



**Kayu Cleaning Services Limited v Ongoche (Appeal E122 of 2024)
[2025] KEELRC 2040 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2040 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E122 OF 2024**

**JW KELI, J
JULY 4, 2025**

BETWEEN

KAYU CLEANING SERVICES LIMITED APPELLANT

AND

VIOLET NAOMI ONGOCHE RESPONDENT

*(Being an Appeal from the Judgment and Orders of the Honourable B. Kasavuli (SPM)
delivered at Nairobi on the 3rd day of April, 2024 in MCELRC No. 314 of 2022)*

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Orders of the Honourable B. Kasavuli (SPM) delivered at Nairobi on the 3rd day of April, 2024 in MCELRC No. 314 of 2022 between the parties filed a memorandum of appeal dated the 16th April, 2024 seeking the following orders:-
 - a. The Appeal herein be allowed.
 - b. The Judgment and Decree of the lower court be set aside and the Respondent's case in the lower court be dismissed.
 - c. This court makes its own assessment of damages if any.
 - d. The Appellant be awarded the costs of the Appeal and those in the lower court.

Grounds Of The Appeal

2. That the whole judgment and decree of the Honourable Trial Magistrate is against the testimony, pleadings, submissions and the law.



3. That the Honourable Trial Magistrate erred in law and fact by not considering the weight of the evidence adduced by the Appellant that clearly showed that the Respondent was not terminated from her employment.
4. That the Honourable Trial Magistrate erred in law and fact by failing to find that the Appellant had proved that the Respondent had breached contractual rules and regulations by absconding from employment.
5. That the Honourable Trial Magistrate erred in law and fact in expressing outright bias against the Appellant and wholly disregarded its arguments.
6. That the Honourable Trial Magistrate erred in law and fact in failing to find that the evidence presented by the Appellant was more credible than that given by the Respondent.
7. That the Honourable Trial Magistrate erred in law and fact in awarding the Respondent excessive damages taking into account the claim.

Background To The Appeal

8. The Respondent filed a claim against the Appellant vide a memorandum of claim dated the 15th of September 2021 seeking the following orders:-
 - a) A declaration that the termination of the claimant's employment by the respondent was unlawful, malicious, unprocedural and an infringement on his constitutional rights.
 - b) Maximum compensation for wrongful dismissal.
 - c) Special damages
 - i. One month salary in lieu of notice Ksh 15,607.00
 - ii. Damages for wrongful dismissal Ksh 187,284.00
 - iii. Underpayment Ksh 83,677.00
 - iv. Public holidays Ksh 87,318.00
 - v. Overtime Ksh 83,853.00
 - d) Interest on the total.
 - e) Certificate of Service.
 - f) Costs of the Cause.
 - g) Any other and further relief this Honourable Court may deem fit and just to award under the circumstances.

(Pages 3-9 of the ROA dated 12th November 2024).
9. The Respondent filed her verifying affidavit, list of witnesses, witness statement, and list of documents all dated 15th September 2021 (pages 10-19 of ROA).
10. The claim was opposed by the Appellant who entered appearance and filed a memorandum in reply dated 9th April 2022 (pages 20-21 of ROA). They also filed a list of witnesses, witness statement of Gilbert Kayugira Chogo, and list of documents, all dated 9th April 2024 (pages 22-27 of ROA).



11. The Claimant's/Respondent's case was heard on the 21st of February 2024, where the Claimant relied on her witness statement, produced her documents, and was cross-examined by counsel for the Appellant Mr. Kori (pages 54-57 of ROA).
12. The Appellant's case was heard on the same day. The Appellant's witness testified relying on his filed witness statement, and produced the Appellant's document. He was cross-examined by counsel for the Claimant/Respondent Mr. Wetaba (pages 57-58 of ROA).
13. The parties took directions on filing of written submissions after the hearing. The parties complied.
14. The Trial Magistrate Court delivered its judgment on the 3rd of April 2024 partially allowing the Claimant's claim and awarding her the sum of Kshs. 237,749.60 comprising of 1 month's salary in lieu of notice, salary compensation, and underpayment (Judgment at pages 46-49 of ROA).

Determination

15. The appeal was canvassed by way of written submissions. Both parties filed.
16. 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."
17. 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

18. The Appellant identified the following issues for determination in their submissions dated the 3rd of February 2025:-
 - i. Whether the whole judgement and decree of the Principal Magistrate is against the testimony, pleadings, submissions and the Law.
 - ii. Whether the learned Magistrate erred in law and fact by not considering the weight of the evidence adduced by the Appellant that clearly showed that the Respondent was not terminated from her employment.
 - iii. Whether the learned Magistrate clearly erred in law and fact by failing to find that the Appellant had proved that the Respondent had breached contractual rules and regulations by absconding from employment.



- iv. Whether the learned Magistrate erred in law and fact in expressing outright bias against the Appellant and wholly disregarded its arguments.
 - v. Whether the learned Magistrate erred in fact and law in failing to find that the evidence presented by the Appellant was more credible than that given by the Respondent.
 - vi. vi. Whether the learned Magistrate erred in fact and in law in awarding the Respondent excessive damages taking into account the claim.
19. In her submissions dated 2nd March 2025, the Respondent submitted generally on the appeal.
 20. The court on perusal of the evidence before the lower court, the grounds of appeal and the submissions was of the considered opinion that the issue for determination in appeal were-
 - a. Whether the trial court erred in finding unfair termination.
 - b. Whether the reliefs granted were merited.
 - Whether the trial court erred in finding unfair termination
 21. The respondent in her witness statement adopted as evidence in chief told the court that on the 18th June 2021 having asked for time off to attend burial of her late cousin , the employer refused permission and on insisting on leaving for the burial immediately, the employer told her that her services were not needed. That she was ordered to release all the company property (page 13 of ROA).
 22. Conversely, the appellant in witness statement of Gilbert Kayugira Chogo adopted as evidence in chief told the court that on 14th June 2021 the respondent asked for permission to travel to Vihiga for burial of her late cousin. That he informed her as it was COVID time she needed vaccination against the virus on returning thus he informed her it was hard to grant permission to travel. That after 2 days later the claimant reported to work as usual but left 30 minutes without informing anyone. That he tried to reach her on phone but it was switched off and she did not report to text messages. That after 3 to 4 days later she sent him a text message on a Sunday asking if she could come to work of which he declined on basis of having hired some else to fill her position. Gilbert stated that the respondent was a casual labourer and her services were not terminated.
 23. During cross-examination the claimant confirmed that on 18th June 2021 there were travel restrictions due to COVID 19. That she requested for permission to travel to Vihiga to bury her late cousin which was declined the last minute the boss having earlier not given a negative response to her request. That she left for Vihiga for 2 days. The claimant confirmed her working days were Monday to Saturday.
 24. During cross-examination of Gilbert for the appellant , he stated that the claimant absconded on the 15th July 2021 which the court finds must have been an error as he also denied having fired the claimant on 18th June 2021. Gilbert said he did not fire her and that he was waiting for her to return to work.
 25. The trial court held that the Respondent did not justify the reason for the termination.

Decision

26. Having re-evaluated the evidence (Selle) I came to the conclusion that the respondent admitted she was away from work without permission. She confirmed having been away for 2 days yet her working days were Monday to Saturday. The court then established there was a case of absconding duty. The respondent confirmed that he did not issue notice to show cause nor did he produce call logs or the text messages alleged to the respondent on the said absconding. The law is settled that for reason of termination on basis of absconding the employer must take steps in compliance with section 41 of



the *Employment Act*. In *Simon Mbithi Mbane Vs Inter Security Services Limited (2018) eKLR* the Court stated, an allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success. In the upshot, the court then upheld the finding of the trial court of unfair termination.

Whether the reliefs granted were merited

27. It was the appellants position that the reliefs granted were excessive. The appellant submitted that the claimant was engaged in July 2020 and left in June 2021 hence had not completed 12 months and was thus not entitled to compensation and relied on section 45(3) of the *Employment Act* to wit – ‘(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.’ The appellant relied on a decision before 2010 Constitution. The court finds the correct position of the law is that any employee including those on probation are entitled to fair labour practises. The Court in *Monica Munira Kibuchi & 6 others v. Mount Kenya University (Mbaru, Abuodha and Ndolo, JJ.)*. In the case the petitioners challenged the upfront section 42(1) of the *Employment Act* as inconsistent with Articles 10, 25, 41, 47 and 50 of *the Constitution*. The petitioners’ contracts of employment were terminated during probation but they contended, among others that section 42 (1) of the Act was draconian, curtailed their constitutional rights and allowed employers to dismiss employees on probation whimsically. After hearing the matter, the Court by a judgment dated 30th July 2021 held that, to the extent that section 42(1) of the Act excludes an employee on probation from the provisions of section 41 of the Act, it was inconsistent with Articles 41 and 47 of *the Constitution* and therefore null and void. The court then proceeds to re-evaluate the merit of the awarded reliefs.
28. The salary of the claimant was Kshs. 8,000. It was proved that she was underpaid as the Regulation of Wages (General) Amendment Order of 2018 . It was not disputed that her lawful wage was Kshs. 13572.90.
29. The notice pay of 1 month was awarded Kshs. 13,572.90. and is upheld under section 35 of the *Employment Act*.
30. Underpayment was awarded for the difference between the salary paid of Ksh. 8000 and minimum wage of Kshs. 13572.90. for the 11 months total sum of Kshs. 61,301.90 which I uphold.
31. On salary compensation, the claimant was awarded maximum compensation of 12 months yet she had only worked for 11 months, this was clearly excessive. The criteria to apply in determination of compensation is not whimsical but as guided by section 49(4) of the *Employment Act* to wit:-
- ‘49(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—
- (a) the wishes of the employee;
 - (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
 - (c) the practicability of recommending reinstatement or re-engagement;
 - (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
 - (e) the employee's length of service with the employer;



- (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
- (g) the opportunities available to the employee for securing comparable or suitable employment with another employer;
- (h) the value of any severance payable by law;
- (i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
- (j) any expenses reasonable incurred by the employee as a consequence of the termination;
- (k) any conduct of the employee which to any extent caused or contributed to the termination;
- (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
- (m) any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee. “Taking into account the length of time served(11 months), the fact that to some extent the claimant contributed to the termination and factoring the underpayment and lack of social security, the court finds that compensation equivalent of 3 months wages was sufficient and is so granted for the sum of Kshs. 40,718.70.

Conclusion

32. The Appeal is partially allowed. The Judgment and Orders of the Honourable B. Kasavuli (SPM) delivered at Nairobi on the 3rd day of April, 2024 in MCELRC No. 314 of 2022 is set aside and substituted as follows:-

Judgment is entered for the claimant against the respondent as follows:-

The termination is held as unfair.

Notice pay of Kshs. 13,572.90

Salary compensation equivalent of 3 months salary Kshs. 40,718.70.

Underpayment (back pay) Kshs. 61,301.90

Total sum of Kshs. 115,593.50 is awarded with interest at court rate from date of judgment.

Certificate of service to issue under section 51 of the [Employment Act](#).

Costs of the suit.

33. Each party to bear own costs in the appeal.

34. Stay of 30 days.

35. It is so Ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MACHAKOS THIS 4TH DAY OF JULY 2025.



J.W. KELI,

JUDGE

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – Kori h/b Githui

Respondent: Wetaba

