



**Ogare v G4S Kenya Limited (Appeal E350 of 2024)
[2025] KEELRC 2039 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2039 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E350 OF 2024**

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

BETWEEN

ZIPPORAH KEENGU OGARE APPELLANT

AND

G4S KENYA LIMITED RESPONDENT

*(Being an Appeal from the whole of the Judgment and Decree of the Hon.
C. Ogweno delivered on 7th November, 2024 in MCELRC/E1589/2022)*

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. C. Ogweno delivered on 7th November, 2024 in MCELRC/E1589/2022 between the parties filed a memorandum of appeal dated the 3rd of December 2024 seeking the following orders:-
 - a) This Appeal be allowed.
 - b) This Honourable Court be pleased to set aside the judgement delivered at Milimani Commercial (Hon. Christine Ogweno) on 7th November, 2024 in MCELRC/E1589/2022 and substitute it with a judgment allowing the Memorandum of claim as prayed.
 - c) The court awards the costs of the appeal to the Appellant.
 - d) Any other or further relief as this Honourable Court may deem fit.

Grounds of the Appeal

2. The Honourable Magistrate erred in law and in fact in finding that the dismissal of the Appellant from employment was procedurally fair.



3. The Honourable Magistrate erred in law and in fact in disregarding the evidence that the notice to show cause was sent to the Claimant through her email but was not brought to her personal attention.
4. The Honourable Magistrate erred in law and in fact in not considering the fact that the Respondent has a communication policy which it did not exhibit.
5. The Honourable Magistrate erred in law and in fact in finding that the Respondent's official communication channel was email yet no evidence was proffered to prove this.
6. The Honourable Magistrate erred in law and in fact in finding that the Appellant did not answer phone calls when allegedly contacted by the Respondent's employee who was never called as a witness.
7. The Honourable Magistrate erred in law and in fact in disregarding the evidence that all the Respondent's employees (including the Appellant) gave the details of their next of kin to be contacted whenever the employees could not be reached.
8. The Honourable Magistrate erred in law and in fact in holding that the Appellant should have checked her email on 2nd December, 2021 for any communication from the Respondent.
9. The Honourable Magistrate erred in law and in fact in not addressing her mind to the Appellant's evidence that she would check her email only once every month.
10. The Honourable Magistrate erred in law and in fact in dismissing the Appellant's suit.
11. The Honourable Magistrate erred in law and in fact in not awarding the costs of the suit to the Appellant.

Background to the Appeal

12. The Appellant filed a claim, in the lower court, against the Respondent vide a memorandum of claim dated the 30th of May 2022 seeking the following orders:-
 - Judgment against the Respondent for loss of employment arising from the Respondent's above breaches as follows:
 - a. Compensation for unfair termination 12 monthsx3,000/=Ksh.276,000/=
 - b. Payment in lieu of notice Kshs. 23,000/=
 - c. Compensation for discrimination, harassment and unfair labour practices.
 - d. Costs of the suit.
 - e. Interest on (a),(b) and (c) above from the date of issuance of the demand letter.
 - f. Any other relief that this Court may deem fit and just to grant in the circumstances.

(see pages 6-16 of the ROA dated the 3rd of December 2024)
13. The Appellant also filed her verifying affidavit, list of witnesses, witness statement and list and bundle of documents all dated the 30th of May 2022 (pages 17-40 of ROA).
14. The claim was opposed by the Respondent who entered appearance and filed a statement of response dated the 1st of December 2022 (pages 41-45 of ROA). They also filed a witness statement of Stephen Owuor, list and bundle of documents, and list of witnesses, all dated 1st December 2022 (pages 46-82 of ROA).



15. The Claimant's/Appellant's case was heard on the 25th of July 2024, where the Claimant testified in the case relying on her witness statement, produced her documents, and was cross-examined by counsel for the Respondent, Ms. Muthiani (pages 101-104 of ROA). The Respondent's case was heard on the same day, when the witness for the Respondent, Stephen Owuor, testified in the case relying on his witness statement, produced their documents, and was cross-examined by counsel for the Appellant, Mr. Odhiambo, and the respondent's case was closed. (pages 104-105 of ROA).
16. The parties took directions on filing of written submissions after the hearing. The parties complied.
17. The Trial Magistrate Court delivered its judgment on the 7th of November 2024 dismissing the Claimant's claim in its entirety with each party ordered to bear their own costs (Judgment at pages 107-114 of ROA).

Determination

18. The appeal was canvassed by way of written submissions. Both parties filed.
19. 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."
20. 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

21. In her submissions dated the 11th of April 2025, the Appellant identified the following issues for determination:-
 - i. Whether due process was followed before terminating the Claimant's contract; and
 - ii. Who should bear the costs of the litigation.
22. On their part, the Respondent generally submitted on the appeal in their submissions dated the 16th of May 2025.
23. The court adopted the issues addressed by the parties in the appeal –
 - a. Whether the trial court erred in its findings on unfair termination
 - b. Whether the appellant was entitled to reliefs sought



Whether the trial court erred in its findings on unfair termination

24. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the Employment Act to wit:- ‘45(2) A termination of employment by an employer is unfair if the employer fails to prove—
- (a) that the reason for the termination is valid
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.” To pass the fairness test, the termination of employment must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the Employment Act (Walter Ogal Anuro v Teachers Service Commission[2013]eKLR.
25. The burden of proof in employment cases is as stated in section 47(5) of the Employment Act as follows:-‘47 (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

Fairness

26. Section 43 provides for proof of reasons for termination of employment as follows:-‘ 43. Proof of reason for termination
- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”
27. Section 41 provides for procedural fairness as follows:- ‘41. Notification and hearing before termination on grounds of misconduct
- (1) 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.
 - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.” It is on the basis of the foregoing legal framework the court proceeded to re-evaluate the evidence before the lower court to reach own conclusion on the fairness in the termination.



27. From the grounds of appeal and submissions by the appellant, the court finds that the validity of the reason for termination being absconding was not in question. What was in question was due process. The appellant submitted as follows on due process :- ‘ It was not contested that the accusation, invitation to disciplinary hearing and dismissal letter were all sent to the Claimant via her email. It was also common ground that the Claimant did not attend the disciplinary hearing. It was also not contested that email was the primary means of communication between the Respondent and its employees. The Appellant admitted before the trial court that the email to which the documents were sent is her personal email but argued that it was wrong for the Respondent to send documents (including the ‘show cause letter’), the invitation to the disciplinary hearing and the dismissal letter via email. The Appellant submitted that the Respondent ought to have effected personal service as that is the surest way to reach the employee and hear her side of the story before making a decision.
28. The Appellant referred the court to the exhibits at page 30-33 of the record of appeal which show that the documents had space where employees were required to sign acknowledging receipt of the documents. On this, the Appellant submitted that this was evidence that the Respondent’s policy was to effect physical service.
29. RW1 told the court that they had a policy allowing them to serve employees via email whenever the employees were unreachable (page 105). The appellant submitted that this was not the case for the following reasons: (i) The policy was never exhibited in court. The disciplinary code which was produced in court does not state that position. (ii) RW1 testified that they have personal data of their employees including contacts of the next of kin. He told the court that they did not contact the next of kin (page 105). This means the Appellant’s case had not yet been classified as ‘unreachable’ as her next of kin had not been contacted. The condition for emailing the show cause letter had not therefore been met, assuming the communication policy existed.
30. The applicant contended that the Respondent did not provide evidence of the Claimant’s ‘unreachability.’ The Claimant told the court that she was taking care of her sick father and her phone was always on as she was always receiving emergency calls. She also told the court that the Respondent knew where she was staying and should have made a physical visit to her place, assuming (which was not the case) her phone was off. At paragraph 9 (a) of the Memorandum of Response (page 42), the Respondent avers that the Claimant was contacted by one Joel Atunga who was never called as a witness to give evidence on the day and time he phoned the Claimant but could not reach her and whether he contacted the Claimant’s next of kin. To buttress its case the appellant relied on the decision in *Musyoka v Diamond Trust Bank Limited* [2023] KEELRC 2276 (KLR) where the court found that it was unreasonable for the employer to send disciplinary notices via postal address when the employee could be reached through other internal communication addresses like work email and phone number. The court held: ‘As the employer, the respondent had the full control of all disciplinary matters against the claimant. Where warnings and show cause notices issued, while employment subsisted, the claimant had internal communication addresses, communication through work email address and her phone number and her personal postal address. 33.The necessity to post letters to the claimant through registered mail over dates and timelines that were so close and practically impossible for her to receive such notices is hereby found unreasonable. 34.Sending important notices to the claimant through registered mail led to a serious gap in terms of receipt dates. Posting a disciplinary notice dated 9 March 2022 from Nairobi with a hearing date notice on 16 March 2022 to an address in Mombasa while the claimant’s work office was head office in Nairobi effectively meant that the claimant would not see this notice until she visited Mombasa post office or notice issued from the post office to her to collect such letter. This was effectively an unfair labour practice.’”



31. Conversely, the Respondent submitted that in the elaborate 10 grounds of appeal, the appellant challenges the finding on due process on the grounds that she ought to have been physically served with the notices for disciplinary hearing prior to her dismissal. The appellant does not challenge the finding that there were valid grounds for her dismissal. It is not in dispute that the respondent sent to the appellant's email address zipogare2000@gmail.com the following documents: -
- a) On 26th November 2021, a pre-desertion letter dated 26th November 2021 informing the appellant that she had been away from work without authorization and requesting her to report to work or to communicate reasons for her continued absence by 29th November 2021.
 - b) On 29th November 2021, a notice for disciplinary hearing scheduled to take place on 2nd December 2021.
32. It is also not disputed that the email address belonged to the appellant and that the emails in contention were received in her mailbox. The appellant's only contention is that the letters should have been served upon her physically, wherever she was. The respondent submits that email is an acceptable mode of communication. In *Abraham Kimutai Cheruiyot v Aga Khan Hospital Kisumu* [2017] KEELRC 56 (KLR), the court held that email communication was an acceptable mode of communication where there was evidence that the parties had previously communicated by email and the employee absconded duty. In *Ramogi v Great Lakes University of Kisumu (Cause 2 of 2022)* [2022] KEELRC 13032 (KLR) (2 November 2022) the court held; "Further, under the statutory framework in our jurisdiction, even the deserting employee is entitled to a hearing. And to ensure that due process is followed, the employer should make reasonable attempts to contact the employee. This can be through phone, email, colleagues or even contact details in the employee's file (records). An employer can also issue an ultimatum, such as through a show cause letter addressed to the employee's contact details on its records."(emphasis give) The appellant had deserted work from 22nd November 2021. The respondent's attempt to reach the appellant had been unsuccessful and the respondent was within its rights to send the documents to the appellant by the email address provided by the appellant to the respondent having communicated with her successfully in the past vide the email as follows:-
- a) The respondent would send the appellant's payslips by email. In her cross examination, the appellant confirmed that payslips would be sent to her email address, and she would download them from the email address. The appellant produced a copy of her payslip for October 2021 which she accessed through her emails. (See page 102 of the Record of Appeal).
 - b) In June 2021, the appellant had emailed the respondent on her concerns on a notice of intended redundancy. See pages 35 to 36 of the Record of Appeal.
 - c) On 3rd November 2021, the appellant wrote to the respondent appealing the decision to transfer her. The respondent responded to the email on 4th November 2021. (See page 40 of the Record of Appeal). The appellant was therefore conversant with the use of emails having herself initiated correspondence with the respondent by email. The appellant argues that no reasonable employee would be checking her email for any communication regarding the terms of her service. It is noteworthy that the appellant had been away from work from 22nd November 2021. The appellant alleged that she was unwell and was instructed by her manager on 22nd November to wait to be deployed. While no evidence was produced to support this allegation, one would expect that a reasonable employee who has been away from work awaiting deployment would either check her emails for communication on her employment or at the very least, physically attend her employer's offices for an update on her employment. The appellant only reported to work in January 2022 for the appeal hearing. The case of *Musyoka v Diamond Trust Bank Limited* [2023] KEELRC 2276 (KLR) cited by the



appellant where notices were sent by postal address can be distinguished from the present. In this instant case, the notices were sent by email which was a regular mode of communication between the appellant and the respondent. The requirement to track down an employee who has absented from work without authority and communication in order to serve them with the disciplinary processes would place upon the respondent an unduly and unproportionate burden given the huge number of employees it has.

Decision

33. The court on perusal of the submissions and evidence before the court found that the appeal was not merited as the claimant acknowledged that she had stayed away from work without permission, that the email address used by employer was hers and of which she had used before to communicate with the employer on employment issues. The court found no fault in use of personal email of an employee by employer in a case of absconding duty. The appellant relied on decision in *Musyoka v Diamond Trust Bank Limited* [2023] KEELRC 2276 (KLR) the court found that it was unreasonable for the employer to send disciplinary notices via postal address when the employee could be reached through other internal communication addresses like work email and phone number. The court found that in the instant case the employee was reached through her personal email which she had used before to communicate to the employer. Indeed the court has held that email is a proper mode of communication. In *Abraham Kimutai Cheruiyot v Aga Khan Hospital Kisumu* [2017] KEELRC 56 (KLR), the court held that email communication was an acceptable mode of communication where there was evidence that the parties had previously communicated by email and the employee absconded duty, like in the instant case.
34. The court found the ground of appeal that the policy of employer was not produced on communication was an academic issue, the appellant having admitted that the employer sent pre-desertation notice to her on her own personal email. The threshold of compliance with section 41 of the *Employment Act* as concerns absconding which is a valid ground of summary dismissal under section 44 of the *Employment Act* is as stated in *Simon Mbithi Mbane Vs Inter Security Services Limited* (2018) eKLR where 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. The court finds that the Respondent made reasonable effort to contact the Appellant vide a known personal email address. The court established that the respondent heard the appellant on appeal and even offered her a position at Kisumu. In the appeal proceedings before the employer it was recorded as follows:- ‘Question: We have a vacancy in Kisumu branch, can you work in Kisumu branch

Ans: No, I only want to work in Kisii branch due to the reasons i stated earlier Findings,

There were excess ladies in the branch who had no assignments.

Communication was done to them that they were to be transferred to Mombasa and disturbance allowance paid to her.

Zipporah wrote an email ceiling her reasons why she could not honor her transfer to Mombasa and said that she wished communication had been done early.

Zipporah was granted 14 days unpaid leave to enable her to sort herself before proceeding for the transfer.

Zipporah went home after being informed that she will be transferred to Mombasa and never communicated. The employee never responded to the pre desertion letter and GD3 sent to her via email.



The employee states that she can only work in Kisii branch and cannot work in Kisumu branch where the panel had suggested to her.

Conclusion/Recommendations

The panel recommended that the decision to dismiss the employee be upheld since she refused to take the offer of being transferred to Kisumu branch.” (at page 79 of ROA) (emphasis added).

35. It is a prerogative of the employer to decide on transfer of employees as per its operational requirements. The appellant was granted an opportunity to continue in service in Kisumu but insisted on service in Kisii. I find that the appeal on the dismissal on account of desertion on ground of service vide personal email was academic and moot, the appellant having been extended an olive branch by the respondent to serve in Kisumu which was a station even nearer to Kisii than initial posting at Mombasa. The appellant refused the offer. The court finds no basis to interfere with the decision of the trial court as guided 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.”

Whether the appellant was entitled to reliefs sought

36. The court upheld the finding of the trial magistrate court to effect that the termination was lawful and fair. The appellant was thus not entitled to notice or compensation as sought in the claim. The claim of unfair labour practice was proved on a balance of probabilities.

Conclusion

37. The appeal is dismissed with costs to the respondent taking into account the conduct of the appellant. The court upheld the Judgment and Decree of the Hon. C. Ogwenyo delivered on 7th November, 2024 in MCELRC/E1589/2022.
38. 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 – Odhiambo

Respondent: Mwendwa h/b Makori

