



**Kahindi v Pioneer Vision Group Africa Ltd (Appeal E177 of 2023)
[2025] KEELRC 1965 (KLR) (27 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1965 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E177 OF 2023
NJ ABUODHA, J
JUNE 27, 2025**

BETWEEN

COSMAS RUWA KAHINDI APPELLANT

AND

PIONEER VISION GROUP AFRICA LTD RESPONDENT

(Being an appeal from the Judgment and decree of Hon. B. Cheloti (PM) delivered on 18th August, 2023 in the Chief Magistrate Court at Nairobi, CMEL NO. E773 of 2022)

JUDGMENT

1. Through the Memorandum of Appeal dated 20th November, 2024 the Appellant appeals against the Judgement of Hon. B. Cheloti (PM) delivered on 18th August, 2023 in the Chief Magistrate Court at Nairobi, CMEL NO. E773 of 2022) The Appeal was based on the grounds among others that: -
 - a. That the learned trial magistrate erred in law and fact by concluding that the appellant was only sent for compulsory leave through a letter dated 19th January, 2023 and failed to report to work without any credible evidence that the appellant was privy to that information
 - b. That the learned trial magistrate erred in law and fact by affirming the validity of the messages allegedly sent by the respondent to the appellant on 26th and 27th January, 2023 without credible evidence that they were actually sent to the appellant and he actually received them.
 - c. That the learned trial magistrate erred in law and fact by failing to consider and have due regard to the appellant's case and to the facts and evidence presented in support thereof
 - d. That the learned trial magistrate erred in law and fact by admitting into evidence the respondent's supplementary documents after the appellant had closed his case, therefore greatly injuring his case and prejudicing him.



2. The Appellant therefore prayed that the Appeal be allowed and that the Judgment and decree of the Hon. Principal Magistrate delivered on 18th August, 2023 be set aside in its entirety and the appellant be awarded terminal dues and compensation as prayed in the statement of claim amounting to Kshs. 1,048,690- or such amount as the court may deem fit and just.
3. The Appeal was disposed of by written submissions.

Appellant's Submissions

4. The Appellant's Advocate Mr. Nyabena submitted among others that the trial court did not consider the appellant's statement in arriving at the judgment. According to counsel, the appellant stated that he served the respondent diligently and faithfully until about January 19th, 2022 when the respondent terminated his service unfairly and wrongfully without any justifiable reason or notice. According to counsel, the appellant stated that prior to his termination, he had taken an off-duty on 18th January, 2022 but was called back by the respondent on 19th where he was admonished by the respondent for mistakes made in the kitchen by his colleagues on 18th while absent from work. The claimant reported to work on 20th but was told his services were no longer required.
5. Mr. Nyabena submitted that under section 41 of the *Employment Act* an employer ought to be fair when considering termination of employment and the burden was on the employer to show the court that they observed fairness. According to Counsel, their submission before the trial court was that the termination was unfair. Counsel relied on the case of James Orwaru Nyaundi v Kilgoris Klassic Sacco Ltd [2002] eKLR. According to counsel, a hearing must be conducted even when contemplating termination of an employee deemed a deserter. The appellant did not desert duty. It was his submission that 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 unauthorised absenteeism. Counsel relied on the case of Godfrey Anjere v Unique Suppliers Ltd [2015]eKLR. In this particular case no attempt was made by the respondent to trace the appellant. The only correspondence presented before the court as evidence of reaching out was a letter dated 19th January, 2022 which did not bear the appellant's signature that he received it. Further, the screenshots of messages supposedly sent to the appellant did not bear the mobile number used. It was therefore erroneous for the trial magistrate to rely on the evidence. The respondent further did not produce a show cause letter.
6. On the issue whether the termination was justified, counsel submitted that the trial magistrate erred in concluding that the fact that the appellant was not issued with a show cause letter and was neither subjected to disciplinary hearing did not amount to summary dismissal. According to counsel, the trial magistrate failed to consider all the facts, evidence and submissions by counsel and ended up treating the case casually leading to miscarriage of justice.
7. On remedies sought, counsel submitted that the claimant was entitled the same. According to Counsel, the respondent had a responsibility to under section 10 and 74 of the *Employment Act* to keep employment records. The claimant did not discharge this burden at the trial. Mr. Nyabena further submitted that the trial magistrate did not consider each claim specifically. The appellant was entitled to overtime, service gratuity, off-days and balance of the contract period as pleaded. The appellant was further entitled to 12 months' salary as compensation for unfair termination.



Respondent's Submissions

8. Ms Kusow for the respondent on the other hand submitted that the appellant's service was not terminated. Counsel submitted that the appellant would ordinarily go on leave on Tuesdays. 18th January was a Tuesday as such the appellant was away on leave. He was expected back on 19th January hence no one called him back from leave. The appellant was questioned on some things that happened on 17th before he proceeded on leave but did not provide a satisfactory answer prompting the respondent to send him on 7 days compulsory leave as was evidenced by a letter dated 19th January, 2022. He was required to be back on 26th January, 2022 but failed to do so. The respondent's manager then texted the appellant urging him to come back to work but he did not respond. According counsel, the appellant was therefore not terminated as alleged. He chose to desert work. He only resurfaced with a demand letter from his lawyer demanding unjustified figures from the respondent. Counsel relied on section 47(5) of the *Employment Act* on burden of proof and the case of Pius Machafu Isindu v Lavington Security Guards Ltd [2017] eKLR. Counsel further submitted that the *Employment Act* does not provide for the procedure for suspension or compulsory leave. They are usually contained in the internal human resource manuals or code of regulations. According to Counsel, section 41 of the Act which requires giving of reasons and according an employee a chance to respond only applied to termination and not suspension or compulsory leave. The respondent maintained that the claimant never came for his September salary and never reported to work after his suspension as required. Counsel further submitted that the appellant did not table any termination letter or call any witness to corroborate his claim that he was terminated.
9. Regarding reliefs sought, counsel submitted that the appellant was not entitled to any of the reliefs as he was never terminated. Concerning overtime, it was submitted that the appellant was not entitled to overtime and whenever he worked overtime, he was paid. The claim for Kshs. 362,880- on account of overtime was not backed by any evidence of how the figure was arrived at. In this regard counsel relied on the case of Rogoli Ole Manadieggi v General Cargo Services Ltd [2016] eKLR. Regarding service gratuity, counsel submitted that under section 35(6) of the Act the appellant was not eligible for service gratuity because he was registered with NSSF

Determination.

10. This appeal revolves around the question whether the respondent terminated the appellants service or he deserted duties. The trial court after hearing evidence did not believe the claimant and dismissed his suit hence the appeal.
11. The principles that guide the Court as a first appellate court have been stated in several decisions of the Court of Appeal for instance in the case of Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High Court 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.
12. The trial court from the evidence was not persuaded that the appellant's service was terminated. The court however ordered the respondent to pay the appellant for the 19 days worked in January, 2022, his remaining leave days and that the appellant be issued with certificate of service.



13. The respondent produced before the trial court the appellant's suspension letter dated 19th January, 2022 which required him to resume work on 26th January, 2022. The respondent further stated that it sent the claimant text messages through mobile number 0733398409 which were never responded to. The appellant did not deny that the number was his although claimed he never received any messages from the respondent.
14. Under section 47(5) of the *Employment Act*, the burden of proving that an unfair termination has occurred is on the employee and the burden of proving reasons for termination is on the employer. These burdens are mutually exclusive. That is to say failure by one party to discharge the burden cast upon them by law, does not discharge the other from his or her responsibility to prove their case. As observed, the trial court had the benefit of hearing the parties and observing their demeanour. The appellant claimed that he was terminated on 19th January, 2022 yet did not produce any termination letter. The respondent on the other hand produced a letter dated 19th January, 2022, the same date the appellant alleges he was terminated, sending the appellant on compulsory leave.
15. From the foregoing the trial court became persuaded that the respondent had discharged the burden of proof cast upon it by law while the appellant had not. The Court has carefully reviewed the evidence vis-à-vis the judgment of the trial court and is persuaded that it is sound in law. The Court will therefore not disturb the same.
16. In conclusion, the Appeal is found without merit and is hereby dismissed with no order as to costs.
17. It is so ordered.

DATED AT NAIROBI THIS 27TH DAY OF JUNE 2025.

DELIVERED VIRTUALLY THIS 27TH DAY OF JUNE, 2025.

ABUODHA NELSON JORUM.

PRESIDING JUDGE-APPEALS DIVISION

