Rupra Construction Company Limited v Makomere (Civil Appeal E221 of 2023) [2025] KEELRC 1376 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1376 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CIVIL APPEAL E221 OF 2023

JW KELI, J

MAY 9, 2025

BETWEEN

RUPRA CONSTRUCTION COMPANY LIMITED ..... APPELLANT

AND

AYUB TSISAMWA MAKOMERE ..... RESPONDENT

(Being an appeal from the Judgement of the Chief Magistrate's Court at Nairobi (Hon. N. Ruguru Senior Principal Magistrate) delivered on 6 October 2023 in Nairobi Chief Magistrate's CMEL No. 1623 of 2019)

JUDGMENT

1. Rupra Construction Company Limited being dissatisfied with the Judgement of Honourable N. Ruguru Senior Principal Magistrate delivered on the 6th day of October 2023, appealed against the whole of the said decision vide memorandum of appeal dated 1st November 2023 seeking the following Orders:-

    a. That the Appellant's Appeal be allowed.

    b. That the Judgement delivered by Hon. N. Ruguru on 6 October 2023 in the Chief Magistrate's Court at Nairobi be set aside in its entirety and judgement be entered instead in favour of the Appellant.

    c. That in the alternative to prayer (2) above, this Honourable Court be pleased exercise its power under Order 42 Rule 25 of the Civil Procedure Rules, 2010, to determine this matter finally.

    d. That the costs of the previous suit CMEL Number 1623 of 2019 be awarded to the Appellant.

    e. That the costs of this Appeal be awarded to the Appellant.

Grounds Of The Appeal

2. That the learned trial magistrate erred in ignoring a binding Court decision in Matsesho v Newton (Cause 9 of 2019) [2022] KEELRC 1554 (KLR) where the Court held that the employer is entitled to plead matters that he genuinely believed to exist and which would, if they were in fact in existence, provide valid grounds for terminating an employee;

3. That the learned trial magistrate erred in law and in fact by failing to make a finding that the Respondent's use of abusive and insulting language, through the offensive message sent to the Appellant's Director on 24 April 2019, constituted gross misconduct under section 44 (4) (d) of the *Employment Act* Chapter 226 of the Laws of Kenya-(2007) and provided valid grounds for summary dismissal contrary to the Appellant's employee code of conduct;

4. That the learned trial magistrate erred in law and in fact by failing to make a finding that the Respondent's abscondence from work on or around 23 May 2019 without notice or explanation contrary to the contract of employment and failure to return to work despite multiple attempts by the Appellant to inquire about the reason for the Respondent's unauthorized absence amounted yet again to gross misconduct subject to section 44 (4) (a) of the *Employment Act* Chapter 226 of the Laws of Kenya (2007);

5. That the learned trial magistrate erred in fact and law by falling to appreciate and hold that the Appellant ensured the observance of procedural fairness during the Respondent's summary dismissal despite the Appellant's inability to facilitate disciplinary hearings for the Respondent owing to the practical impossibility of the same since Appellant's usual and substituted means of communication and service upon the Respondent were unsuccessful;

6. That the learned trial magistrate erred in law and in fact by failing to take into account the fact that the Appellant paid all of the Respondent' s terminal dues as well as remitted NHIF & NSSF payments in good time since the time of the Respondent's employment leading all the way to his summary dismissal.

Background to the appeal

7. The respondent/claimant filed a memorandum of claim dated 6th September 2019 alleging unfair termination and sought for compensation for unfair termination , notice pay, untaken leave, unpaid dues, NSSF and NHIF deducted and not remitted all mounting to Kshs. 380,777/-. (pages 4-6 of ROA was the claim). The claimant filed witness statement of even date in support of the claim (pages 8-9 of ROA). The claimant filed his bundle of documents (pages 18-38 of ROA).

8. The appellant entered appearance and filed statement of defence dated 26th November 2019 and denied the claim. The appellant further filed witness statement of Jane Nderitu dated 26th November 2019 and list of documents of even date together with the bundle of documents (pages 47-63 of ROA). The appellant substituted its witness with that of Hellen Njeri Ndegwa dated 3rd June 2022(pages 66-68 of ROA) The appellant filed further list of documents dated 18th January 2023 and the bundle (pages 69-99 of ROA).

9. The Respondent /claimant filed a reply dated 4th May 2021 to the statement of defence.

10. The Respondent's case was heard by the trial court on the 28th March 2023, where he testified on oath relying on his witness statement dated 6th September 2019 and produced documents as exhibits 1-9. He was cross-examined by counsel for the appellant, Mr. Kuloba and was re-examined(pages 153-156 of ROA).

11. The appellant's case was heard on even date where Hellen Njeri Ndegwa was the witness(RW). She testified on oath and adopted her witness statement dated 3rd June 2022, documents under list dated 26th November 2019 and supplementary list of documents dated 18th January 2023 which she produced as exhibits 1-6 and 7 to 11 as they appear on the two lists respectively. She was cross-examined by counsel for the claimant, Ms Gitonga and re-examined by appellant's counsel.(pages 157-259 of ROA). The parties filed written submissions on close of defence case.

12. The trial court delivered its judgment on the 6th October 2023 in favour of the claimant as follows:-

''Judgment is hereby entered for the Claimant against the respondent in the following term;

a) A declaration that the termination was both procedurally and substantively unfair.

b) 6 months' compensation.. Ksh.151, 020.0.

c) One-month notice in lieu of notice....Kshs. 25, 170.00

d) Unpaid leave arrears.. ..Kshs. 21, 814.00

e) Unpaid dues for services rendered.. ..Kshs. 22,653.00.

f. Cost of suit and interest''(pages 144-148 of ROA was the Judgment)

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-

i. Whether the trial magistrate erred in finding that the Respondent was wrongfully terminated

ii. Whether the Respondent absented himself from work without leave or other lawful cause

iii. Whether the Appellant followed due process in terminating the Respondent's employment

iv. Whether the Appellant paid the Respondent all terminal dues owed

v. Whether the Appellant is entitled to the orders sought in the Appeal.

17. The Respondent responded to the submissions of the appellant.

18. The parties being in agreement with the issues for determination in the appeal the court adopted the issues listed by the appellant in determination of the appeal which were consolidated as follows:-

a. Whether the trial court erred in finding the Respondent's employment was wrongly terminated

b. Whether the trial court erred in finding lack of procedural fairness

c. Whether the trial court erred in reliefs granted

d. Whether the appellant is entitled to prayers sought in the appeal

Whether the trial court erred in finding the Respondent's employment was wrongly terminated Appellant 's submissions

19. The Appellant submitted that the trial magistrate erred in finding that the Respondent was wrongfully terminated. This error stemmed from the following key issues:

Application of Incorrect Legal Principles

20. The trial court failed to assess whether there were valid substantive grounds for the Respondent's termination before evaluating procedural fairness. It is our submission that this was a misapplication of the law. The correct approach is that substantive justification for termination must be considered first, followed by procedural fairness. An employer's duty to defend procedural fairness only arises after substantive grounds for termination are established. By prioritising procedural fairness, the trial court improperly spared the Respondent from the burden of laying out a prima facie case. This unlawfully shifted the evidentiary burden to the Appellant prematurely. In Dungani v *West Kenya Sugar Company Limited (Employment and Labour Relations Appeal 12 of 2023*) (20241 KEELRC 172 (KLR), the court clarified that under Section 47(5) of the *Employment Act*, the employee bears the initial burden of proof in claims of unfair termination. Only when a prima facie case is established does the employer need to justify the termination. The trial court compounded its error by failing to assess the substantive grounds for dismissal. Instead, it concluded that the alleged absence of procedural fairness automatically rendered the dismissal unfair. This reasoning is flawed and contradicts established legal precedent, which requires the employee to prove a prima facie case before the employer is called upon to justify both substantive and procedural fairness.

21. The Appellant asserted that the correct position, as established in law, is that the employee must first demonstrate a prima facie case of unfair termination. Only then does the employer bear the burden to prove substantive grounds for dismissal and adherence to procedural fairness. This principle protects employers from frivolous claims by requiring claimants to present credible evidence at the outset. This misapplication of the law resulted in a miscarriage of justice that rendered the trial court's finding erroneous.

Ignoring Established Precedent

22. The trial court also failed to apply established precedent regarding exceptional circumstances. Specifically, it erroneously held that the Appellant failed to accord the Respondent a fair hearing prior to dismissal. In Joseph Njoroge Kiama v Summer Ltd [2014] eKLR, the court held that while employers are encouraged to contact employees who have absconded, this obligation is a matter of best

practice and not a legal requirement. The employee bears the primary responsibility to communicate their absence to the employer. Despite the Appellant providing witness testimony of attempts to contact the Respondent, the trial court imposed an unreasonable additional burden on the Appellant, requiring it to maintain contact details for the Respondent's next of kin and to follow up on the Respondent's whereabouts. This imposes an unfair and impractical obligation on employers - one not contemplated in law. Employers cannot reasonably be expected to monitor employees' private lives or maintain detailed contact information for their families. Such an obligation infringes on employees' privacy and creates undue hardship for employers. The trial court also disregarded binding precedent on exceptional circumstances. In Cooperative Bank of Kenya Limited v Yator (Civil Appeal 87 of 2018) (20211 KECA 95 (KLR), the Court of Appeal held.

> " That notwithstanding, even where an employee has committed gross acts of misconduct, which acts warrant summary dismissal, the law requires that before such sanction is undertaken, an employer must ensure procedural fairness to the employee by allowing the employee to give his defence. Where the employer is unable to hear the employee in defence, such must only be in exceptional circumstances which the employer must demonstrate." In this case, the Appellant demonstrated that it was unable to reach the Respondent due to abscondment. This constituted an exceptional circumstance, exempting the Appellant from the obligation to hold a disciplinary hearing in absentia. Therefore, the trial court erred in its finding by imposing a legal burden on the Appellant to contact the absconded employee and to maintain a database of the employee's kin and home addresses. The trial court further erred in ignoring the binding principle of exceptional circumstances, leading to an unjust conclusion. The appellant urged the court to set aside the decision of the trial court.

Whether the Respondent absented himself from work without leave or other lawful cause

23. The appellant submitted that it is well-established that an employee is obligated to notify their employer if they intend to be absent from work. Failure to do so constitutes gross misconduct as stipulated under Section 44(4)(a) of the *Employment Act*. The Respondent admitted in his Witness Statement that the last day he reported to work was 30 May 2019. This admission confirms that from 1st June 2019 onwards, the Respondent failed to report to work. Notably. the Respondent's absence began earlier, on 23 May 2019, when he failed to resume duty after tendering an apology for prior misconduct. The Respondent's claim that his employment was terminated on 30 May 2019 is misleading. In his Witness Statement, the Respondent stated he was informed that 'the director had gone overseas. This information cannot reasonably be construed as a dismissal. (See pages 8 and 9 of the Record of Appeal).The Respondent's statement further indicates that he was aware his employment was still ongoing, obligating him to report to work. The Respondent failed to do so and has not provided any lawful cause for his absence.The trial court overlooked this crucial admission. Any employee aware of an ongoing employment relationship is legally bound to report to work unless they have lawful cause for absenteeism. The Respondent's actions constitute gross misconduct as defined under Section 44(4)(a) of the *Employment Act*. Even assuming the Respondent's claim about being informed of the director's overseas travel is true, such information does not equate to termination. The Respondent was employed by the Appellant not the Appellant's director. The director's absence did not alter the Respondent's employment terms nor relieve him of his duty to report to work. The Respondent's failure to report to work or communicate with the employer constitutes abscondment, which is gross misconduct under both the employment contract and the *Employment Act*. Employers are entitled to a reasonable expectation of communication from employees absent from duty. The Appellant made reasonable efforts to contact the Respondent. When these attempts failed. the Appellant justifiably concluded that the Respondent had absconded from duty. This belief was further

substantiated by the Respondent's failure to provide any update or explanation for his absence. It must be noted that the Respondent's assertion that he was informed "there was no more work is highly improbable and false. The Appellant had previously issued show cause letters for misconduct, all in writing, and would have followed the same formal process if it intended to terminate the Respondent's employment. The court in Matsesho v Newton (Cause 9 of 2019) (20221 KEELRC 1554 (KLR) established the test for employer actions in termination cases;

> ''25. It should be noted that in proving the reasons for termination under section 43 of the *Employment Act*. the employer is entitled to plead matters that he genuinely believed to exist and which would, if they were in fact in existence, provide valid grounds for terminating the employee. In other words, situations may arise where the employer genuinely believes that a ground for terminating an employee has arisen when in actual fact it has not. For example, the employer may have strong preliminary evidence pointing to the employee having committed an offense against the property of the employer only for subsequent investigations to clear the employee. If the employer shows that he acted on such evidence out of a genuine belief that the employee had committed the act, the termination would be on valid grounds. 26. The test is whether the action of the employer falls in the band of actions that would be considered reasonable in the circumstances. Put differently, the question would be whether another reasonable employer acting on the same set of facts would have reached a similar decision (see Galgalo Jarso Jillo v Agricultural Finance Corporation 120211 eKLR)."

24. Consequently, applying the above test, the Appellant acted reasonably in summarily dismissing the Respondent after concluding, based on the Respondent's unexplained absence and lack of communication, that he had absconded from duty. The Respondent failed to report to work after 23 May 2019 and offered no lawful justification for his absenteeism. A reasonable employee in his position would have sought clarification regarding their employment status, but the Respondent made no such inquiry. The Respondent's prior conduct on 30 May 2019 demonstrates that he was capable of responsibly seeking clarification about his employment. However, on this occasion. his inaction reflects a wilful decision to abandon his duties. The Appellant did not instruct the Respondent to stop reporting to work or suggest that his role was redundant. As a construction company, the Appellant relied on staff continuity to fulfil its contractual obligations. The Respondent's unexplained absence disrupted operations, necessitating the Appellant's conclusion that he had absconded. Under Section 47(5) of the *Employment Act*, the burden of proving unfair termination lies with the employee. The Respondent failed to produce evidence during the trial to substantiate his claims, as required under Section 107 of the *Evidence Act*. In Milano Electronics Limited v Dickson Nyasi Muhaso (20211 eKLR, the court affirmed that while the employer bears the burden of proving that proper procedures were followed during termination, the employee must first present a prima facie case of unfair termination. In this case, the Respondent has failed to meet that threshold. Similarly, in Peter Otabong Ekisa v County Government of Busia (2017) eKLR the court outlined the evidentiary burden under Section 47(5) of the *Employment Act*."The standard of proof is set out under Section 47(5) of the Act. In terms thereof, the employee shall adduce prima facie evidence that there was no valid reason to dismiss him from employment and once that is done the employer bears the burden of justifying the dismissal. In other words, the respondent bears the evidential burden of rebuttal. If the employer is unable to rebut the evidence by the claimant, then the employee is said to have proven that there was no valid reason to dismiss him on a balance of probabilities.". The court in Kamotho v Njuca Consolidated Ltd (Employment and Labour Relations Appeal E005 of 2022) (20231 KEELRC 541 (KLR) held that an employee who absconds from duty cannot later claim unfair termination. The Respondent's conduct similarly precluded him from alleging unfair termination after absconding. The Respondent's failure to report to work, communicate his whereabouts, or provide a lawful reason

for his absence constitutes a clear breach of his employment obligations and justified the Appellant's decision to summarily dismiss him.

Respondent's submissions

25. Conversely, the respondent submitted that during the hearing, the Respondent admitted that he was the author of the text message sent to the Appellant's Managing Director on 24th April, 2019. All the other employees that were proceeding on leave had been paid their dues except for the Respondent whose leave dues were withheld by the Appellant's Managing Director and no reasons were given for withholding the leave dues. During the hearing the Appellant's witness admitted that the Managing Director had withheld the Respondent's leave dues but no reasons were given. This is what made the Respondent to send the offensive message with the hope that he would be paid. Otherwise he was not abusive and rude as alleged in the Appellant's Statement of Defence at paragraph *para_4 4*(a) and neither did the Respondent occasionally send offensive messages to the Appellant's Managing Director. Such an offensive message was only sent once.

26. That on 24th April, 2019, the Respondent was given a Notice to show Cause why disciplinary action should not be taken against him for sending the offensive message. He respondent by writing a letter dated 23rd May, 2019 apologizing for sending the message and he gave the reasons why he had sent the message. 23rd May, 2019 was the day the Respondent reported back to work after his leave. Although in paragraph 4(b) of the Appellant's Statement of Defence it says that a disciplinary hearing was held, there was no such hearing held. It appears that once the Responded had apologized, the matter rested there. In paragraphs 4, 5 and 6 of the Appellant's submissions, the Appellant is harping on the fact that the Respondent's behavior amounted to gross misconduct which warranted the Appellant to take action but when it came to terminating the services of the Respondent as per the letter dated 11th June, 2019, the reason quoted for terminating the Respondent's services was absconding from work and not the offensive message. From the cause of events, the issue of the offensive message seemed to rest with the apology from the Respondent.

27. Contrary to the allegations made in paragraph 7 of the Appellant's submissions, the Respondent submits that he was asked by Human Resource Manager (HRM) to take his leave from 18th April, 2019 and he was to resume on 22nd May, 2019. He reported to work on 23rd May, 2019 which is the date he was given the show cause letter dated 24th April, 2019. He responded to it. However, he was told that there was no work for him and he should report the following day to see the HRM. When he reported the following day, he was not assigned any work. He was told to go home and the Appellant would call him. On 30th May, 2019 he went to enquire on the matter and he was told that the Managing Director had gone overseas. He was directed to go home and the Appellant would call him. The Appellant did not call hence the suit claiming his terminal dues.

28. The Respondent submitted that he did not abscond but he went home as he was asked to do. He waited for the Appellant to call him but upto the time of filing the suit he had not been called. That the issue of absconding work does not arise. He waited at home for the Appellant to call him but this did not happen. It is expected that the Appellant would have kept its records properly by noting the Respondent's mobile contacts, address, next of kin etc, it even had the message that was sent to its Director via WhatsApp which would have provided them with a number through which it would contacted the Respondent.

29. The Respondent submitted that between 1 and 11th June, 2019, there were 11days in which the Appellant claims to have contacted the labour office in an attempt to get hold of the Respondent. It even sent the cheque for final dues to the Labour office. Yet the Appellant did not provide any evidence of its attempts to locate the Respondent and no evidence was provided of the letter that was sent to

Labour to show that the Appellant had tried to reach the Respondent through Labour. Nor was there evidence provided of a letter written by Labour to show that they had failed to locate the Respondent. The Respondent submits that the explanation given by the Appellant that within Eleven (11) days, it had sent communication to labour and labour had sent their response back is a concoction by the Appellant to cover the fact that it did not follow the procedure laid down in the *Employment Act* in dismissing the Respondent.

Decision

30. The burden of proof in employment claims is as stated in section 47 (5) of the *Employment Act* to wit:- '(5) 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." In Dungani v *West Kenya Sugar Company Limited (Employment and Labour Relations Appeal 12 of 2023*) (20241 KEELRC 172 (KLR), the court clarified that under Section 47(5) of the *Employment Act*, the employee bears the initial burden of proof in claims of unfair termination. Only when a prima facie case is established does the employer need to justify the termination.The case by the respondent was that he was asked to proceed on leave by the HRM on the 18th April 2019 for 26 days. That Salary was usually paid in advance and other employees were paid. He was not paid. He sent a message to the Managing Director who he had been told had taken his cash and of which message he was issued with a disciplinary letter when he resumed duty on the 23rd May 2024 and he responded. He was then issued with a show cause letter and told the company would call him which never happened. During the hearing, the Appellant's witness admitted that the Managing Director had withheld the Respondent's leave dues but no reasons were given. The court found the claimant discharged his burden of laying basis of claim of unfair the termination by stating on response to show cause he was not called back to work.

31. The appellant in response gave reason for the termination as absconding duty and not the offensive message to the Managing Director. The trial court found no evidence of the Respondent having contacted the claimant after the absconding. The appellant's witness had no such evidence. The appellant relied on the decision in Joseph Njoroge Kiama v Summer Ltd [2014] eKLR, the court held that while employers are encouraged to contact employees who have absconded, this obligation is a matter of best practice and not a legal requirement. The employee bears the primary responsibility to communicate their absence to the employer. The court was not persuaded by this position as section 41 of the *Employment Act* provides for the procedure of termination of employment on basis of misconduct. Definitely absconding duty amounts to gross misconduct and is a valid reason for termination. The employer is obliged to take steps towards ending the employment relationship on basis of absconding by issuance of notice to show cause why the employment should not be terminated on basis of absconding. The trial court found no such effort. In a subsequent decision of Simon Mbithi Mbane Vs Inter Security Services Limited (2018) eKLR the Court stated, an allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success. The court upholds the decision to find the trial court correctly applied the law in finding that the reason of absconding was not proved as per section 43 of the *Employment Act*. I find no basis to interfere with the finding of the trial court (Mbogo v Shah).

Whether the trial court erred in finding lack of procedural fairness

32. Procedural fairness is as stated under section 41 of the *employment Act*.

Appellant's submissions

33. The appellant submitted that having established that the Respondent absconded duty and unlawfully absented himself from work without leave, it follows that the Appellant was justified in terminating the Respondent's employment. The remaining question is whether the Appellant adhered to the principles of procedural fairness as required by law. The law on summary dismissal in Kenya is well established. In Cooperative Bank of Kenya Limited v Yator (Civil Appeal 87 of 2018) (20211 KECA 95 (KLR), the Court of Appeal held:-

> " That notwithstanding, even where an employee has committed gross acts of misconduct, which acts warrant summary dismissal, the law requires that before such sanction is undertaken, an employer must ensure procedural fairness to the employee by allowing the employee to give his defence. Where the employer is unable to hear the employee in defence, such must only be in exceptional circumstances which the employer must demonstrate." The appellant submitted that while the Appellant had valid grounds to terminate the Respondent's employment, exceptional circumstances existed that made it impossible to grant the Respondent an opportunity to participate in disciplinary proceedings. The Respondent's unexplained absence and unreachability precluded the Appellant from serving a show cause letter or initiating other procedural measures. The Appellant exhausted all reasonable efforts to contact the Respondent through the usual channels. In the absence of any communication or cooperation from the Respondent, it was practically impossible to accord him a disciplinary hearing. That it would have been unreasonable and burdensome for the Appellant to retain the Respondent-effectively a 'ghost worker'-on its payroll while he remained absent without any lawful explanation. The law does not require employers to bear such undue hardship.

34. The Appellant stated that the Respondent failed to present evidence showing an absence of valid grounds for dismissal. The Respondent's own admissions of abscondment. coupled with the Appellant's evidence of failed attempts to contact him, clearly demonstrate that the trial court erred in shifting the burden of proof to the Appellant. As held in Cooperative Bank of Kenya Limited v Yator (supra), exceptional circumstances may preclude strict adherence to procedural requirements. The Respondent's unexplained and prolonged absence falls squarely within this principle. justifying the Appellant's actions. In conclusion, the Appellant fulfilled its legal obligations under the prevailing circumstances. The termination of the Respondent's employment adhered to principles of fairness and was consistent with both the law and reasonable workplace practices.

Respondent's submissions

35. The Respondent submitted that after his leave ended on 22nd May, 2019, he reported to work on 23rd May, 2019. He was given the Show Cause Letter which he responded to on 23rd May, 2019. On 23rd May, 2019, he was told that there was no work for him. He was further told that he should go home and wait for the Appellant to call him. He was not contacted. He went back on 30th May, 2019 to enquire and he was told the Director had gone overseas. He was directed to go back home and wait to be called. The Respondent submits that he did not abscond work. He simply followed the directions given and waited at home to be called. On the part of the Appellant, it has not demonstrated how it tried to reach the Respondent for it have concluded within Ten (10) days since 1st June was a holiday that the Respondent had absconded work so that it could then issue a termination letter on 11th June, 2019 quoting abscondment. There was no evidence adduced by the Appellant to demonstrate how it tried to reach the Respondent within the Ten (10) days aforesaid. That the test quoted in paragraph

36 of the Appellant's submissions does not apply to this case. The Appellant did NOT act reasonably in summarily dismissing the Respondent when it not demonstrate how on its part it tried to reach the Respondent even the communication to labour office by the Appellant was not produced to support its allegation (page 67 of the Record of Appeal paragraph *para_10 10*). The Respondent has clearly met the standard of proof as stated in paragraph 43 of the Appellant's submissions.

Decision

36. Procedural fairness in case of absconding would require notice of intention to end the employment relationship. The court upheld the decision in Simon Mbithi Mbane Vs Inter Security Services Limited (2018) eKLR the Court stated, an allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success. The trial court found there was no evidence of a warning or any notice to the claimant on allegation of absconding. The alleged communication with Labour office before the letter of dismissal was issued was not produced. I find no basis to interfere with the finding of the trial court (Mbogo v Shah).

Whether the trial court erred in reliefs granted

37. The trial court delivered its judgment on the 6th October 2023 in favour of the claimant as follows:-

''Judgment is hereby entered for the Claimant against the respondent in the following term;

a A declaration that the termination was both procedurally and substantively unfair.

b) 6 months' compensation.. Ksh.151, 020.0.

c) One-month notice in lieu of notice....Kshs. 25, 170.00

d) Unpaid leave arrears.. ..Kshs. 21, 814.00

e) Unpaid dues for services rendered.. ..Kshs. 22,653.00.

e. Cost of suit and interest''

38. The principles to guide the court are as stated 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.''

Appellant's submissions

39. The appellant submitted that in addition to ensuring fairness in the termination process, the law requires employers to fairly address terminal dues owed to employees upon dismissal. In the Respondent's case, these dues were limited to outstanding leave pay, as the Respondent was not entitled to severance pay or payment in lieu of notice due to his abscondment and subsequent summary dismissal. The Appellant calculated the Respondent's outstanding leave pay to be Kshs. 9.440.00. Despite the Appellant's willingness to remit this payment, the Respondent has failed to avail himself to collect the amount, leaving it unclaimed with the Appellant. The Respondent alleged unpaid leave arrears amounting to Kshs. 21.814/. However, this claim was vague and failed to specify the months to which it pertained. Such a claim cannot stand in law without proper particulars, as it denied the Appellant the opportunity to adequately respond. Nevertheless, the Appellant refuted these

allegations by producing leave payment vouchers from 2007 to 2018 which were duly acknowledged by the Respondent, demonstrating that no additional leave payments were outstanding (see pages 75-90 of the Record of Appeal). The Respondent's claim for additional leave payments for April 2019 is baseless, as the Respondent received his full salary for that month. Furthermore, the Respondent absconded and failed to report back to work after his leave ended on 23 May 2019, precluding any claim for leave pay thereafter. The Appellant tabulated all pending payments owed to the Respondent, including the leave arrears of Kshs. 9.440/=, as captured in the final dues calculation (see page 71 of the Record of Appeal). Despite repeated efforts to settle this amount, the Respondent has failed to collect the payment. Additionally, the Appellant demonstrated that no payment was due to the Respondent beyond 23 May 2019, the date on which the Respondent last reported to work and delivered an apology letter for misconduct. Since the Respondent rendered no services thereafter, no further payments were warranted. The Respondent's salary for the period prior to taking leave was also fully paid. This is evidenced by the Appellant's remittance of statutory deductions, including NSSF and NHIF contributions for April 2019, as shown in the NSSF provisional statement and NHIF data summary. These documents confirm that the statutory deductions were duly made, indicating that the Respondent's salary was processed and disbursed. It is important to note that such statutory deductions could not have been remitted without the corresponding salary payments being approved. Therefore, the Respondent's allegations of unpaid dues for this period are unfounded and contradicted by the evidence presented.Furthermore, the Respondent's NHIF data summary confirmed that his contributions were "PAID UP TO DATE" as of May 2019. This corroborates the Appellant's evidence of compliance with statutory obligations regarding the Respondent's contributions. The Appellant also reconciled its NSSF and NHIF remittances before terminating the Respondent's employment. This is evidenced by the production of arrears payment receipts dated 8 June 2019 and 14 June 2019, respectively. These receipts show that the Appellant proactively addressed any outstanding statutory dues, going beyond the Respondent's claims. The Appellant's evidence, including payment vouchers, statutory contribution statements, and arrears payment receipts, conclusively refuted the Respondent's allegations of unpaid dues. These claims were baseless and unsupported by evidence.. In light of the foregoing, it is evident that the only amount legitimately owed to the Respondent was Kshs. 9.440/=, which remains unclaimed due to the Respondent's failure to collect it. All other claims by the Respondent lack merit and were sufficiently rebutted by the Appellant.

40. That despite the clear evidence presented by the Appellant, the trial court erroneously awarded the Respondent Kshs. 21,814/ for unpaid leave arrears and Kshs. 22.653/ for alleged unpaid dues. These awards were unsupported by evidence and failed to consider the Appellant's submissions and evidence.

Respondent’s submissions

41. In regard to paragraphs 54 to 66 of the Appellant's submissions, the Respondent submits that he did not abscond work but has unfairly terminated and, therefore, he is entitled to the Claim as per the statement of claim. The Respondent was not given one month's notice instead he was directed to go home and wait till the Appellant called him back. That was on 30th May, 2019. Therefore, the Respondent is entitled to one month's pay in lieu of notice amounting to Kshs 25,170/= The Respondent is also entitled to compensation for unfair termination. The Respondent had worked for the Appellant for a period of 13 years, 4 months and 17 days. Having considered this, the lower Court awarded the Respondent Six (6) months compensation for unfair termination to Kshs 151,020/- which the Respondent urged this honourable Court to uphold. On the issue of leave pay, the Respondent admits that he was paid leave pay for the years 2007 to 2018. The Vouchers for the leave pay for 2007 to 2018 are signed by the Respondent and he also placed his thump print on them. However, the leave Voucher for 2019 at page 71 of the Record of Appeal is not signed by the Respondent. The heading for the payment voucher for 2019 is misleading because it reads "Final Dues payment voucher

yet the payment being made therein is reflected as leave pay which is calculated for January, 2019 to May 2019. The Respondent took 26 days paid leave as per the Contract at page 33 of the Record of Appeal at the paragraph headed "Annual Leave). The Respondent was to proceed on leave from 18th May, 2019 and took 26 days to 23rd prime d May, 2019. The Appellant's Managing Director withheld the Respondent's leave pay for 26 days which works out to Kshs 21,814/. This is the leave pay the Respondent is entitled to. The Final Dues Payment Voucher does not reflect the correct leave pay for the Respondent like the other leave payment Voucher at pages 75,76,78,89,81.82,83,84,85,86 and 87. The Respondent claims unpaid dues for services rendered from 1" to 17th April and 23rd to 30th May, 2019 which works out to Kshs 22 ,653/= This amount excludes the days the Claimant took for leave. It is not clear why the Appellant included a pay slip for June, 2019 in its Supplementary list of Documents dated 18th January, 2019 item No. 2 because the Respondent's last day was 30th May, 2019 when he was told to go home and wait until he was called. In the lower Court's records the pay slip clearly reads as pay slip for June 2019 but in the record of Appeal at page 72 the month of June has been altered by hand to read May, 2019. The Respondent was not at work after 30th May, 2019. The Appellant has admitted this in paragraph 3 of its Statement of Defence at page 40 of the Record of Appeal.

42. .In conclusion, the letter of dismissal dated 11th June, 2019 at page 63 of the Record of Appeal is an attempt by the Appellant to show that the Respondent absconded from work from 1st June, 2019 whereas the Respondent had been clearly told on 30th May, 2019 not to report back to work until he was called. The Appellant in its Statement of Defence at paragraph *para_3 3* at page 40 of the record of Appeal, has admitted the contents of paragraph 3 of the Respondent's Statement of Claim at page 4 of the Record of Appeal. The Appellant's witness in cross - examination stated that the decision to terminate the Respondent's services was communicated to the labour Office through a letter dated 11th June, 2019 which the Appellant failed to produce to show that it had actually sent the said letter to the labour Office. The Respondent urged the Court to uphold the Judgement delivered in favour of the Respondent by the lower Court because his services were terminated unfairly.

Decision

43. The court having upheld the decision on unfair termination found the compensation award of 6 months' salary by the trial court was fair taking into account the length of service. The notice pay was also due under section 35 of the *Employment Act* for lack of procedural fairness. On the leave and dues, the appellant's witness admitted that the claimant was not paid as his leave money was held by the Managing director and further the trial court explained the basis of the dues being days worked(see pages 146-148 of ROA).

44. The trial court rightfully declined the claim for NSSF and NHIF deductions hence there was no reason why the appellant submitted on the same at appeal. I find no basis to interfere with the decision of the trial court as there was no demonstration before me that the trial court misdirected itself or that it had 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(Mbogo v Shah).The decision of the trial court is upheld in its entirety.

Conclusion

45. The appeal is dismissed for lack of merit with costs to the respondent. The Judgement of the Chief Magistrate's Court at Nairobi (Hon. N. Ruguru Senior Principal Magistrate) delivered on 6 October 2023 in Nairobi Chief Magistrate's CMEL No. 1623 of 2019 is upheld.

46. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF MAY , 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Appellant:- Munene

Respondent:- Ms. Kitonga