



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Lumbasi v Victory Consultants Limited (Employment and Labour Relations Appeal E222 of 2023) [2025] KEELRC 1719 (KLR) (12 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1719 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E222 OF 2023**

**JW KELI, J
JUNE 12, 2025**

BETWEEN

PETER MUKWEI LUMBASI APPELLANT

AND

VICTORY CONSULTANTS LIMITED RESPONDENT

(Being an Appeal from the Judgment and Orders of the Honourable M.W. Murage (PM) delivered at Nairobi on the 6th of October, 2023 in MCELRC No. 2325 of 2019)

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Orders of the Honourable M.W. Murage (PM) delivered at Nairobi on the 6th of October, 2023 in MCELRC No. 2325 of 2019 between the parties filed memorandum of appeal dated the 2nd of November, 2023 seeking the following orders:-
 - a. This appeal against the said decision be allowed.
 - b. The decision of the Honourable and Learned Magistrate dated 6/10/2023 be set aside in its entirety.
 - c. The Appellant herein be granted the remedies sought/prayed for in his Memorandum of Claim dated 16/12/2019.
 - d. Costs of the lower court and of the appeal be borne by the Respondent.
 - e. That this Honourable Court do issue such orders and directions as it may deem fit and just to grant to meet the ends of justice.



Grounds of the Appeal

2. The Honourable Magistrate erred in law and in fact by dismissing the claimant's case and finding that the claimant failed to prove that his services were unlawfully terminated and without establishing a prima facie case as against the respondent.
3. The Honourable Magistrate erred in law and in fact by finding that the contract of employment produced in court by the appellant did not have the name of the employee for the same was blank, so was the part of the of the signature by either the alleged employee and the respondents managing director and that the said contract did not belong to the appellant, yet the fact of the appellants employment (a fixed term contract between 8/7/2019 to 8/7/2020) was not in dispute having been admitted by the respondent in their pleadings.
4. The Honourable Magistrate erred in law and in fact by finding that the contract of employment produced in court by the appellant did not belong to the appellant, contrary to the law and the Employment Act 2007 (the Act) which provides that the employer has an obligation to reduce employments engagements of over 3 months into writing and that the employer has the obligation of keeping written records of all employees contracted by them.
5. The Honourable Magistrate erred in law and in fact by finding that the contract of employment produced in court by the appellant did not have the name of the employee for the same was blank, so was the part of the of the signature by either the alleged employee and the respondents managing director yet the fact of the appellants employment was not in dispute having been admitted by the respondent and the issue in dispute was unfair termination while the respondent alleged that the appellant had absconded from employment, without applying the principles that govern cases of desertion and or abscondment and thereby arrived at a wrong decision by ignoring the provisions of law and the Act.
6. The Honourable Magistrate erred in law and in fact by not awarding the appellant herein the remedies sought/prayed for in his memorandum of claim, as against evidence and facts presented before the Honourable Court.

Background to the Appeal

7. The Appellant filed a claim against the Respondent vide a memorandum of claim dated 16th December 2019 seeking the following orders:-
 - i. A declaration that the termination of the Claimant by the Respondent with effect from 27/9/2019 was unfair and unlawful. .
 - ii. An order compelling the Respondent to pay the Claimant his terminal benefits amounting to Kshs. 1,008,999.15
 - iii. Costs of this suit
 - iv. Interest on (a), (b) and (c) above at court rates from the date of filing suit till payment in full.
8. The Appellant filed his verifying affidavit, list of witnesses, witness statement and list of documents all dated the 12th of December 2019 (see pages 7-18 of ROA).
9. The claim was opposed by the Respondent who entered appearance and filed a Reply to Memorandum of Claim (page 20 of ROA). The Respondent also filed the witness statement of Peter Ongeto dated 4th February 2021 (pages 21-22 of ROA).



10. The Claimant/Appellant's case was heard on the 22nd of March 2023. The claimant relied on his witness statement, and produced his documents. He was cross-examined by counsel for the Respondent, Mr. Murioko (pages 101-102 of ROA).
11. The Respondent closed their case without testifying (page 102 of ROA).
12. The Trial Court issued directions on filing of written submissions after the hearing. Both parties complied.
13. The Trial Magistrate Court delivered its judgment on the 6th of October 2023 dismissing the Claimant's case with costs to the Respondent.

Determination

14. The appeal was canvassed by way of written submissions. Both parties filed.
15. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co.* [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."
16. Further in on principles for appeal decisions in *Mbogo V Shah* [1968] EA Page 93 De Lestang V.P (As He Then Was) Observed 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

17. The appellant identified the following issues for determination :-
 - a. Whether the facts of the claimant's employment were in dispute?
 - b. Whether the claimant's services were unlawfully terminated?
 - c. Whether the learned Magistrate erred in fact and in law by not awarding the claimant the remedies sought/prayed for in his Memorandum of Claim?
18. The Respondent proposed the following issues for determination:
 - a. Whether the facts of the Appellant's employment were in dispute based on the evidence produced by the Appellant.
 - b. Whether there was termination of the Appellant's Services by the Respondent



- c. Whether the Appellant was entitled to the remedies sought/prayed for in his memorandum of Claim.
19. The court was of the considered opinion that the existence of the employment relationship was not in dispute in the lower court as per the pleadings of the parties. The court found it was true the contract filed in court did not have the name of the claimant and was not signed by either party, hence of no probative value (the said blank contract was at pages 14-16 of ROA). The said document cannot amount to evidence of employment as held by the trial court. consequently, the issue for determination in the appeal were:-
- a. Whether the appellant was unfairly terminated from employment by the Respondent.
 - b. Whether the appellant was entitled to reliefs sought in the claim.

Whether the appellant was unfairly terminated from employment by the Respondent.

20. The court found the parties were in agreement that the claimant had been engaged for a fixed 1 year contract. The claimant stated it ran from 8th June 2019(page 9 of ROA, witness statement of the appellant) while the respondent stated it ran from 8th July 2019(Reply to claim paragraph 3). The claimant had produced the draft he called a contract which stated 8th July 2019. The trial court also found the date of start of the new fixed contract was 8th July 2019 and I find no basis to interfere with the finding.

Appellant' Submissions on the issue

21. The issue in dispute was unfair termination while the Respondent alleged that the Appellant had absconded from employment, and the learned Magistrate erred in law and in fact by dismissing the Claimant's case and finding that the Claimant failed to prove that his services were unlawfully terminated and that the claimant did not establish a prima facie case as against the Respondent, without applying the principles that govern cases of desertion and or abscondment and thereby arrived at a wrong decision by ignoring the provisions of law and the Act. It is uncontroverted that the claimant renewed his employment contract with the Respondent on 8/7/2019 which was to come to an end on 8/7/2020 or by the giving of one month notice and the reasons thereof. However, the evidence on record is that the Respondent terminated the claimant without giving him any sufficient reason other than being told the contract between Res Ole Sereni Hotel had ended or without following due procedure. It is a trite law that before terminating and/or dismissing an employee, the employer is obligated by law under section 41(1) and 42(2) of the *Employment Act* to explain to the employee, in a language the employee understands the reason for which the employer is considering terminating his or her employment. Section 43(1) further obligates the employer to provide the reason for the termination and where the employer fails to do so, the termination is deemed unfair within the meaning of section 45(2) of the *Employment Act* The reason for termination was not valid and/or justified and thus making the termination unfair and/or unlawful and the Respondent failed to prove the reason(s) for terminating the employment of the Claimant. The Respondent pleaded under paragraph 4 of the Reply to memorandum of Claim that the claimant absented himself from job without permission from his supervisors and only resurfaced to claim his dues. This was not proved as per the requirements of the law.
22. The Courts have dealt with the issue of abscondment. In the matter of Milano Electronics Limited v Dickson Nyasi Muhaso [2021] eKLR, the court said; "This evidence established a prima facie case for unfair termination within the meaning of section 43 of the *Employment Act*. The burden of proof shifted onto the Appellant to justify the termination. That the Appellant elected to offer a



flat denial of the alleged termination by pleading abandonment of the contract by the Respondent through absconding duty did not discharge the burden of proof placed on it by sections 43 and 47 of the *Employment Act*. Indeed, my view is that the Appellant had an obligation, if it believed that the Respondent had absconded duty, to lawfully bring the contract of service to closure by invoking the provisions of section 44 of the *Employment Act*. The section permits an employer to terminate an employee who has absconded duty on ground of gross misconduct. The law as currently designed does not appear to contemplate closure of employment contracts through unilateral abandonment of the parties' Desertion being a unilateral act of abandonment of the contract cannot operate to bring a contract of service to closure until the employer acts on it.' In *James Okeyo v Maskant Flower Limited* [2015] eKLR the court observed as follows:- the employee who deserts employment does not dismiss himself, so to speak. The decision to formally end the employment relationship should come from the innocent party."

23. The Respondent alleged that the claimant absconded duty from 2/9/2019, but has not demonstrated efforts made to trace the claimant and establish why he was allegedly not at work. The Respondent did not issue the Claimant with a notice to show cause asking why he was not at work from allegedly from 2/9/2019. The Claimant was not informed through any notice that his employment was at risk on account of his abscondment from duty from 2/9/2019. The Respondent admitted that the Claimant went back to their premises to ask for his dues, but there was no disciplinary process and or hearing when the Claimant reported back to the work place, on account of abscondment. The Claimant was not issued with a letter of termination on account of desertion even after appearing at the work place to request for his terminal dues, and or when the Respondent received the demand letter dated 17/10/2019 on 31/10/2019. The Claimant was not paid his terminal dues upon demand from the local labour office and or his advocates on record. Having established that the Claimant employment was terminated without any valid reason and that he was terminated without any lawful and or due process. The appellant urged the Court to declare that the termination of the Claimant's employment herein unlawful and unfair.

Respondent's submissions

24. The, a million dollar question the Honorable Court ought to answer is; when is employment deemed terminated when an employer or employee initiates the process, following procedures and grounds in the *Employment Act* and the Employment Contract, resulting in the end of that employment contract. Termination is a statutory term and procedure that involves ending the contractual relationship between an employer and employee. Under the *Employment Act* of 2007, can either be initiated by the employer or the employee and is governed under Sections 39,40,41, 42, 44 and 45 of the *Employment Act*.
25. The Respondent submits that it never initiated any Process to Terminate the Appellant's employment with it. During trial, the Appellant indeed admitted during his cross-examination that he was not issued with any Termination or Show cause letter. This is prima facie corroboration of the Respondent's submission that it never initiated nor carried out termination process of the Appellant.
26. It is the Respondent's case that the Appellant was never terminated. The Appellant, together with other employees that he had incited abandoned a refresher training course that had been organized by the Respondent at its cost, went to the Labour Office to report that the Respondent had terminated their employment without pay and went ahead to file a case for unfair termination while still in Employment! It is true that the Appellant's assignment at Ole Sereni Hotel was abruptly ended. This was not the will of the Respondent. As it is the customary practice in the security industry, the most sensible and civil thing to do was for the Respondent to recall its guards and take them through



a refresher training to update them with the current trends and emerging issues in the industry in readiness for a new assignment. But the Appellant did not want to hear any of that, he simply chose to act on his own terms, left the training, changed his phone numbers deliberately to avoid being contacted by the Respondent and decided to wage a legal battle without any evidence whatsoever there was no termination in the first place. The Respondent did not terminate the Appellant's employment contract with it. This was admitted by the Appellant as recorded in the proceedings of the trial court filed at page 102 of the Record of Appeal by the Appellant. Having established that the Respondent did not terminate the Appellant's employment, the question of unfair termination cannot see the light of the day. Going back to Section 107 of the *Evidence Act*, the Appellant, having alleged that he was unfairly terminated, the burden of proving those allegations sits squarely in his court. The Appellant failed to prove that allegation during trial. He confirmed in cross examination that he was never issued with a termination letter or a show cause letter nor was he taken through any disciplinary hearing. It is obvious that the Appellant was motivated with reaping unfairly from the Respondent by rushing to court on allegations of unfair termination when actually he was still in employment. The Respondent stated in its pleadings that the employees that lawfully elected to leave employment were seamlessly cleared and paid their dues but for the Appellant who rushed to the courts before time.

Decision

27. The court found that it was not in dispute that there was no evidence of formal termination of the employment of the claimant's services by the respondent. The evidence before the trial court was that on expiry of service contract of the respondent at Ole Sereni the appellant and others were to undertake refresher course. The appellant told the court he attended the two-week refresher course. That he made a follow up on salary and dues and was told to surrender his uniform on the 3rd week of the month of September. (Pages 102 and 106 of ROA). The respondent alleged the claimant absconded duty having refused to undertake refresher training and only returned with letter from Ministry of Labour (pages 20-21).
28. The court found the appellant had relied on authorities of absconding and took it that the reason for termination was accepted as absconding. The court agreed with the cited authorities by the appellant to effect that on defence of absconding the burden is on the employer to prove effort towards informing the employee of intention to terminate and bringing the employment relations to an end according to section 41 of the *Employment Act*. Abscondment being a unilateral act of abandonment of the contract cannot operate to bring a contract of service to closure until the employer acts on it. In *James Okeyo v Maskant Flower Limited* [2015] eKLR the court observed as follows:- "..... the employee who deserts employment does not dismiss himself, so to speak. The decision to formally end the employment relationship should come from the innocent party." The court then found that there was unilateral abandonment of contract and the employer failed to action the termination according to section 41 of the *Employment Act* hence a case of unfair termination.

Whether the appellant was entitled to reliefs sought in the claim

29. The appellant at paragraph 12 of the claim sought various items which the court considered separately. The appellant submitted that he was employed by the Respondent on 25/5/2018 as a night security guard with a monthly basic salary of Kshs. 13,337.90. He was not being paid house allowance and/ or accommodation by the Respondent. His gross salary was not per the Regulation of Wages (General) (Amendment) Order 2018. That the appellant who was residing in Nairobi ought to have been paid as follows; Kshs 15,141.95 + (Kshs 15,141.95 x 15/100) Kshs 15,141.95 + ksh 2,271.29 = Ksh 17,413. Minimum wages are basic conditions of employment which must be met by all employers.



30. On the claim for Salary for August and September 2019.- The claimant produced a payslip of August 2019 but insisted he was not paid. The respondent did not produce evidence to effect of having paid the salaries. The court finds that the claimant proved he was underpaid. The court found this claim was not controverted and the same is allowed as prayed for Kshs. 26,675.80.
31. On claim of 10 months of unpaid salary for fixed term contract. – The court found that the basis of the item was not established. It was not a remedy under section 49 of the *employment act* which guides the court as instructed under section 50 of the *Employment Act* to wit:- ‘50. Courts to be guided. In determining a complaint or suit under this Act involving wrongful dismissal or unfair termination of the employment of an employee, the Employment and Labour Relations Court shall be guided by the provisions of section 49.’ The court is restrained by law in claims of unfair termination to award only remedies as per section 49 of the *Employment Act*. The item is disallowed.
32. On the claim for one month salary in lieu of notice ; the court found that there was a case of unfair termination for non –compliance with the procedure to terminate employment according to section 41 of the *Employment Act* . Notice pay is awarded as the employer did not provide evidence to the contrary of Kshs. 17,314.25.
33. Claim of 30 days leave. The claim for leave was not controverted. The respondent opted not to call a witness to produce employment records. The prayer is allowed as sought as there was admission of previous engagement before the 2019 contract for Kshs. 17,314.25.
34. On claim for underpayment claim(salaries and housing) . The court found this claim was not controverted and is awarded for Kshs. 61130.25.
35. Claim for overtime , rest days and public holidays. The court has held in numerous cases that these claims fall under special damages category and the burden is on employee to prove any time worked in excess. The court on perusal of the evidence before lower court did not find such evidence and the claims are dismissed.
36. Claim for unfair termination -In the case of abscondment the employee is guilty of a misconduct and in this case the issue was procedural unfairness of which the notice pay applied. The court declined to award compensation beyond the notice pay.
37. In conclusion. The appeal is allowed. The Judgment and Orders of the Honourable M.W. Murage (PM) delivered at Nairobi on the 6th of October, 2023 in MCELRC No. 2325 of 2019 is set aside and substituted with judgment for the claimant against the respondent as follows:-
 - A. The termination is held as procedurally flawed.
 - B. Notice pay of 1 month Kshs. 17413.25
 - C. Unpaid salary for Months of August and September 2019 Kshs. 26,675.80
 - D. Untaken leave of 30 days in lieu Kshs. 17413.25
 - E. 15 months gross salary underpayment Kshs. 61130.25
 - F. Total sum award for Kshs. 122,632.55(B-E ABOVE) with interest at court rate from date of filing suit.
 - G. Cost of the suit.
38. The appellant is awarded costs of the appeal.



39. Stay of 30 days granted.

40. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 12TH DAY OF JUNE, 2025.

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Appellant : - Rakoro

Respondent: absent.

