



**Roben Aberdare Limited v Merabe (Appeal E029 of 2024)
[2025] KEELRC 1881 (KLR) (27 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1881 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
APPEAL E029 OF 2024
ON MAKAU, J
JUNE 27, 2025**

BETWEEN

ROBEN ABERDARE LIMITED APPELLANT

AND

SIMEON MISATI MERABE RESPONDENT

*(Being an appeal from the Judgment of Honourable M.N.Munyendo
(PM) delivered on 13th September 2024 in Othaya PMELRC Cause No.
E018 of 2023 Before Hon. Justice Onesmus N Makau on 25th June, 2025)*

JUDGMENT

Introduction

1. This appeal relates to termination of employment contract between the parties herein. The appellant faults the judgment of the trial court on the following grounds:
 - a. That the learned trial Magistrate erred in law and fact applying the wrong principles of law and thus erroneously dismissing the Appellant’s prayers as contained in the Statement of Response thereby occasioning a miscarriage of justice.
 - b. That the learned trial Magistrate erred in law and fact applying the wrong principles of law by not subjecting the award to statutory deductions thereby occasioning a miscarriage of justice.
 - c. That the learned trial Magistrate erred in law and fact applying the wrong principles of law by failing to make a finding that the reason for termination was valid thus Respondent was fairly and lawfully terminated from his employment, thereby occasioning a miscarriage of justice.
 - d. That the learned trial Magistrate erred in law and fact by taking into account extraneous and irrelevant considerations thus arriving at erroneous findings in the judgment, thereby occasioning a miscarriage of justice.



- e. That the learned trial failed to address her mind to the pleadings on record and the evidence by the parties, thereby occasioning a miscarriage of justice.
 - f. That the learned trial Magistrate erred in law and fact in failing to evaluate the entire evidence as well as submissions as presented by the Appellant, thereby occasioning a miscarriage of justice.
2. The appeal seeks the following reliefs: -
- a. This Appeal be allowed in its entirety.
 - b. The said judgment of the learned Trial Magistrate Honourable M.N Munyendo, Principal Magistrate, delivered on 13th September 2004 in Othaya Principal Magistrate Employment and Labour Relations Cause No.E018 of 2023 be varied and/or set aside and substitute the same with an order dismissing the Respondent's claim and allowing the Appellant's counter-claim with costs.
 - c. The appellant be awarded costs of this Appeal.
 - d. This Honorable Court grants any other or further relief it deems fit or just.

Background

3. The respondent was the claimant in the lower court. His case as per the Memorandum of Claim dated 28th November 2023 was that: -
- a. He was employed by the appellant as a driver on 15th March 2021.
 - b. His "average" monthly salary was Kshs.20,170.
 - c. He was not paid house allowance and NSSF contributions were not fully remitted.
 - d. He was never given annual leave or paid in lieu of leave.
 - e. He performed his duties diligently until 28th September 2023 when he was unfairly and unlawfully dismissed for no valid reason and without being accorded any opportunity to defend himself in a disciplinary hearing.
 - f. After the termination he was not paid his terminal dues.
 - g. He prayed for Kshs.604,024 made of salary in lieu of notice, compensation for unfair termination, annual leave, house allowance and unremitted NSSF for 20 months.
4. The appellant's pleadings in the lower court was contained in its statement of Response dated 6th December 2023 where it stated that:
- a. It employed the respondent as a driver on 15th March 2021 and assigned him motor vehicle Registration Number KDA 462C.
 - b. The salary was consolidated and therefore inclusive of house allowance.
 - c. From 1st-30th September 2023 the respondent siphoned fuel from the assigned vehicle totaling to 243.13 liters.
 - d. The pump price of the fuel was Kshs.202.5 per liter equaling to Kshs.47,412.
 - e. The respondent was issued with show cause letter on 28th September 2023 but he declined to respond and proceeded to abscond duty.



- f. On 18th October 2023, he was summarily dismissed for his acts of gross misconduct which fundamentally breached his obligations under the contract of employment.
 - g. The respondent was not entitled to the compensatory damages sought as he caused the dismissal.
 - h. The respondent duly proceeded on leave and if any leave days were outstanding, the same ought to be set off from his terminal dues as he was surcharged for the fuel loss.
 - i. NSSF contributions were duly remitted in favour of the claimant.
 - j. The reliefs sought were statutory time barred by dint of section 90 of the *Employment Act*, unfounded and therefore the suit should be dismissed with costs.
5. During the hearing, both sides tendered evidence and they filed written submissions. The respondent admitted that on 28th September 2023, he was sent to Kiria-ini to deliver some material and on the way he gave a lift to an old lady who was carrying some pitches from Mukurwe-ini to Kabitha. Upon reaching the site, the project Manager, Mr.Wang'ondy instructed him to park the truck, give him the keys and proceed to the office. At the office he met Mr.Ambrose, a manager who informed him that his employment had been terminated for carrying pitchers with intention to siphon fuel. He contended that the fuel Report filed by the appellant provided an incorrect location details. He maintained that the termination was baseless, unfair, unlawful, without prior warning and in complete disregard to the procedure under the *Employment Act*.
 6. He admitted that the vehicle he was driving on the material day was KDA 462C and it was fitted with a fuel monitoring system. He further admitted that he was not allowed to carry passengers. However, he denied having been issued with a show cause letter or termination letter. He was also never issued with any appointment letter.
 7. As regards the other claims, he admitted that his salary of Kshs.22,000 as per the appointment letter dated 15th March 2021, filed by the appellant was inclusive of House allowance. He admitted that in 2022 he applied for 4 days leave and in 2023 he took two days off. He further admitted that NSSF was not remitted only from February to September 2023 and not for twenty (20) months.
 8. The respondent called two witnesses. Mr.Ambrose Kinyua Kiong'o (RW1) testified that upon discovery that the respondent was siphoning fuel from the vehicle assigned to him (KDA 462C). He was served with show cause letter on 28th September 2023 but he failed to respond and proceeded to abscond duty until 18th October 2023 when a summary dismissal letter was addressed to him. He contended that the dismissal was fair and lawful because it was done after he failed to respond to the show cause letter and he could not be reached on phone.
 9. He admitted that no disciplinary hearing was conducted before the dismissal. He further admitted that the fuel tank lock was not tampered with and only the claimant and the Fuel Attendant were custodians of the key to the fuel tank. He stated that the Fuel Attendant could not be the one who siphoned the fuel because he was situated at the site.
 10. Vincent Lukas Odumo Were (RW2), was the Head of Department and Invocator at Africa Fleet Management System Limited. He is a System Administrator and Network Engineer with a degree in IT from JKUAT. He produced a Fuel Report for the month of September 2023 which depicts fuel consumption during a part trip.
 11. He explained that the vehicle has two systems, a fuel level sensor installed in the fuel tank, and a CPRS tracking unit installed in the cabin which pulls telematics data from the vehicle including fuel level



in the tank. The two systems are synchronized to operate together so that when the motor vehicle moves and fuel level reduces that is captured. The data is captured in the form of a Report. When fuel is added (filling) the report indicated green colour. Any vertical downward trend depicts syphoning and an alert is sent. Positive alert is filling while negative alert meant siphoning. He further explained that the system also captures fuel level when the vehicle is at stand still. He contended that a graph should mathematically have consistent flow as its measure of mileage travelled. He admitted that there is margin of error but in the system, it is minimal.

12. After considering the evidence and the submissions by both sides, the trial court (Hon.Munyendo PM) framed two issues for determination, whether the claimant was unlawfully and unfairly dismissed, and whether he was entitled to the reliefs sought. In the end, she concluded that the dismissal was indeed unlawful and unfair and awarded the respondent compensation for the unfair termination and salary in lieu of notice under section 49 of the *Employment Act*.
13. She further awarded him leave for 2022 and 2023 but dismissed the claim for unremitted NSSF and House allowance. Finally, she awarded him certificate of service, costs and interest from the date of the judgment.

Submissions on the Appeal

14. It was submitted for the appellant that his being a first appeal, the court should re-appraise the evidence on record and draw its own conclusions as held by the Court of Appeal in *Okeno v Republic* (1972) EA 32.
15. It was further submitted that the trial court erred by declining to grant the prayer for Kshs.47,421 sought in the statement of response towards lost fuel. It was submitted that there was documentary evidence produced as Exhibit 12 to support the said claim. It was argued that the disregard of the said unrebutted evidence occasioned a miscarriage of justice to the respondent who had already suffered a financial loss.
16. It was further submitted that the trial court erred by failing to subject the assessed award to statutory deduction as required by section 49(2) of *Employment Act*. The court was urged to find that the trial court had by so doing gravely misdirected herself in law.
17. It was further submitted that the trial court erred in applying the wrong principles of law by failing to make finding that there was a valid reason for dismissing the respondent and that a fair procedure was followed. It was submitted that the respondent adduced evidence to prove that the respondent had engaged in fuel siphoning, an act of gross misconduct which justified summary dismissal under section 44(4) of the *Employment Act*. Besides, the respondent absented himself from his place of work which justified summary dismissal under section 44 (4)(a) of the *Employment Act*.
18. It was further submitted that the respondent did not file any reply to the statement of defence to dispute the alleged misconduct of siphoning of fuel and absconding duty and therefore that averment was unchallenged. For emphasis reliance was placed on *The Board of Management, Isovya Secondary School v Salia* (2025) eKLR.
19. It was argued that the respondent was afforded an opportunity to make his defence by being served with a show cause letter but he failed to respond. To that extent the trial court was faulted for her failure to appreciate the said facts leading to an unjust outcome. Reliance was placed on *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* (2014) eKLR.



20. Finally, the court was urged to find merits in the appeal because the trial court failed to address her mind to the pleadings on record and evaluate the entire evidence and submissions and thereby occasioned a miscarriage of justice.
21. On the respondents' side, it was submitted that this court should reevaluate the evidence on record and satisfy itself that the impugned decision was well founded. Reliance was placed on *Selle & Another v Associated Motor Boat Co.Ltd & Others* (1968) EA 123.
22. On the merits of the appeal, it was submitted that fair procedure as prescribed under section 41 of the *Employment Act* was not followed. RW1 (Ambrose Kinyua) confirmed in evidence that neither the show cause nor the dismissal letter was signed to acknowledge receipt. He further admitted that no disciplinary hearing was held.
23. It was further submitted that the same witness confirmed that the respondent was not found in possession of any stolen fuel and no theft of fuel was reported to the police. He further confirmed that the Fuel Attendant had the key to the fuel tank and the tank lock had not been tampered with.
24. It was further submitted that the offence in the show cause letter differed from that in the dismissal letter. It was argued that the reason for the dismissal was never explained to the respondent and he was never given an opportunity to defend himself before the dismissal. Consequently, the court was urged to find that the trial court's decision was sound and dismiss the appeal with costs.
25. It is common ground that the mandate of the court on a first appeal, like in this case, is to re-evaluate the evidence tendered before the trial court and make its own conclusions, while appreciating the fact that it did not have the opportunity of seeking the witnesses give their testimonies in the open court. (See *Selle & Another v Associated Motor Boat Co.Ltd & Others* (1968) EA 123).
26. Having considered the evidence on record and the rival submissions filed herein, the following issues fell for determination:
 - a. Whether the respondent was dismissed on 28th September or 18th October 2023.
 - b. Whether the dismissal of the respondent was fair and lawful.
 - c. Whether the reliefs awarded should stand.
 - d. Whether the appellant is entitled to the prayer for Kshs.47,421 for lost fuel.

Date of the dismissal

27. The respondent averred that he was dismissed by the General Manager (RW1) on 28th September 2023 for alleged siphoning of fuel from the truck he was assigned to drive. However, the appellant's case is that on 28th September 2023, it only served the respondent with a show cause letter which he failed to respond and absconded work until 18th October 2023 when it dismissed him for absconding.
28. The appellant pleaded as much in paragraph 6 of its Statement of Response and the respondent failed to file a Reply to the defence to contest the same. He also said nothing in his evidence to deny the alleged absconding but he admitted that he met RW1 in the office on 28th September 2023.
29. I have seen a copy of the show cause letter dated 28th September 2023 accusing the respondent of siphoning fuel and requiring him to show cause on or before 2nd October 2023 why disciplinary action should not be taken against him. RW1 admitted that the respondent did not sign on the letter to acknowledge receipt. It was a necessary thing to require the respondent to acknowledge receipt by signing but that does not mean that the letter was not served.



30. I have no reason, in the circumstances of this case to doubt that the respondent was issued with the show cause letter when he met RW1 in his office on 28th September 2023. On a balance of probability, I find that the appellant has discharged the burden of proving that it never dismissed the respondent on 28th September 2023 for siphoning fuel but rather served him with a show cause letter and then he absconded work. It has also proved that the dismissal was decided on 18th October 2023.

Unfair and unlawful dismissal

31. Section 45 (1) and (2) of the [Employment Act](#) provides that: -

“ 45. . Unfair termination

- (1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove:
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - i. related to the employee’s conduct, capacity and compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.”

32. The foregoing section does not inunct an employer from dismissing an employee but rather amplifies the right of fair administrative action as enshrined under Article 47 of [the Constitution](#). All that is required is for the employer to have a valid reason to justify termination and the employee to be afforded a fair opportunity of being heard before the termination is decided.

Reason for dismissal

33. For a reason to be valid, it must relate to the employees conduct, capacity and compatibility or operational requirement of the employer. In the instant case, the dismissal letter cited absconding as the reason for the dismissal. The letter is copied below:

“Simeon Misati Mireba

Driver

RA1286

Dear Simoen,

RE: Dismissal On Gross Misconduct

We note that you have been away from work station from 28th September 2023 without proper authorization.

Reference is made to [Employment Act](#) Cap 226 of the Laws of Kenya Sec 44 (4a and g).



You are hereby relieved of your duties as a driver and summarily dismissed as an employee of Roben Aberdare Kenya Limited with effect from 8th October 2023.

You are instructed to hand over all company property in your possession to the Human Resources immediately.

Yours sincerely,

Ambrose Kinyua

General Manager ”

34. The respondent alleged that he was never served with the above dismissal letter but that does not change the fact that the employer made a decision to dismiss him for absconding with effective from the stated date. The employer has expressly stated the reason for the dismissal and produced a letter as supporting evidence. The reason was valid because under section 44(4)(a) of the *Employment Act*, an employer is entitled to summarily dismiss an employee who absents himself from his duty station without leave or lawful cause.

Procedural fairness

35. The respondent alleged that when he met the General Manager (RW1) on 28th September 2023, he was informed that his employment had already been terminated for siphoning fuel from the truck assigned to him. I have already made a finding of fact that the termination was not done on 28th September 2023 but on 18th October 2023.
36. The question that follows is whether fair procedure was followed before the decision to dismiss the respondent was made. There is no dispute that the show cause letter charged the respondent with siphoning fuel but the dismissal was on account of absconding contrary to section 44(4)(a) of the *Employment Act*.
37. Section 41 of the *Employment Act* provides that: -
- “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
 - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”
38. The gist of the foregoing provision is that an employee shall not be subjected to disciplinary action before being accorded a fair hearing. Even where an employee has disappeared from work for a couple of days, and the employer contemplates dismissal on ground of absconding, the employer is legally obliged to trace the employee through his known address and invite him to a hearing. If the employer fails to reach the employee after reasonable effort, a dismissal can be decided.



39. I gather support from the case of *Mombasa Coffee Limited v Shuke* (2024) KEELREC 444 (KLR) where the court held: -

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“24. It follows that an employer alleging that an employee absconded duty must, where the employee denies absconding, demonstrate what action he/she took when the absconding occurred. The employer may do so by demonstrating that he issued a notice to the employee to show cause why he could not be dismissed and/or disciplined, or that he made efforts to find out the employee’s whereabouts by either sending emails, making phone calls to the employee or conducting the employees’ family or contacts furnished by the employee at the time of employment.

In the present case, the employer (the appellant) did not demonstrate having taken any such or related action. The allegation that the respondent absconded duty cannot, therefore stand.”

40. The instant case is on all fours with the above case. The appellant did not prove what effort it took to reach the respondent when he disappeared. There is no indication of what phone number was used and the person who called the respondent. There is also no evidence of email or letter addressed to the respondent to attend hearing or to show cause why he should not be dismissed for absconding work.
41. Consequently, I find and hold that the dismissal was procedurally unfair because the respondent was not accorded any opportunity to defend himself as required under section 41 of the *Employment Act*.

Reliefs awarded

42. In view of the foregoing finding that the dismissal of the respondent was unfair, the court is satisfied that the respondent was entitled to compensation and salary in lieu of notice under section 49 of the *Employment Act*. Considering that he worked for only one and a half years and no misconduct was proved against him, the award of Kshs.66,000 being three months salary compensation for unfair termination was reasonable. It has not been demonstrated that the figure is excessive or that it was reached without considering relevant fact or after considering irrelevant factors. (See *Shah v Butt*).
43. The award of Kshs.22,000 as salary in lieu of notice was supported by the appointment letter and section 35(1)(c) of the *Employment Act* which provides for a termination notice period of 28 working days for employees receiving salary in intervals of one month.
44. There was no cross-appeal in respect of the prayer for unremitted NSSF deductions and unpaid house allowance which were dismissed by the trial court. The award of certificate of service was not specifically faulted by the appellant. It is also justified under section 51 of the *Employment Act* and therefore it remains undisturbed.
45. Having addressed myself on the reliefs awarded by the trial court, I find no grounds for interfering with the same and therefore they shall stand. As regards the failure by the trial court to order that the damages awarded be subjected to statutory deductions, I find that such failure was not fatal.
46. As it has been confirmed by the appellant in its submissions, section 49(2) of the *Employment Act* has already made a command that any payment made by the employer under section 49 of the *Employment Act* shall be subject to statutory deductions. Such command in my view is sufficient and need no court order to be made effective. It is therefore not a sufficient ground upon which to mount a reasonable appeal.



Appellant's prayer of Kshs.47,421

47. There is no dispute that the appellant prayed for the sum of Kshs.47,421 being the value of lost fuel. There is no doubt that the trial court did not address herself to that prayer. It is also without doubt that the respondent never filed any reply to the statement of response denying the claim for Kshs.47,421. To that extent, I am satisfied that the trial court fell into error and I proceed to consider that prayer as invited by the appellant.
48. During the hearing, RW2 produced a fuel Report to demonstrate fuel consumption by KDA 462C from 1st-30th September 2023. To begin with the respondent did not drive the vehicle throughout the said period as he absconded duty from 28th September 2023. Secondly, his contention that the Report referred to locations not covered by him was never rebutted. Finally, the report does not show how the alleged volume of 243.13 litres of fuel, allegedly siphoned by the respondent was arrived at. Consequently, I find that the appellant did not prove the claim for Kshs.47,421 against the respondent on a balance of probability and it fails.

conclusion

49. I have found that the dismissal of the respondent by the appellant was unfair and the awarded reliefs must stand. I have further found that the appellant did not prove his counter claim against the respondent on a balance of probability. Consequently, and save for the issue of the reason for the dismissal, the appeal is dismissed. I award no costs since the appellant has partially succeeded.

DATED, SIGNED AND DELIVERED AT NYERI THIS 27TH DAY OF JUNE, 2025.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

