



**Chitiavi v Musyoka & another (Appeal E180 of 2023)  
[2025] KEELRC 2154 (KLR) (18 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2154 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E180 OF 2023**

**JW KELI, J  
JULY 18, 2025**

**BETWEEN**

**FIBI SHISIA CHITIAVI ..... APPELLANT**

**AND**

**TEDD KIVUNANI MUSYOKA ..... 1<sup>ST</sup> RESPONDENT**

**VICTORIA CHERONO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the whole of the Judgment and Decree of the Hon. G.A. Omodho (PM) delivered on 8th September, 2023 in MCELRC/E1603/2021)*

**JUDGMENT**

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. G.A. Omodho (PM) delivered on 8th September, 2023 in MCELRC/E1603/2021 between the parties filed a memorandum of appeal dated the 22<sup>nd</sup> of September 2023 seeking the following orders:-
  - a) This Appeal be allowed and the decision of the Honourable and learned Magistrate dated 8/9/2023 be set aside in its entirety.
  - b) Costs of the suit at the lower court and of the appeal.
  - c) 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 was lawfully terminated.



3. The Honourable Magistrate erred in law and in fact by finding that the appellant absconded from employment by only relying on the oral evidence of 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 the *Employment Act* 2007, especially Sections 41,43,45,47 and 49.
4. The Honourable Magistrate erred in law and in fact by not awarding the Appellant herein all the remedies sought/prayed for as against evidence and facts presented before the Honourable Court.

### **Background To The Appeal**

5. The Appellant filed a claim against the Respondent vide a memorandum of claim dated the 16<sup>th</sup> of August 2021 seeking the following orders:
  - a. A declaration that the termination of the claimant by the respondents was unfair and unlawful.
  - b. An order compelling the respondents to pay the claimant her terminal benefits amounting to Kshs.1,102,185.84
  - c. Costs of the suit.
  - d. Interest on (b) and (c) above at court rates from the date of filing of suit until payment in full.  
(see pages 3-7 of the ROA dated the 29<sup>th</sup> of July 2024)
6. The Appellant also filed her verifying affidavit, list of witnesses, witness statement and list of documents all dated the 16<sup>th</sup> of August 2021 (pages 8-38 of ROA).
7. The claim was opposed by the Respondent who entered appearance and filed a memorandum of response dated the 2<sup>nd</sup> of June 2022 (pages 39-45 of ROA). They also filed a witness statement of Victoria Cheronu, and list of documents, all dated the 26<sup>th</sup> of September 2022 (pages 49-51 of ROA).
8. The Claimant's/Appellant's case was heard on the 9<sup>th</sup> of March 2023, where the Claimant testified in the case relying on her witness statement, produced her documents, and was cross-examined by counsel for the Respondent Mr. Ayisi (pages 120-121 of ROA).
9. The Respondent's case was heard on the same day, when the 2<sup>nd</sup> Respondent testified in the case relying on her witness statement, produced the Respondents' documents, and was cross-examined by counsel for the Appellant Mr. Rakoro (pages 121-123 of ROA).
10. The parties took directions on filing of written submissions after the hearing. The parties complied.
11. The Trial Magistrate Court delivered its judgment on the 8<sup>th</sup> of September 2023 partly allowing the Claimant's claim to the extent of service pay for two years and salary for April 2021, plus costs of the suit (Judgment at pages 125-129 of ROA).

### **DETERMINATION**

12. The appeal was canvassed by way of written submissions. The Appellant filed, but at the time of writing this judgment, the Respondents are yet to file theirs.
13. 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."

14. 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**

15. In her submissions dated the 6<sup>th</sup> of March 2025, the Appellant identified the following issues for determination:
- i. Whether the claimant/appellant absconded duty or was unlawfully terminated; and
  - ii. Whether the learned Magistrate erred in fact and in law by not awarding the claimant/appellant the remedies sought/prayed for in her memorandum of claim.
16. The respondent did not respond to the appeal.
17. The court finds that the issues for determination in the appeal to be :-
- a. Whether the trial court erred in its finding of no case of unfair dismissal
  - b. Whether the trial court erred in determination of relief.

### **Whether the trial court erred in its finding of no case of unfair dismissal**

#### **Appellant's submission**

18. Whether the claimant absconded duty or was unlawfully terminated? Hon. G.Omodho (PM) in her judgment dated 8/9/2023 stated in part that; "The first issue is whether the termination was fair. The Claimant states that she does not know the reason for her termination. The Respondent witness states that the Claimant left and did not return. Her attempts to reach the Claimant were futile as she did not pick calls. The Claimant admits that she worked but does not explain how she came to leave her workstation." This Court has made reference to Section 41 of the Act which provides for fair procedure in relation to dismissal of an employee stating in part that; 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." Similarly, in the case of *Kenfreight (E.) Limited v Benson K. Nguti* (2019) eKLR the Supreme Court held that: "it is considered unfair to terminate a contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair; and the reason related to the employee's conduct, capacity, compatibility or is based on the operational requirements of the employer. That the employer must also prove that the termination was in accordance with fair



procedure and that the burden on the employee is only limited to asserting that an unfair termination has occurred. In a nut shell, the Court upheld the trial Court's decision that the termination was unfair. The court also found that the treatment of the Respondent leading to the termination as well as the termination itself was discriminatory." This court is not satisfied that the Claimant established a prima facie case against the Respondent on a balance of probabilities that she was dismissed. On record is the police report which is a concern that the Claimant does not address herself to. There is doubt that she may have been fleeing investigations as alleged. I therefore dismiss the prayer for unfair dismissal.....".

19. The evidence on record, which contradicts the position of the court and is that the Appellant at the hearing on 9/3/2023, testified and said " I am Fibi Shisia Chitavi. I am the Claimant. I did witness Statement dated 18/8/2019 and also filed documents which I seek to produce as exhibit 1- 4. I seek claims.;" (See page 121 - Record of Appeal) As per her witness statement dated 16/8/2021 (Page 10 – 12 of the Record of Appeal) the Appellant said that she was fired when she reported to work on 15/4/2021. She said " My sister then came to the house at around 7.30 pm and since it was raining I could not leave for my employer's place. Immediately my sister arrived, Mrs. Victoria called me and asked if I was going to work. I told her that since it was raining, I would report on the next day -- 15/4/2021 – in the morning and Victoria said that it was okay with her. In the morning, I arrived at work at around 7.15am and the child was happy to see me and came running to me. When I asked her mother if I should give her milk or she had given her already, she told me to pick my things and leave. I was paid Kshs. 2,000/= as payment of one off day (400) and working days, then I left. 3 I was dismissed from work summarily. This was unfair termination because I was not told the reasons for termination or taken through the legal process of termination including a warning letter, show cause or a disciplinary hearing. I was not paid my terminal benefits or issued with a certificate of service" (Page 12 of the Record of Appeal). During cross-examination, she confirmed that "I fell ill while at work on 4th April 2021 I visited hospital. She released me so that I would heal first. On return she asked me to leave" (Page 121 of the Record of Appeal). The 2nd Respondent witnessed in Court on 9/3/2023 and said: "I am Victoria Cheronu. I am the Respondent. I did a witness statement. I rely on it. I wish to produce documents exhibit 1 – 2. I know Claimant as Rebecca. I engaged her on 19/3/2019 as a house help. She fell ill at work then bought her sister to help. She then opted to leave all together..." (Page 122 of the Record of Appeal). During cross examination the 2nd Respondent said in part that he Appellant returned on 15/4/2021, but worked up to 9/6/2021 when she absconded, and that she did not give her a notice or warning on absconding duty and do not respond to the demand letter, and that there was no proof of any calls made to the Appellant. This testimony is partly false and not consistent with the documents before the court. Under cross and re-examination, the 2nd Respondent told the court that the Appellant absconded on 9/6/2021 after the report to the police. She also admitted that the Appellant brought the demand letter. (Page 122-123 of the Record of Appeal) The complaint to the police was made on 9/6/2024. (See The OB NO.18 of 9/6/2012 on page 51 of the Record of Appeal) The demand letter dated 25/4/2021 was served and acknowledged on 25/5/2021 even before the complaint to the police was lodged on 9/6/2021. (page 35-38 of the record of appeal ) The obvious reason is that the Appellant had already left employment through oral termination on 15/4/2021 as per the said demand letter. The Respondents did not actually respond to the demand letter, despite indicating as so.
20. Even if the Appellant absconded due to fear to be interrogated by the Police, (which is denied and which was not proved) there was still the need for the Respondents to prove that they complied with the provisions of Section 41, 43 and 45 of the *Employment Act* 2007. (The Act) 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. 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*. 31.

21. 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' obligations under a contract of service. The contract can only be brought to closure as a result of the eventualities contemplated in sections 40 and 41 of the *Employment Act* (redundancy, incompetence, physical incapacity or gross misconduct) or through resignation or mutual agreement with or without notice under sections 35 and 36 of the Act or upon the insolvency of the employer under section 66 and 67 of the Act. 33. 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." The Appellant was therefore obligated to invoke the provisions of section 44 to bring the relationship to closure. The trial magistrate in my view rightly relied on the case of *Godfrey Anjere v Unique Suppliers Limited* [2015] eKLR where the court said in cases 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 unauthorized absenteeism. It was not open to the Appellant to simply say that the Respondent had abandoned work as a basis of justifying the separation. The court expressed itself in the following way on the issue:- "In a dismissal on account of absconding duties, the employer is required to show what steps it took to inform the employee that his or her dismissal would result if they did not report back to work. This is necessary to avoid any injustice to an employee who may be away from work for lawful or reasonable excuse such as illness or circumstances beyond their control and yet unable to communicate to the employer in good time."
22. George Ogembo in his publication titled "Employment Law Guide to Employers, 2016" offers further useful insights on how to handle an employee who is alleged to have absconded duty. He says thus: - "The fact that the employee has absconded work or has advanced unsatisfactory explanation [ for his absence] does not waive his right to be availed the fair process or procedure before termination of his contract of employment. The employer must make several attempts to inform the employee of his intention to terminate his service and invite the employee to a disciplinary hearing." There is no evidence that the Appellant sought to bring the contract to closure in the manner suggested above. On the contrary, RW1 confirmed in cross examination that the Appellant did not summon the Respondent for a disciplinary action. This coupled with the uncontroverted evidence by the Respondent that RW1's wife asked him not to report to work, in my view points to unfair termination of the Respondent by the Appellant. In the matter of *Paul Mwakio v Reliable Freight Services Ltd* [2022] eKLR, that; "14. Under Section 44(4) (a) of the *Employment Act* 2007, absconding duty by an employee constitutes gross misconduct and renders an employee liable for summary dismissal. The



Respondent did not demonstrate that it commenced any disciplinary action against the Claimant under Section 41 of the *Employment Act* after he allegedly failed to report on duty. No attendance registers were produced to show that, indeed, the Claimant absconded duty or absented himself from work at any given time. The Respondent has, failed to prove, on a balance of probability, the allegation of absconding duty by the Claimant.

### **Decision**

23. The trial court held that the claimant had not proved on balance of probabilities that she was dismissed. That the claimant did not address the police report concerning her and there was doubt she may have been fleeing investigations as alleged. This court noted that the police occurrence report was dated 9<sup>th</sup> June 2021 and was a report of Negligent act. The claimant stated she was fired on returning back to duty on 15<sup>th</sup> April 2021 (the return to work on 15<sup>th</sup> April 2021 was admitted by RW1 during cross-examination at page 122 of ROA). The court noted that the appellant's advocate issued a demand letter dated 25<sup>th</sup> April 2021(pages 35-37 of ROA). The respondent's advocates Wambua & Maseno Advocates responded to the demand letter on the 25<sup>th</sup> May 2021. The court then finds it was an erroneous finding by the trial court to rely on the police OB issued in June way after the issuance, receipt and response to the demand letter by the appellant. The court finds that if the claimant absconded, it was not because of the police report.
24. Did the claimant abscond work? The respondent told the trial court that the claimant worked upto 9<sup>th</sup> June 2021 and absconded. The court already found that a demand letter for the termination was issued dated 25<sup>th</sup> April 2021 hence not possible for the appellant to have been working beyond date of the demand letter. The respondent deliberately misled the court. The court finds that it was more probable than not, that the claimant's testimony that she was fired on return to work on 15<sup>th</sup> April 2021 was true. The respondent did not give a valid reason for the termination as the reason of absconding from 9<sup>th</sup> June 2021 has been held as untrue.

This was a case of unfair dismissal. The trial court finding is set aside and substituted with a finding of unfair dismissal.

### **Whether the trial court erred in determination of relief-**

25. The claimant had sought several reliefs. The appellant in ground of appeal did not challenge the finding of the trial court that the salary paid of Kshs. 12000 was proper. The trial court held- ' on underpayments the claimant was paid Kshs. 12000 yet the rate at the time was Kshs. 9780.95. The pay was therefore within the approved grade. The prayer fails.' There was no ground of appeal challenging this specific finding of the trial court and the same cannot be raised in submissions. My role at first appeal is limited to re-evaluation of evidence the lower court and I found no basis to interfere with that finding . The salary is taken as Kshs. 12,000.
26. The appellant's appeal was that the trial court erred in fact and law by not awarding the appellant all the remedies sought as against evidence and facts presented before the trial court. The court having found unfair dismissal and taking into account period of work of 2 years, the nature of work of nanny which is tedious being an inhouse work, and the likelihood to secure a similar job as no special skills are required(there was no prove of the same) the court finds three months' salary as sufficient compensation Thus 3 x 12000 thus Kshs. 36000 awarded as compensation for the unfair dismissal. Notice pay is awarded under section 35 of the *Employment Act* the court having found unfair dismissal Kshs. 12000



27. The trial court awarded half month salary service year for each year worked. The appellant had worked for 2 years thus  $12000 \times 15 / 30 \times 2 =$  Kshs. 12,000 is upheld.
28. Leave days. The claimant testified that she took one week off in December. It was thus not true that she was entitled to 42 days leave which would mean she never took any leave. The respondent stated she gave her 21 days leave and had no documents. The court took cognizance of the nature of domestic work relationships. They are mainly oral agreements without documentation. The claimant having not been truthful in her claim the court believed the respondent that she took leave. The same findings applied to the public holidays. The court agreed with the trial court that in house nanny work was difficult to regulate in terms of overtime. The court found no case of unreasonable work (indeed the sister sat in for the appellant without any complaints) hence no basis to interfere with the finding.
29. The salary as claimed for April 2021 is upheld as awarded for Kshs. 4461.54

### **Conclusion**

30. The appeal is allowed. The Judgment and Decree of the Hon. G.A. Omodho (PM) delivered on 8<sup>th</sup> September, 2023 in MCELRC/E1603/2021 is set aside and substituted as follows:-
- a. The termination is held as unfair and unlawful.
  - b. Compensation for unfair dismissal awarded for the sum equivalent of 3 months salary for Kshs. 36,000.
  - c. Notice pay of Kshs. 12000
  - d. Service pay of Kshs. 12000
  - e. Unpaid April salary of Kshs. 4462.54
- Total sum of Kshs 64,462.54 awarded with interest at court rate from date of judgment until payment in full.
- Costs of the suit.
31. Taking into account this was a domestic worker employment to temper justice with mercy on appeal the court makes no order as to costs.
32. It is so ordered.

**DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> JULY DAY OF 2025.**

**J.W. KELI,**

**JUDGE.**

In The Presence Of:

Court Assistant: Otieno

Appellant – absent

Respondent: absent

