 1/3/2020, to 13/7/2020 or prove that it did.
2. The Respondent did not issue the Appellant with a notice to show cause asking why he was not at work from 19/3/2020 and was not informed through any notice that his employment was at risk on account of his abscondment-from-duty-from-19/3/2020.
3. The Appellant was not given a letter of termination of service on account of desertion from duty



4. The Appellant was-not-paid-his-terminal benefits.
  5. The Respondent did not comply with the provisions of Section 18(5) (b) of the Act, where if the employer cannot trace the employee, notice must be issued to the Labour Officer and any terminal dues deposited in such office.’
35. The court on perusal of record found that the statement of having exercised diligence to look for the employee through mobile phone which employer pleaded was switched off was not controverted. The appellant had a reason to switch off and hide in the upcountry following the arrest and release, possibly to avoid prosecution. The essence of such diligence to look for the employee is to give opportunity for the employee to justify the absence. In *Ayub Kombe Ziro v Umoja Rubber Products Limited* [2022] Eklr cited by the appellant it was held;- *Ayub Kombe Ziro v Umoja Rubber Products Limited* [2022] eKLR, the court said:-
- “The law regulating the processing of release from duty of an employee who has absconded duty is now fairly settled. It is not open to the employer to simply plead abandonment of duty by the employee as evidence of termination of the contract. The employer must demonstrate that he has taken reasonable steps to find out the whereabouts of the employee and required him to resume duty to no avail. The employer must where possible, demonstrate that he has addressed the matter of the employee’s unexplained absenteeism through the available internal disciplinary channels.
38. It is desirable that upon realizing that an employee is no longer reporting at work the employer should formally require the employee to resume duty immediately and warn such employee of the risk of disciplinary action if he fails to. If the employee persists in his absence, it is desirable that the employer issues the employee with a formal notice to justify why he should not be terminated for unsanctioned absenteeism.
39. Desertion being a unilateral act of abandonment of the contract cannot operate to bring a contract of service to a close until the employer acts on it. In *James Okeyo v Maskant Flower Limited* [2015] eKLR, the court observed as follows on the issue: -
- “.....the employee who deserts employment does not dismiss himself, so to speak. The decision-to-formally-end-the-employment-relationship-should-come from the innocent party.”
40. It is up to the employee to show up to explain his absence from duty. It is possible that he may have been prevented from reporting on duty for justifiable reasons such as incapacitating sickness or natural calamities.
41. . If the employee: fails to resume duty or respond to the notice to show cause; or is not traced by the employer despite diligent effort; or responds to the employer but the reasons for his absence are considered unjustifiable, then the employer may proceed to terminate such employee for unauthorized absenteeism.(Emphasis given).
36. The appellant alleged upon arrest by police at work place on the 18<sup>th</sup> March 2020 (admitted by Respondent in paragraph 6 of the response at page 17 of ROA), after recording statement on the next day he reported to work with three of his colleagues and they were informed to stay away and would



be called(not admitted by employer and not proved). The appellant told the trial court he stayed in Nairobi for 4 days and left for the village where he was locked down pursuant to COVID 19. That he returned to Nairobi(site) on 13<sup>th</sup> July 2020 and went back to site and was informed there was no job. The reporting back was denied by the respondent and not proved. The appellant never pleaded that he reached out to the employer the entire period he was away. The court on re-evaluation of the case finds defence of res-ipso loquitor, that the Appellant had no intention of ever going back to work and cannot turn around to expect reward for his own gross-misconduct alleging failure of contract to be terminated by the employer. That is impunity and abuse of the court process. It is unreasonable to expect the employer to wait for the employee for more than 4 months yet they need the labour. Section 44 of the *Employment Act* states that absconding without authority is a ground of summary dismissal. It is further unreasonable to expect disciplinary proceedings where the employee cannot be reached on available contact or the employee has not reached out to the employer at any time of the period of absence, and after lapse of the wage period, say end of month in the instant case. In the upshot the court finds no basis to interfere with the finding of the trial court (Mbogo v Shah)

### **Whether the appellant was entitled to reliefs sought in the claim before trial court**

37. Having upheld the decision of the trial court that there no case of unfair termination the only relief for consideration is terminal dues. On re-evaluation of the evidence the court found that the employer admitted that the claimant was arrested at work on the 18<sup>th</sup> day of March 2020. He was paid monthly. There was no evidence that his wages for the 18 days worked in March had been paid. Under section 18 (5) of the *Employment Act* states:- ‘Upon the termination of a contract of service—
- (a) by effluxion of time, it shall be the duty of the employer to ensure that the employee is paid the entire amount of the wages earned by or payable to the employee and of the allowances due to him as have not been paid;
  - (b) by dismissal, the employer shall, within seven days, deliver to a labour officer in the district in which the employee was working a written report specifying the circumstances leading to, and the reasons for, the dismissal and stating the period of notice and the amount of wages in lieu thereof to which the employee would, but for the dismissal, have been entitled; and the report shall specify the amount of any wages and other allowance earned by him since the date of the employees dismissal.’ The Respondent by effluxion of time, end of month of March 2020, when salary was due for days worked ought to have complied with the forgoing provisions and remitted the wages for days worked to the area labour officer. The claim was for months of March to July. Wages are only due for days worked unless the absence was justified. In the instant case the absence was not justified. The appellant told the court his last salary was Kshs. 24,000 per month and this was not controverted at cross-examination. The Court awards the unpaid salary for 18 days in March 2020 thus  $18/30 \times 24000$  totals award of Kshs. 14,400/=.
38. The trial court found that the employer had proved payment of public holidays and leave in lieu by producing payslips. The appellant was under NSSF, hence not entitled to service pay ( section 35(6) of the *Employment Act*). Thus the appeal is only successful on the salary arrears for 18 days worked in March 2020 for sum of Kshs. 14,400/=.

### **Conclusion**

39. The court on first appeal , on re-evaluation of the evidence before the trial court upheld the finding on lack of prove of unfair termination. On the reliefs sought , the Court held the appellant was entitled to salary arrears for 18 days worked in March 2020. Consequently, the court interfered with the Judgment of the Chief Magistrate’s Court at Nairobi (Hon. C.K CHEPTOO (P.M)) delivered on 3<sup>rd</sup> March 2023



in Cause CMELRC NO. E988 of 2021 by award of salary arrears to the appellant for the sum of Kshs. 14,400/- with costs and interest from the date of filing suit.

40. The Appellant is awarded costs of the appeal.

41. It is so ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9<sup>TH</sup> DAY OF MAY, 2025.**

**J.W. KELI,**

**JUDGE.**

IN The Presence Of:

Court Assistant: Otieno

Appellant : -Kataghai h/b Rakoro

Respondent:- Ochieng h/b Juma

