



REPUBLIC OF KENYA



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

**Corrugated Sheets Limited v Ngao (Appeal E031 of 2025)  
[2025] KEELRC 2322 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2322 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E031 OF 2025**

**M MBARÚ, J  
JULY 31, 2025**

**BETWEEN**

**CORRUGATED SHEETS LIMITED ..... APPELLANT**

**AND**

**ALI MAGWAMA NGAO ..... RESPONDENT**

*(Being an appeal from the judgment delivered 7 February 2025 by  
Hon. M. S. Kimani in Mariakani MCELRC No. E033 of 2023)*

**JUDGMENT**

1. The appeal arises from the judgment delivered on 7 February 2025 in Mariakani CMELRC No. E033 of 2023. The appellant is seeking that the judgment be set aside on the grounds that the trial court erred in finding that there was unfair termination of employment, whereas the respondent absconded from duty. The date of employment was applied incorrectly instead of 1 September 2020 to 6 August 2008. The years the respondent was employed as a casual were not applicable, and hence the finding that he worked for 14 years was in error.
2. The appeal is that the award of Ksh. 191,975 as service pay was in error despite the appellant submitting evidence of payment of statutory dues to NSSF. The award of Ksh.164,550 in compensation was not based on facts and the law.
3. The claim before the trial court was based on the respondent's assertion that he was employed by the appellant as a machine attendant on 6 August 2008, a fact confirmed by a letter of offer dated 12 September 2020. He was assigned duties at the Kokotoni site within Kilifi County. His salary was Ksh.27, 425 per month. He worked until 10 March 2023, when the appellant unlawfully terminated his employment. On 22 February 2023, the respondent had worked overnight and was summoned back to work by his supervisor, Farouk, on the grounds that one machine was not functioning and required repairs. He was accused of stealing scrap metals in collusion with other security guards. He



requested access to the CCTV footage from that day and the names of the guards he was alleged to have colluded with, but was unsuccessful. He was then arrested by the police, paid a cash bail of Ksh.10, 000, and was released on 24 February 2023. He was not charged in court. On 4 March 2023, the respondent reported back to work but was not assigned duties until 10 March 2023, when the human resources manager informed him that his employment had been terminated. This was unfair and unlawful, and the respondent claimed for:

- a. Notice pay Ksh.27,425,
  - b. Unpaid salary for February 2023 Ksh.27,425,
  - c. Unpaid leave for 15 years Ksh.287,910,
  - d. 12 months compensation Ksh.329,100,
  - e. Service pay for 15 years ksh.205,687.50
  - f. Certificate of service,
  - g. Costs of the suit.
4. In reply, the appellant's case was that there was no termination of employment as alleged. The respondent did not work continuously as stated. He was called back to work by the supervisor of the outsourced security firm, Texas Alarms, to be questioned about the robbery and was then arrested by the police. The respondent absented himself from work without leave from 23 February 2023 to date. The appellant did not know his whereabouts and did not report him back on 10 March 2023, as Zipporah, the alleged human resource manager, was no longer in Mombasa but at the Athi River plant. Farouk was on leave at the time. Efforts to trace the respondent were fruitless, and the matter was reported to the Labour Office on 6 March 2023, concerning the arrest and desertion of duty. The appellant also communicated with the police about the arrest of the respondent and learnt that there was an agreement to report to the police for six months. There was no termination of employment as alleged, and the desertion of duty permitted summary dismissal under the law. The claims made are not justified; there were no pending dues, and the service claim is not applicable as there were NSSF payments.
5. In the judgment, the trial court held that there was unfair and unlawful termination of employment and the following awards:
- a. Notice pay Ksh. 27,425.
  - b. Salary for February 2023 Ksh. 21,025.
  - c. Service pay Ksh.191, 975.
  - d. Compensation at 6 months' wage Ksh. 164,550.
  - e. Interests at court rates.
  - f. Costs of the suit.
6. On the appeal, the appellant submitted that from 23 February 2023, the respondent did not report back to work. The security firm outsourced at the plant called the respondent following a robbery; he was arrested and since then, he has not reported back to work. Efforts to trace him were fruitless. The appellant reported the matter to the labour office. The allegations that the representative reported back to work on 10 March 2023 are incorrect, as the person cited as having been sent away was not present at the plant. The fact of reporting back on 10 March 2023 confirms the abandonment of work from



- 23 February 2023. The findings that there was unlawful and unfair termination of employment were contrary to the evidence submitted.
7. The appellant submitted that employment commenced from the date of the written contract on 12 September 2020 and not earlier. The employer is allowed to convert casual term employment to written term as held in *Peter Ngunjiri Kariuki v Board of Management Magomano Secondary School* [2011] eKLR. There was no proof of employment before the written contract was issued. The trial court relied on Certificates of Fitness, which were not produced. This is contrary to section 10(7) of the *Employment Act* (the Act). The employer is the custodian of work records.
  8. Employment was terminated due to abscondment, and the matter was reported to the law enforcement authorities. Compensation and notice pay are not justified. Service pay only applies when there are no statutory payments. The appellant remitted NSSF dues for the respondent. The judgment of the trial court should be set aside with costs.
  9. The respondent submitted that the awards by the trial court are justified and should be confirmed with costs. There was unfair termination of employment contrary to sections 41, 43, and 45 of the Act, which justified the award of notice pay and compensation. In the case of *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR, the court held that under section 47(5) of the Act, the employee bears the burden of proof in a claim for unfair termination of employment which the respondent discharged. The employer bears the burden to justify reasons for termination of employment and in this case, no reasons were given.
  10. In the case of *Josephine M. Ndungu & others v Plan Internal Inc.* [2019] eKLR, the court held that once the employee has discharged his burden of proof under section 47(5) of the Act, the employer must give reasons that led to the termination of employment. In this case, under sections 43 and 45 of the Act, the appellant failed in this regard. The awards by the trial court in compensation, notice pay and service pay are justified.

### **Determination**

11. This being a first appeal, the court is required to review the record, reassess the findings, and make its conclusions. It should take into account that the trial court had to hear the witnesses give evidence.
12. The appellant asserts that the respondent deserted duty on 23 February 2023, after a robbery at the plant and his arrest by the police. The respondent argues that upon his arrest by the police on 23 February 2023, he reported back to work on 10 March 2023, but was dismissed by the human resource manager and his supervisor, Zipporah and Farouk, respectively.
- 13.. The admission by the respondent that he did not attend work from 23 February 2023 until 10 March 2023, in itself, is being absent from duty without permission from the employer and is defined as gross misconduct under section 44(4)(a) of the Act. Such a breach justifies summary dismissal.
14. However, the employer must secure the employee's rights pursuant to section 41(2) of the Act, issue notice, and allow the employee to attend and make his representations. Where notice is issued and there is no attendance, the employer is permitted under Section 18 of the Act to serve notice upon the labour officer, detailing the circumstances of the case and indicating that the employee has abandoned work, is absent from duty, cannot be traced, or is deemed to have absconded. See *A.A Bayusuf & Sons & another v Geoffrey Wandera Muruka* [2024] KECA 1906 (KLR) and the case of *Brade Gate Holdings Limited v Mwangi* [2024] KECA 1011 (KLR), which establish that once an employee is absent from work without permission, summary dismissal is permissible. Notice must be tendered to the labour office.



15. In this case, the appellant asserts that efforts to trace the respondent were fruitless. They wrote to the labour officer on 6 March 2023, informing the office that the respondent had been arrested on 23 February 2023 and had since not returned back to work.
16. The notice to the labour office is attached to the response. This notice was not challenged in any material way.
17. The learned magistrate interrogated the evidence and established that before the notice to the labour office issued, the appellant did not demonstrate the efforts put in place to trace the respondent. No notice issued to him to report back to work and show cause why he was absent from work as held in *Milan Electricals Limited v Dickson Nyasi Muhaso* [2021] eKLR. The motions of section 18(4) of the Act are not mechanical. That once the employer finds the employee is not at the shop floor, they should immediately write to the labour officer and assert that there is abandonment of work. This should be after the motions of section 41 of the Act have failed to bear fruit.
18. There is no notice issued to the respondent to give an account for his absence. The fact of his arrest by the police following a robbery was sufficient cause to be served with notice under section 41 of the Act.
19. The findings by the learned magistrate that there was an unlawful and unfair termination of employment are justified. Notice pay and compensation were correctly analyzed and awarded.
20. On the period of employment, under paragraph 2.1 of the Memorandum of Claim, the respondent's case was that he was employed on 6 August 2008. Under paragraph 2.2, he asserts that through a letter from the officer dated 12 September 2020, his employment was confirmed.
21. The respondent attached the offer letter to his claim. The letter was an appointment with effect from 1 September 2020 as a machine attendant. There is no previous record of employment before this letter.
22. Even in a case where the respondent may have been an employee, which is not the case here, upon the letter of appointment dated 12 September 2020, his employment with the appellant commenced with effect from 1 September 2020. Under section 10(3) of the Act, the employer is allowed to convert any casual, oral or term contract employment into a written contract. The written contract is the correct record for the court.
23. Where the respondent had different terms of employment before 12 September 2020 and there were claims for service pay or accrued leave days, such should have been addressed under the provisions of section 90 of the Act. His claim was filed in April 2023. Any allegations going back to April 2020 were time-barred. Any claim of the nature of continuing injury and going back to April 2022 was time-barred under section 90 of the Act. See *The German School Society & another v Ohany & Another* [2023] KECA 894 (KLR) and the case of *Brinks Security Services Limited v Salim* [2025] KEELRC 1952 (KLR).
24. In this case, employment was regulated under the written contract dated 12 September 2020.
25. On the claim for unpaid leave, the leave form records were filed for the last time in 2022. The claim for leave pay for 15 years is not justified.
26. On the claim for service pay, the justification in the judgment was that although the respondent was registered with the NSSF, there was no evidence of remittances of his dues. Under section 35(6) of the Act, the employer requires that the employee is registered under a pension scheme. Where there is no remittance or there is no record of remittance, this is a separate issue and is defined as a labour offence.



27. Upon the satisfaction that the respondent was registered with NSSF, the award of service pay is not justified.
28. On the claim for pay for February 2023, there is no evidence of the remittance of the wage due. Whatever the reasons result in termination of employment, for work done, under section 18 of the Act, the wage due should be paid at the end of employment. The award of Ksh.21, 025 is justified.
29. The respondent was also awarded costs and interest on the award, based on the principle that, under Section 26 of the *Civil Procedure Act*, costs and interest follow the cause. However, in employment claims, the governing legislation is section 12(4) of the *Employment and Labour Relations Court Act* and Rule 70 of the Employment and Labour Relations Court (Procedure) Rules. Costs are discretionary. Reasons for awarding costs should be provided and justified. In this case, the basis for the award of costs under a different regime of laws is not justified.
30. Accordingly, the appeal is partially successful and the judgment in Mariakani CMELRC No. E033 of 2023 is reviewed in the following terms;
  - a. Compensation Ksh. 164,550,
  - b. Notice pay Ksh. 27,425,
  - c. Pay for February 2023 ksh. 21,025,
  - d. Each party to bear its costs for the appeal and trial court proceedings.

**DELIVERED IN OPEN COURT AT MOMBASA, THIS 31ST DAY OF JULY 2025**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

