



Structural Construction International Limited v Muleka (Employment and Labour Relations Appeal E120 of 2024) [2025] KEELRC 1361 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1361 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E120 OF 2024**

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

**BETWEEN
STRUCTURAL CONSTRUCTION INTERNATIONAL LIMITED APPELLANT
AND
PATRICK MULEKA RESPONDENT**

(Being an Appeal from the Judgment of the Honourable Rawlings Liluma Musiega (SRM) delivered in Nairobi on the 16th February, 2024 in Nairobi CMELRC No. E818 of 2020)

JUDGMENT

1. The Appellant being dissatisfied with the Judgment of the Honourable Rawlings Liluma Musiega (SRM) delivered at Nairobi on the 16th February, 2024 in Nairobi CMELRC No. E818 of 2020 between the parties filed a Memorandum of Appeal dated 25th April, 2024 seeking the following orders:
 - i. The Appeal be allowed with costs and the Judgment of the trial Magistrate be set aside.

The Grounds Of The Appeal

2. That the learned Magistrate erred in law and in fact, misdirected himself and ignored the Appellant's testimony and evidence in arriving at the Judgement, to the Appellant's prejudice.
3. That the learned Magistrate erred in law and in fact when he found that the Appellant had not demonstrated that it had commenced any disciplinary action against the Respondent.
4. That the learned Magistrate erred in law and in fact and exhibited bias when he found that the Appellant had not demonstrated that it made efforts or attempts to reach the Respondent in an aim to seek explanation as to why the Respondent was not reporting to work.



5. That the learned Magistrate erred in law and in fact, misdirected himself and ignored the Appellant's testimony and evidence in arriving at the conclusion that the Appellant had failed to prove on a balance of probability, that the Respondent had absconded his duties.
6. That the learned Magistrate erred in law and in fact, misdirected himself and ignored the Appellant's testimony and evidence in arriving at the conclusion that the Appellant had failed to comply with the Provisions of Section 42 (1) of the Employment Act 2007.
7. That the learned Magistrate erred in law and in fact, misdirected himself and ignored the Appellant's testimony and evidence in finding that the Respondent's termination was substantively and procedurally unfair.
8. That the learned Magistrate erred in law and in fact, misdirected himself and ignored the Appellant's testimony and evidence in finding that the Appellant had not paid to the Respondent, one-month salary in lieu of notice.

Background Of Appeal

9. The Claimant filed claim against the Respondent/Appellant vide a Memorandum of Claim dated 7th February, 2020 seeking the following orders:-
 - i. Accrued leave days pay Kshs. 140,000/-
 - ii. House allowance Kshs. 252,000/-
 - iii. Notice Pay Kshs. 28,000/-
 - iv. Damages Kshs. 336,000/-
 - v. Certificate of Service
 - vi. Costs of this suit
 - vii. Any other relief the court may deem fit and just to award
10. The Claimant filed his verifying affidavit, witness statement of the Claimant and list and bundle of documents of even date (see pages 26-45 of ROA).
11. The claim was opposed by the Respondent who entered appearance and filed a Respondent's Statement of Response and Counterclaim dated 19th November, 2020, Respondent's Verifying Affidavit, Respondent's list of witnesses and Witness Statements of Karsan Harji Raghwani and Daniel Odhiambo respondent's list and bundle of documents all of even date (Pages 47-155 of ROA).
12. The Respondent's Counterclaim sought the following orders:
 - i. A declaration that the termination of the contract by the Claimant was unfair and unlawful;
 - ii. Kshs. 28,000/= being one month's salary in lieu of notice;
 - iii. Compensation to the Respondent for unlawful termination of the contract by the Claimant
 - iv. Costs of the suit
13. The Claimant responded by filing a Reply to Statement of Response and Counterclaim dated 15th February, 2021 (Pages 156-158 of ROA).



14. The claimant's case was heard on the 18th October, 2023 where the claimant testified in the case, he adopted their Witness Statements as his evidence in chief and produced his list of documents dated 7th February, 2020 as exhibits 1-6. The Claimant was cross-examined by Counsel for the Respondent Mr. Maranga (see pages 14-16 of ROA)
15. The Respondent's case was heard on even date where the Respondent's witness Mr. Kasan Herji testified on behalf of the Respondent and was cross-examined by counsel for the Claimant Mr. Ondigi (Pages 16-19 of ROA).
16. The parties took directions on filing of written submissions after the hearing. The parties complied.
17. The Trial Magistrate Court delivered Judgment on the 16th February, 2024 in favour of the Claimant thereby dismissing the Respondent's counterclaim and awarding the Claimant the following reliefs: notice pay in the amount of KShs. 28,000/-, compensation for unlawful termination of employment in the amount of KShs. 252,000/=, costs of the suit awarded to the Claimant and interest at court rates; and the Claimant to be issued with the Certificate of service (Judgment at pages 231-234 of ROA).

Determination

18. The appeal was canvassed by way of written submissions. Both parties complied.
19. 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."
20. 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

21. The Appellant identified two(2) issues for determination namely:
 - i. Whether the Respondent was summarily dismissed; and
 - ii. Whether the Respondent was entitled to the reliefs awarded at trial.
22. Conversely, the Respondent identified three(3) issues for determination namely:
 - i. Whether the learned magistrate erred in law and fact by dismissing the Appellant's counterclaim;
 - ii. Whether the learned magistrate erred in law and fact in finding that the termination of the Claimant's employment was unfair



- iii. Whether the learned magistrate erred in awarding the Respondent compensation and notice pay.
23. The court on perusal of grounds of appeal, submissions and decision of the trial court found the issue for determination at appeal to be
1. Whether the Respondent's employment was unfairly terminated
 2. Whether the trial court erred in reliefs granted
 3. Whether the Respondent's employment was unfairly terminated

Appellant's submissions

24. According to the Memorandum of Claim dated 7th February, 2020, it was the Respondent's assertion, at paragraph 3 thereof, that he was, on the 9th day of December, 2013, employed by the Appellant, as a construction operator, until the 9th day of February 2019, when he was, without any reason whatsoever, dismissed summarily. In that regard, the Respondent posits that the said alleged conduct by the Appellant was unfair and unlawful. That on the contrary, it is the Appellant's case that it never dismissed summarily, the Respondent and instead, it is the Respondent who on the said date absconded his duties, without any notice and/or knowledge of the Appellant.
25. The concept of summary dismissal is espoused under Section 44(1) of the *Employment Act* in the following terms:-"Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term." In light of the foregoing description, it follows that for an employee to be said to have been summarily dismissed from employment, it must be demonstrated that the employer terminated the employee's employment and that the same was done without notice.
26. The appellant submitted that the burden of proving that the Respondent was terminated from employment and that the same was done unfairly and/or wrongfully, lies on the Respondent himself as per provisions of section 47(5) of the *Employment Act* which provides thus:-
- "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." That, in the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR it was held as follows:
- "...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)..."
27. The appellant further submitted that the Respondent did not, at trial, discharge with the burden of proving that the Appellant terminated him from employment let alone that the said alleged termination was unlawful. Put differently, the Respondent did not lay the necessary foundation to warrant the Appellant's response under Section 43 of the *Employment Act* on proof of reason for termination. Whereas the Respondent's case was purely anchored on the allegation that on 9th February, 2019, the Appellant summarily dismissed him from employment, no ounce of evidence in support thereof was adduced. For instance, what did the Respondent do after the alleged termination of employment? He certainly did not make any immediate protest in writing or at all, either to the Appellant or the labour officer as anticipated under section 47 of the *Employment Act*. It was only on



- 9th September 2019, seven months later, that the Respondent's lawyer addressed a demand letter to the Appellant. In light of this, on a balance of probabilities, the appellant's was hardly the conduct of an employee whose services were summarily and rudely terminated.
28. That the Trial Magistrate erred in law by failing to consider whether the Respondent had met his initial legal and evidentiary burden of, first, proving dismissal and that, if at all, the same was wrongful before shifting the same to the Appellant to prove that the alleged dismissal was lawful. In that regard, the burden of proof was, prematurely, shifted to the Appellant.
29. That the Trial Magistrate erred in law in tasking the Appellant to adduce evidence in rebuttal of a claim that was yet to be substantiated. That it was not sufficient for the Respondent to lay an oral claim that the Appellant summarily dismissed him from employment without corroborating the same. It is noteworthy that courts of law are bound to make decisions based on the law and evidence presented. In support of the foregoing the Appellant urged the court to be guided by Section 109 and 112 of the *Evidence Act*; section 109; "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person." In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. In any event, that failure by courts to strictly make certain that employees have discharged their respective burdens of proof under section 47(5) of the *Employment Act* would trigger floodgates of litigation from employees who willingly abscond their places of employment.

Respondent's submissions

30. The Appellant in its response to the Respondent's Memorandum of Claim argued that the Respondent was not dismissed rather he absconded duty resulting to the separation. On this argument, the Appellant raised a counterclaim against the Respondent praying for Notice pay and compensation for unlawful termination, the Respondent having left employment without notice. In his response to the counterclaim, the Respondent denied ever absconding duty and maintained that he was summarily dismissed on 9th February 2019 when the Appellant's Director (RW-1) summoned him and told him that his services were no longer needed. During the hearing, RW-1 who is the Director of the Appellant testified that abscondment is a misconduct but conceded that there was no disciplinary process initiated against the Respondent for the alleged misconduct. The Appellant equally failed to produce any evidence that he tried to reach the Respondent and serve him with a Notice to Show Cause or an invitation to a Disciplinary Hearing. The Appellant having failed to demonstrate any steps it took to address the Respondent's abscondment which it admitted to be a misconduct, the learned magistrate found that the Appellant had not discharged its burden of proof that the Respondent absconded duty and went ahead to dismiss the Appellant's counterclaim.
31. The Respondent urged the court to uphold the finding of the trial court and in doing so to be persuaded by the long-established ratio that an employer who alleges abscondment/desertion on the part of the employee should demonstrate to the court that it took steps to subject the employee to a disciplinary process for the alleged desertion. In this case, the Appellant failed to demonstrate to the court that it served the Respondent with a show cause notice or invite him to a disciplinary hearing and that if the Respondent ignored the invitation, a disciplinary hearing was conducted in his absence. The Appellant's witness testified that one of its other employees by the name Daniel attempted to call the Respondent to no avail but then the Appellant failed to produce any evidence that Daniel tried to call the Respondent. In fact, in a statement handwritten by Daniel and attached to the Appellant's documents, nowhere does Daniel state that he tried to call or contact the Respondent in any way. In *Orero v Prime Steel Mills Ltd (Cause 1190 of 2015) [2022] KEELRC 3987 (KLR)* (27 September



2022) (Judgment) wherein the facts are in pari materia with the facts herein. The court while quoting several of its decisions with approval held thus: '72. In support of its averment that the claimant absconded duty, the respondent's witness stated that Mr Kelvin Omondi was to follow up to ascertain the whereabouts of the claimant. It is unclear whether he did so and what transpired. The witness was unaware of the telephone number of the claimant or whether Mr Kelvin Omondi actually called the claimant. 73. Even assuming that Mr Kelvin Omondi called the claimant, and there was no response, the respondent was still bound to issue a notice to show cause to the claimant and inform him that termination of employment was being considered on the ground of absconding duty. 74. The court is guided by the sentiments of Onyango J in *Felistas Acheha Ikatwa _v Charles Peter Otieno* (2018) eKLR, the court held "The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, is expected to issue a notice to the deserting employee that termination of employment on the grounds of desertion is being considered." 75. Similar sentiments were expressed in *Boniface Mwangi v B.O.M Iyego Secondary School* (2019) eKLR, *Simon Mbithi Mbane v Inter Security Services Ltd* (2018) eKLR as well as *Nzioka v Smart Coatings Ltd* (2017) eKLR. 76. Similarly, in *Judith Otieno Owuor v Sameer Agriculture and Livestock Ltd* (2020) eKLR 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 have 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. 77. The court is guided by these sentiments. 78. For the foregoing reasons, the court is satisfied that the respondent has on a balance of probability failed to demonstrate that it took reasonable steps to ascertain the whereabouts of the claimant to resume duty or issue the necessary notices to commence the disciplinary process." 20. That the learned magistrate was bound by the decision and holding of this court. Nothing has been submitted by the Appellant to demonstrate that the learned magistrate erred in finding that it had failed to prove that the Claimant initiated the separation by absconding duty.

32. The Appellant further relied on the Court of Appeal's decision in *Pius Machafu Isiundu v Lavington Security Guards Limited* [2017] e KLR where the appellate court held that the employee had the burden to lay foundation of unlawful termination. In the instant case, the Respondent produced a Termination Notice dated 19th November 2018 and further averred that although he continued to work beyond the notice period, he was summoned on 9th February 2019 by the Appellant's Director Mr. Karsan who told him that his services were no longer needed therefore summarily dismissing him from employment. The Respondent maintained that he was not subjected to a disciplinary process when the Termination Notice was issued purportedly on grounds of misconduct and neither was any disciplinary process initiated before he was summarily dismissed on 9th February 2019. Mr. Karsan himself testified and admitted that the Appellant issued the termination notice of 19th November 2018 and that the same was not effected as the Respondent continued to work past the notice period. Mr. Karsan admitted that the Respondent was the sole backhoe machine operator hence was a crucial employee to the Respondent's construction business thus drawing an inference as to why the Termination Letter was not effected upon the lapse of the notice period. By producing a Termination Notice issued on alleged ground of misconduct which is not particularised and testifying that although the same was lifted by conduct, the Appellant through its Director summarily dismissed him later on without a notice to show cause or disciplinary hearing, the Respondent painted a motive/intention by the Appellant to terminate his employment.

Decision

33. The trial court found the allegation of absconding not supported. There as no notice to show cause. On perusal of the evidence before trial court I uphold the finding of trial court of lack of proof of the



reasons for the termination and for lack of procedural fairness. The court noted that after the notice of termination of 19th November 2018 the appellant admitted it allowed the respondent to continue working apparently on humanitarian ground. That meant the termination notice was waived. There was no other notice after that.(pages 48 of ROA was response to that effect). RW led evidence that the claimant absconded duties. That one Daniel called the claimant but the evidence was not before trial court. He admitted that the claimant was in Meru and the respondent was the only machine operator hence the claimant was important. RW admitted there was no disciplinary hearing. The court was satisfied that the claimant laid sufficient basis for claim of termination of employment which elicited informed response from the employer(section 47 (5) of the *Employment Act*). During cross-examination the claimant told the court he was dismissed summarily by one Karsan verbally in the presence of Daniel. Daniel in his handwritten statement stated the Claimant left Meru site without informing him. Daniel was the supervisor. He did not indicate whether he called the claimant as alleged by RW. The defence of absconding requires the employer to prove that they made an effort to reach the employee in compliance with section 41 of the *Employment Act*. Absconding means the employee has no intention to return to work. The employer alleged absconding but failed to prove that reason as stated by trial court. The court upholds the decision of the court on absconding in " Felistas Acheha Ikatwa _v Charles Peter Otieno (2018) eKLR, where the court held: "The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, is expected to issue a notice to the deserting employee that termination of employment on the grounds of desertion is being considered." .Similar sentiments were expressed in Boniface Mwangi v B.O.M Iyego Secondary School (2019) eKLR, Simon Mbithi Mbane v Inter Security Services Ltd (2018) eKLR as well as Nzioka v Smart Coatings Ltd (2017) eKLR. Similarly, in Judith Otieno Owuor v Sameer Agriculture and Livestock Ltd (2020) eKLR 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 have 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." The court was not satisfied there was any basis to interfere with the decision of the trial court to the effect the termination was unfair. (Mbogo v Shah)

Whether the trial court erred in reliefs granted

34. The appellant submitted that the Trial Magistrate erred in law in awarding reliefs to the Respondent whereas he had failed to discharge the burden laid upon him under section 47(5) of the *Employment Act*. In that regard, the reliefs set out under section 49 of the *Employment Act* can only be issued upon proof of wrongful dismissal or unfair termination. As this standard of proof was not met, the Respondent was not entitled to the reliefs awarded at trial.

Respondent's submissions.

35. Upon finding the termination of the Respondent's employment to be unlawful, the learned magistrate in line with Section 49 of the *Employment Act* awarded the Respondent an equivalent of nine months' pay as compensation amounting to Kshs. 252,000/-. The amount awarded as compensation is capped at 12 months' salary being the highest award therefore leaving the trial court with the discretion on what amount should be awarded depending on the circumstances of each case.
36. When can the appellate court interfere with the trial court's discretion? The principle applicable for an appellate court to interfere with a judicial discretion of the trial court was discussed in Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR
- (a) The judge misdirected himself on law, or (b) That he misapprehended the facts, or



- (c) That he took account of considerations of which he should not have taken an account, or
- (d) That he failed to take account of consideration of which he should have taken account, or (e) That his decision, albeit discretionary one, was plainly wrong.
37. For the appellate court to interfere and disturb the amount awarded by the trial court as prayed, the Appellant must demonstrate that in exercising his judicial discretion, the learned magistrate misdirected himself on the law, or that he misapprehended the facts and thereby arrived at a wrong decision. That the Appellant has failed to satisfy the above laid principles. In awarding the 9 months' salary, the learned magistrate relied on the manner in which the Respondent's employment was terminated. In *Kenfreight (E.A.) Limited v Benson K. Nguti* [2016] eKLR, the Court of Appeal held that the manner in which the Respondent's termination was executed could not warrant them interfere with the trial court's discretion and disturb the award of 12 months' pay as compensation. This was the same position held by the Supreme Court when the Appellant preferred a further and final appeal in Supreme Court Petition 37 of 2018; *Kenfreight (E.A) Limited v Benson K. Nguti* [2019] eKLR. That based on lengthy period the Respondent served the Appellant and the inhumane manner employed to dismiss him where he was only kept in employment due to his expertise and dismissed once he finished the pending assignment and upon securing the services of his replacement, the trial court exercised its discretion judiciously in awarding nine (9) months' pay as compensation.
38. On Notice pay the trial court having found that the Respondent's employment was unfairly terminated by Appellant, he was inclined to award Notice pay in line with Section 36 of the [Employment Act](#).

Decision

39. The appeal on the reliefs was basically hinged on ground that the decision on unfair termination was erroneous. The court on appeal upheld the finding of unfair termination. On Notice pay- there was no procedural fairness hence was due under section 35 of the [Employment Act](#) .On Compensation awarded for equivalent of 9 months. The trial court took into account manner of termination. The claimant had served for 4 years, a job that required him to travel in between sites and he was considered an important employee by the Appellant. Taking into account the foregoing and the manner of termination of the employment, I find no basis to interfere with the reliefs awarded by the trial court.
40. In conclusion, on re-evaluation of evidence before the trial court, the court on first appeal found no basis to interfere with the decision of the trial court (See *Mbogo v Shah*).
41. In the upshot the appeal is dismissed with costs to the respondent. The entire judgment of Honourable Rawlings Liluma Musiega(SRM) delivered in Nairobi on the 16th February, 2024 in Nairobi CMELRC No. E818 of 2020 is upheld.
42. 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:

C/A Otieno

Appellant – Muigai h/b Maranga



Respondent – Ms Maina h/b Odigi

