



Colnet Limited v Kamau (Employment and Labour Relations Appeal E043 of 2024) [2025] KEELRC 2255 (KLR) (29 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2255 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E043 OF 2024
ON MAKAU, J
JULY 29, 2025**

BETWEEN

COLNET LIMITED APPELLANT

AND

CAROLYNE WANGUI KAMAU RESPONDENT

(Being an appeal from the Judgment of the Honourable F.K.Munyi (SPM) delivered on 19th November, 2024 in Nyeri Chief Magistrates Court MCELRC Cause No. E068 of 2022)

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated 5th December 2024, the Appellant challenged the judgment of lower court on the following grounds:
 - a. The Learned Trial Magistrate erred in law and in fact in holding that the Respondent had been constructively terminated despite the Respondent not making a prayer for constructive dismissal.
 - b. The Learned Trial Magistrate erred in law and in fact in holding that the Respondent had been constructively terminated despite overwhelming evidence to the contrary that the Respondent had absconded from duty.
 - c. The Learned Trial Magistrate erred in law and in fact in shifting the burden of proof from the Respondent to the Appellant thereby arriving at wrong conclusions.
 - d. The Learned Trial Magistrate erred in law in failing to appreciate the Law and evaluate the pleadings and evidence before her and consequently arrived at wrong conclusions.



- e. The Learned Trial Magistrate erred in law and in fact in failing to attach any weight whatsoever to the evidence of the Appellant and its pleadings.
 - f. The Learned Trial Magistrate erred in law and in fact in finding that the Respondent had been underpaid despite overwhelming evidence indicating that the Respondent had been paid according to the General Wages Order in force at the material time.
 - g. The Learned Trial Magistrate erred in law by awarding the Respondent a total of Kshs.141,048.79/= without any basis in law.
2. The appeal seeks the following reliefs: -
- a. That this appeal be allowed.
 - b. That the Judgment in ELRC Cause No.E068 of 2022 delivered on the 19th of November, 2024 be set aside and the same be substituted with an order dismissing the suit with costs.
 - c. Costs of the Appeal be awarded to the Appellant.

Background

3. The appellant employed the respondent on 1st October 2021 as a Cleaner for monthly salary of Kshs.8,327. She worked until 11th May 2022 when allegedly, she was dismissed for no valid reason and without being served with any show cause letter or being given an opportunity to be heard. She prayed for compensation for unfair termination, salary for May 2022, unpaid house allowance from 1st October 2021 to May 2022, salary underpayment for 8 months and one-month salary in lieu of notice.
4. The appellant filed Memorandum of Response admitting that it employed the respondent but denied liability to pay the sum claimed. It further averred that the respondent terminated her employment by failing to report to work as directed by her supervisor. It further averred that the respondent's salary was consolidated and it was not underpaid. Consequently, it prayed for the suit to be dismissed with costs.
5. During the hearing both sides called one witness who basically adopted written statements and produced documents as exhibits. The written statements basically echoed the facts in the pleadings.
6. The claimant (CW1) testified that her salary did not include house allowance. She further stated that on 11th May 2022, the supervisor (Karanja) came to her place of work and asked her to return uniform and go away until he called her back. She complied but she was never called back. She denied that Karanja told her to communicate with the HR Officer, and denied ever seeing the appellant's letter dated 7th July 2022.
7. She admitted that she never went to Nairobi contending that by that time she had hired a lawyer. She denied ever switching off her phone and contended that she was waiting to be called back by the supervisor. She confirmed that she was working with Sina and they were all told to handover uniform and leave.
8. She contended that she did not know whether the other employees in Nyeri were being paid Kshs.7,240 and averred that she only knew about the contract she signed.
9. Harriet Wahome (RW1) testified that the respondent's salary was Kshs.8,327 and denied that it was an underpayment. She averred that on 11th May 2022, the respondent was served with show cause letter and directed to report to the Head office for her pending issue to be finalised there. She received the letter and signed on it but she failed to go to Nairobi and disappeared. In the meanwhile, two casuals were hired to clean the bank.



10. She stated that the HR officer called the respondent but she never picked the calls and the matter was reported to the Labour officer. Thereafter, the appellant wrote to the respondent's Advocates requesting him to tell the respondent to go to the appellant's office to clear pending issue but she never showed up and she never responded to the show cause letter. She also failed to attend hearing after the said letter was written to her Advocate requesting her to go to the office.
11. After the hearing, both sides filed written submissions which were considered together with the evidence adduced, the trial court concluded that the respondent was constructively dismissed and awarded her 6 months salary as compensation for unfair termination, salary for the days worked in May 2022, House allowance from 1st October 2021 to 11th May 2022, salary underpayment for 8 months and one-month salary in lieu of notice totalling to Kshs.141,058.79. She was also awarded certificate of service, costs and interest.

Before this court

12. It was submitted for the appellant that the respondent did not prove unfair termination as she never produced a termination letter. It was argued that the respondent was issued with show cause letter on 11th May, 2022 and directed to report to the HR Manager's office in Nairobi but she neither replied the letter nor reported to the HR office in Nairobi. The said conduct was described as insubordination and absconding.
13. It was submitted that the supervisor never dismissed the respondent but merely visited her work place after receiving complaints from the client and served her with the said show cause letter requiring her to respond within 24 hours and report to the HR Office, in Nairobi, the following day. When the respondent failed to comply with the instructions given, and when efforts to reach her by phone failed, the appellant reported the matter to the Labour office by letter dated 13th May 2022.
14. It was submitted that when the respondent's Advocate served demand letter dated 16th May 2022, the appellant responded by letter dated 7th July 2022 indicating that the respondent was still in employment, and requested that she should attend the appellant's office in Nairobi for resolution of outstanding issues. The said request was ignored and the respondent filed suit, which was deemed to be without merits as the respondent declined to submit herself to internal disciplinary process.
15. On the other hand, it was submitted for the respondent that her claim was unfair termination and not constructive dismissal. It was further submitted that the use of the word constructive termination was in the ordinary sense of the word and not the technical legal meaning. The Court was therefore urged to find that the Respondent did not abscond but she was unfairly dismissed.
16. It was submitted that the Appellant did not in any way show by evidence that it tried to trace the Respondent before the termination for absconding. It was further submitted that the Court correctly found that asking the Respondent to surrender her uniform amounted to termination. It was also argued that the trial court could not be faulted for its decision as it analysed the pleadings and evidence before reaching a determination.
17. On the issue underpayment of salary, it was submitted that Nyeri is a former municipality and thus the minimum salary was Kshs.12,522.70. Consequently, it was submitted that the trial court was right in awarding salary underpayment since it was in line with section 48(1) of the *Labour Institutions Act*.
18. Finally, it was submitted that the trial court properly analysed the evidence and the relevant law before arriving at the impugned judgment and as such there is no ground to warrant interfering with the judgement. Consequently, this Court was urged to dismiss the Appeal with costs.



Mandate of this court

19. This being a first appeal my mandate is to re-evaluate the evidence and make my own independent conclusions while warning myself that I never saw the witnesses while giving their evidence. I gather support from *Selle v Associated Motor Boat Company Ltd* (1968) EA 123 the court held thus: -

“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 consider the evidence, evaluate 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.”

Issues for determination

20. Having considered the evidence on record there is no dispute that the appellant employed the respondent as a Cleaner from 1st October 2021 to 11th May 2022. The issues in controversy are: -
- a. Whether the respondent deserted employment or she was dismissed by the appellant.
 - b. If the answer to (a) above is dismissal, whether the same was unfair and unlawful.
 - c. Whether the award of damages by the trial court should stand.

Desertion or dismissal

21. The respondent alleged that she was dismissed from employment by the appellant through the Supervisor when he visited her place of work on 11th May 2022. She contended that the Supervisor repossessed her uniform and terminated her employment. However, the Appellant denied that the Respondent was not dismissed from service on the said date and averred that she was only served with a show cause letter requiring her to respond within twenty-four hours and then visit the HR office in Nairobi to clear pending issues, but she failed to respond to the letter or even attend the HR Office in Nairobi. It was therefore appellant’s case that the respondent voluntarily deserted her job.
22. I have carefully considered the evidence on record and it is clear that there is no letter from the appellant dismissing the respondent from employment. There is however a show cause letter dated 11th May 2022 which was served on the respondent on the same date and she acknowledged by her signing. She had 24 hours to respond but she never did so. She was also instructed by the supervisor to attend the HR Office in Nairobi but she did not comply and instead disappeared and could not be traced over her phone.
23. Subsequently, she instructed an advocate to serve a demand letter to the appellant. The appellant responded by the letter dated 7th July 2022 clarifying that the respondent was still in employment and that she should report to the HR Office to address pending issues. However, he failed to comply and instead filed suit alleging unfair termination.



24. Having considered the foregoing matters, it is apparent that the Respondent frustrated the disciplinary process and deserted employment. Desertion is defined in the Black's Law Dictionary as:

“Wilful and unjustified abandonment of a person's duties or obligations. It implies a deliberate act where an employee leaves job with no intention to return. This is distinguished from absence without leave, where the employee may intent to return.”

25. In this case, the appellant did not dismiss the respondent after she deserted work and instead it served her with a show cause letter, reported the matter to the Labour Office and later wrote to her Advocate requesting her to report to the office. In *Paul Wanyangah v Market Development Trust t/a Kenya Markets Trust* [2017] eKLR the Court held:

“51. Where the employee has the right to a hearing, the employer has the right to terminate the employee upon following due process. Where an employee squanders the chance to be heard the employer cannot be found to have acted unfairly where great effort was taken and is demonstrated to have been applied to have the employee heard but such employee remained adamant and made irrational demands to avoid a hearing.”

26. In the instant case the respondent had a valid reason for dismissing the respondent for desertion but it did not. It is the respondent who declined to submit herself to the internal disciplinary process and filed suit claiming terminal dues. In my considered view, the respondent, voluntarily terminated her employment contract to evade the disciplinary process initiated by appellant. She was therefore responsible for the termination of her employment and she cannot rightly fault the appellant for the termination.

27. Having said that, I find that the alleged unfair termination/dismissal was not established by evidence. On the contrary, I find that by filing the suit the respondent indicated that she had left her employment with no intention of returning. Consequently, I hold that the trial court erred by concluding that the appellant had unfairly/constructively dismissed the respondent from employment.

Award of damages

28. In view of the foregoing conclusion, I find that the award of six month's salary as compensation for unfair termination and the one-month salary in lieu of notice are unmerited and must be set aside.

29. However, I find that the trial court was right in awarding the claim for salary for 11 days worked in May 2022 being Kshs.4,591, salary underpayment and house allowance being Kshs.15,027.24 and Kshs.33,781 respectively. As submitted by the respondent, Nyeri is a former municipality and under the Wages (General) Order 2018 the minimum monthly salary exclusive of house allowance was Kshs.12,522.70. Even if the respondent signed a contract for consolidated salary of Kshs.8,327, that does not defeat her claim for the correct minimum wages under the *Labour Institutions Act*.

30. Section 48 (1)(a) and (b) of the above Act provides that:

“(1) Notwithstanding anything contained in this Act or any other written law –

- a. The minimum rates of remuneration or conditions of employment established in a wages order constitutes a term of employment of any employee to whom the wages order applies and may not be varied by agreement.



- b. If a contract of an employee to whom a wages order applied provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.”

Conclusion

31. I have found that the respondent terminated her employment contract by the desertion to evade disciplinary action. Accordingly, I have further found that the respondent was not entitled to the award of compensation for unfair termination and one-month salary in lieu of notice. However, I have affirmed the award of salary underpayment and house allowance by the trial court since the same was founded on evidence and the law. Besides, the trial court applied the correct legal principle in assessing the award. Consequently, I allow the appeal to the extent highlighted above and make the following orders:
 - a. The awards of kshs.75,136.20 being compensation for unfair termination and Kshs.12,522.70 being one-month salary in lieu of notice are hereby set aside.
 - b. The rest of the awards in the impugned judgment are not disturbed.
32. Since the appeal has substantially succeeded, I direct that each party bears own costs of the appeal and the court below.

DATED, SIGNED AND DELIVERED AT NYERI THIS 29TH DAY OF JULY, 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.

ONESMUS N MAKAU

JUDGE

