



**Guardian Coach Limited v Kebasi (Appeal E078 of 2024)
[2025] KEELRC 1308 (KLR) (8 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1308 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E078 OF 2024**

JK GAKERI, J

MAY 8, 2025

BETWEEN

THE GUARDIAN COACH LIMITED APPELLANT

AND

EVANS ONDIEKI KEBASI RESPONDENT

JUDGMENT

1. This is an appeal against the Judgment of Hon. B. O. Omwansa, S.P.M delivered on 12th November, 2024 in Evans Ondieki Kebasi V The Guardian Coach Kisii CMELRCC No. 40 of 2023.
2. The brief facts of the case are that the appellant employed the respondent on 15th February, 2021 as a driver under a 5 year contract and he served until 13th April, 2023, when he alleges to have been dismissed orally.
3. The respondent testified that he was taken ill on 4th March, 2023 and discharged on 10th March, 2023 and informed the appellant, took drugs for 21 days and was dismissed by one Dennis Maragia thereafter, when he reported to resume work and attempts to seek Mr. David Ongera’s audience bore no fruit.
4. The appellant’s case on the other hand is that the respondent was its employee but he deserted duty without communicating and the allegation of having been dismissed by the manager at Kisii was untrue since the manager was answerable to the General Manager based in Nairobi.
5. The respondent prayed for a declaration that the oral suspension, dismissal or termination of employment was unfair, salary in lieu of notice, severance pay for 3 years, payment for remainder of the contract, annual leave, 12 month’s compensation, outstanding NHIF and NSSF arrears, national holidays, general damages and costs and interest.



6. After considering the evidence before him and submissions by the parties, the learned trial magistrate found that the respondent had proved that his employment was terminated by the appellant but the requisite procedure had not been complied with.
7. The trial court entered judgment in favour of the respondent and awarded one month's salary in lieu of notice, Kshs.20,000, severance pay for 3 years, Kshs.312,156.00, annual leave Kshs.28,014.00 general damages Kshs.100,000 and costs.
8. This is the Judgment appealed against.
9. The appellant assails the trial court on the grounds that it erred in law and fact by:
 1. Failing to appreciate that there was no evidence to prove that the respondent's employment was unfairly terminated, and arrived at conclusions unsupported by evidence.
 2. Finding that respondent was entitled to pay in lieu of notice.
 3. Awarding severance pay of Kshs.312,156 in addition to general damages.
 4. Awarding Kshs.28,014.00 as leave pay without supportive evidence.
 5. Using an erroneous formula to compute severance pay.
 6. Misapplying the provisions of Section 47(5) of the *Employment Act*.
 7. Awarding compensation for unlawful termination of employment yet the respondent deserted duty.
 8. Failing to consider the evidence adduced by the appellant.
 9. Misapprehending the evidence on record coupled with failure to properly and exhaustively evaluate it.
 10. Awarding the inordinately high and excessive sum of Kshs.100,000 as general damages.
10. In sum, the appellant is challenging the trial court's appreciation and application of the evidence before it as well as the law on termination of employment and the reliefs granted.

Appellant's submissions

11. On dismissal from employment, counsel submitted that the learned trial magistrate did not take into consideration the provisions of Section 45(5) of the *Employment Act* or state the grounds he relied upon to establish whether there was a termination of employment or whether it was just and equitable.
12. On severance pay, of Kshs.312,156.00, counsel submitted that since the respondent was not declared redundant the award lacked supportive evidence and was contrary to the provisions of Section 40(1) of the *Employment Act*.
13. Reliance was placed on the sentiments of the Court of Appeal in *Thomas De La Rue V David Opondo Omutetema* [2013] eKLR to urge that severance pay is only payable on account of redundancy.
14. Counsel further submitted that the award of general damages was wrongful and placed reliance on the sentiments of the court in *Heaton V Weitz* 534 F.3d 882891 (8th Sept. 2008) and *D K Njagi Marete V Teachers Service Commission* [2020] eKLR, to urge that the award was unjustifiable.
15. Revisiting the issue of severance pay, counsel submitted that the award of Kshs.312,156.00 in place of Kshs.30,000.00 was inaccurate.



16. Reliance was placed on the decisions in *RV Commissioner for Co-operatives ex parte Kirinyaga Tea Growers Co-operatives Savings and Credit Society Ltd, Macmillan Bloedel Ltd V Galiano Island Trust Committee* as well as *Selle & Another V Associated Motor Boat Co. Ltd & Others* [1968] EA 123.
17. The respondent did not file submissions.
18. This being a first appeal, the court is enjoined to re-evaluate and reconsider the evidence a fresh and arrive at its own conclusions as held by the Court of Appeal in *Selle and another V Associated Motor Boat Co. Ltd (Supra)* as follows:

I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this 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, this 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 impressions based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif V Ali Mohamed Sholan* [1955] 22 E.A.C.A 270)".

19. Since the appellant's case is grounded on the evidence before the trial court and awards, it is essential to evaluate the evidence with a critical eye.
20. In his witness statement, the respondent stated that after admission at Hema Hospital, he was placed on drugs for 45 days and was dismissed from employment by one Mr. Dennis Maragia, the appellant's Manager, Kisii.
21. Although the respondent alleged to have travelled to Nairobi to meet one Mr. David Ongera, he had no date and only mentions that Mr. Ongera "dismissed him and never attended" to him.
22. Similarly, in his written witness statement, the respondent is silent on whether he notified the employer about his admission to hospital or the medication period of 45 days, which puzzlingly reduced to 21 during the hearing in court, which is too large a variance.
23. While the Hema Discharge card appears authentic, on the face of it, the Laboratory Request Form dated 5th June, 2023 is of no evidential value.
24. Significantly, the respondent's testimony that he reported to the Manager Kisii Mr. Dennis Maragia and was orally dismissed was uncontroverted, the fact that appellant had a General Manager in Nairobi notwithstanding.
25. The respondent admitted on cross-examination that at Kisii he was answerable to Mr. Dennis Maragia.
26. Equally, the respondent's evidence that Mr. David Ongera refused the respondent to be assigned duty was uncontroverted as neither Mr. Dennis Maragia nor Mr. David Ongera testified.
27. Mr. Erick Orina RWI, did not testify on this issue other than stating that he never reported to strengthen the appellant's case that the respondent deserted duty.
28. Puzzlingly, the appellant feigns ignorance of the respondent's hospitalization or period of medication yet he was not rendering any services as a driver and the appellant was unaware of his condition or whereabouts.



29. According to the appellant's witness, the respondent deserted the work place from 4th March, 2023 and did not report back until the instant suit was filed on 29th December, 2023.
30. It is trite law, that whether a suit is defended or not, it is the duty of the party suing to prove its case.
31. In *Kirugi & Another V Kabiya* [1987] KLR 347 the court stated as follows:
- The burden was always on the plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof. Likewise, failure by the defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard”
32. See also *Nicholus Kipkemoi Korir V Hatari Security Guards Ltd* [2016] on the import of Section 47(5) of the *Employment Act*.
33. As to whether the respondent's employment was terminated by the appellant or he deserted the workplace, the court proceeds as follows:
34. According to *Blacks Law Dictionary* 10th Edition, "Desertion" means
- The wilful and unjustified abandonment of a persons duty or obligations”.
35. In the often cited South African case in *Seabolo V Belgravia Hotel* [1977] 6 BLLR 829 (CCMA) the court distinguished desertion from absence from duty as follows:
- ...desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning, or having left his or her post subsequently formulates the intention not to return”.
36. In *Ronald Nyambu V Tornado Carriers Ltd* [2019] eKLR Ndolo J stated.
- Desertion of duty is a grave administrative offence which if proved, would tender an employee liable to summary dismissal”.
37. The emerging jurisprudence of this court is that an employer who relies on desertion is required to demonstrate the reasonable efforts it expended to contact the employee to resume duty or know his or her whereabouts and make him or her understand that termination of employment on account of the desertion was being considered. A notice to show cause to the deserting employee is the bare minimum.
38. See *Felistas Acheha Ikatwa V Charles Peter Otieno* [2018] eKLR, *Simon Mbithi Mbane V Inter Security Services Ltd* [2018] eKLR, *Joseph Nzioka V Smart Coatings Ltd* [2017] eKLR, *Bonface Francis Mwangi V Iyego B.O.M Secondary School* [2019] eKLR and *Evans Ochieng Oluoch V Njimia Pharmaceuticals Ltd* [2016] eKLR.
39. Having failed to adduce evidence to demonstrate what steps it took after ascertaining that the respondent had deserted the workplace, the plea of desertion or abandoning duty becomes unsustainable.
40. The foregoing reasoning comports with the sentiments of *Maureen Onyango J* in *Judith Atieno Owuor V Sameer Agriculture and Livestock Ltd* [2020] eKLR that:
- Further, even if she had absconded, she is by law entitled to a fair disciplinary process as set out in Section 41 of the *Employment Act*, 2007. No evidence was availed to the Court to support there having been a disciplinary process or notice issued prior to the termination. It



is the duty of the Respondent to show this Court it did accord the Claimant a fair hearing prior to her termination”.

41. Finally, the sentiments of Ndolo J in *Walter Ogal Anuro V Teachers Service Commission* [2013] eKLR as worth recapitulating as follows:

...For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness...”

42. Admittedly, whereas under the provisions of Section 47(5) of the *Employment Act*, the employee must establish a prima facie case of an unfair or unlawful termination of employment or dismissal, under the provisions of Section 43 and 45 of the Act, the employer is required to prove that it had a valid and fair reason to terminate the employee’s employment and that conducted it in accordance with a fair procedure.

43. Flowing from the foregoing, it is discernible that having failed to prove that the respondent deserted the workplace or the termination of employment or dismissal was lawful or fair, the inescapable conclusion is that the separation was unfair as found by the trial court albeit for different reasons.

44. The foregoing analysis addresses grounds number 1, 2, 10, 11, 12, 13, 14 and 15 of the Memorandum of Appeal.

45. The learned trial magistrate is also faulted on the awards made on the one month’s salary in lieu of notice, the court is satisfied that the trial court did not err on this award.

46. Having found that termination of the respondent’s employment was unfair and the respondent gave neither a notice nor pay in lieu of notice the award was justified.

47. Concerning severance pay for 3 years, the court is in agreement with the appellant’s counsel that the award had no justification for the simple reason that the respondent was not declared redundant and no evidence to that effect was adduced.

48. As correctly submitted by the appellant’s counsel, the provisions of Section 40(1)(g) of the *Employment Act* are only triggered in cases of redundancy.

49. The award was unmerited and it is set aside.

50. As regards annual leave, Kshs.28,014.00, the court is satisfied that the award was unmerited because neither the respondent’s written statement dated 29th December, 2023, nor the oral evidence adduced in court made reference to his having not proceeded on annual leave and/or was not paid for untaken leave days.

51. This is a claim for special damages and had to be pleaded and strictly proved.

52. Although annual leave is one of the statutory rights of the employee, payment for untaken leave days must be proved.

53. The award was unmerited.

54. Finally, as regards the award of Kshs.100,000 as general damages, the awarded was patently unmerited for the simple reason that the remedy does not exist for breach of an employment contract. See *Cleopatra Kama Mugenyi V Aidspan* [2019] eKLR.

55. More significantly, the respondent had prayed for 12 month’s salary compensation for unlawful redundancy and having found that the termination of the respondent’s employment was unlawful,



the provisions of Section 49 of the Employment Act were triggered and compensation ought to have followed.

56. The sum of Kshs.100,000 awarded by the trial court was unmerited.
57. Considering that the respondent was an employee of the appellant for a duration of 2 years and 2 months, which is fairly short, did not appeal the decision by the appellant or express his wish to remain in employment, had no recorded warning or misconduct but contributed to the termination of employment, the court is satisfied that the equivalent of 2 months salary is fair, Kshs.40,000.00.
58. The court is in agreement with the trial court that it is not within the power of the court to compel an employer to pay outstanding NSSF and NHIF arrears, as both are statutory bodies with boards of directors as implementing agents.
59. Relatedly, the claim outstanding or unpaid public holidays lacked particulars and the prayer for payment for the remainder of the employment contract was a claim for anticipatory earnings, and had no legal justification. However, the prayer for a declaration that the dismissal or termination of employment was unlawful and unprocedural was merited in light of the findings of the trial court.
See D. K. Njagi Marete V Teachers Service Commission (supra).
60. The upshot of the foregoing is that the appellant has established a case for interference with the Judgment of the trial court dated 12th November, 2024 to the extent that:
 - a. A declaration that termination of the respondent's employment by the appellant was unfair.
 - b. Severance pay for 3 years, Kshs.312,156.00 is set aside.
 - c. Annual leave of Kshs.28,014.00 is set aside.
 - d. The award of general damages Kshs.100,000.00 for breach of contract is set aside
 - e. The respondent is awarded the equivalent of two (2) month's compensation, Kshs.40,000.00
61. For the avoidance of doubt any other award made by the trial court is upheld.
62. Each party shall bear its own costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 8TH DAY OF MAY 2025

DR. JACOB GAKERI

JUDGE

Order

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

DR. JACOB GAKERI



JUDGE

