Aegis Construction Limited v Kihenja (Employment and Labour Relations Appeal E035 of 2024) [2025] KEELRC 2375 (KLR) (13 August 2025) (Judgment)

Neutral citation: [2025] KEELRC 2375 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E035 OF 2024

ON MAKAU, J

AUGUST 13, 2025

BETWEEN

AEGIS CONSTRUCTION LIMITED ..... APPELLANT

AND

RICHARD MAINA KIHENJA ..... RESPONDENT

(Being an appeal from the Judgment of Hon. E.N. ANGIMA(SRM) delivered on 14th October 2024 in Nyeri MCELRC Cause No. E062 of 2023)

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated 11th November 2024, the appellant challenged the Lower court decision herein on the following grounds: -

    a. That the learned trial Magistrate erred in law and fact and by misdirecting herself on the issues for determination before the Honourable court.

    b. That the learned trial Magistrate erred in law and fact and misdirected herself by misapprehending the nature and circumstances surrounding the claimant's termination.

    c. That the learned trial Magistrate erred in law and misdirected herself by overlooking the import of Section 30 of the *Employment Act*, 2007 which mandated the Respondent to produce a certificate of incapacity to work signed by a duly qualified medical practitioner before resuming work.

    d. That the learned trial Magistrate erred in law and fact in failing to hold that the Respondent's employment terminated by operation of law after he failed to present a certificate of incapacity duly signed by a medical practitioner to the Appellant after being absent without leave for more than two (2) years.

e. That the learned trial Magistrate erred in law and fact in arriving at the conclusion that the Respondent was not required to present a certificate of incapacity duly signed by a qualified medical practitioner to the Appellant before resuming work.

f. That the learned trial Magistrate erred in law and fact in failing to consider the arguments and Defence raised by the Respondent as well as the submissions and authorities submitted thus arriving at an erroneous conclusion occasioning miscarriage of justice.

2. The appeal seeks the following reliefs: -

a. That this Appeal be allowed with costs.

b. That the Judgment of the Learned Magistrate in MCELRC No.E062 of 2022 be set aside and substituted with a judgment dismissing the suit with costs.

Facts

3. The appellant employed the respondent as a driver from July 2015 earning a gross monthly salary of Kshs.25,949. On 9th September 2019, the respondent was involved in traffic accident while off duty and suffered serious injuries. He was admitted in hospital until November 2019 and after discharge he stayed at home for one year. During the time he was in hospital fellow employees visited him including the General Manager.

4. In 2021, he reported back to work but he was informed by Mr.Hitesh that he had dismissed him. The claimant, then brought suit in the lower court alleging that the dismissal was unfair and unlawful since there was no valid reason and fair procedure was not followed. He contended that he was not served with any prior notice and he was not accorded fair hearing before the examination. Therefore, he prayed for Kshs.516,983 as compensation for unfair termination plus accrued benefits under his contract of employment.

5. The appellant admitted that it had employed the respondent and showered a lot of praise for his diligent service. However, it denied the alleged unlawful dismissal and averred that the respondent resigned from employment on medical grounds. It averred that after the resignation by the respondent, his terminal dues were computed and paid to him through his wife.

6. During the hearing, the claimant testified as CW1 and basically adopted his written statement and produced 5 documents as exhibits. His evidence echoed the facts summarized above but clarified that after the discharge from the hospital he stayed at home nursing his injuries. In 2021, he visited respondents' Head office in Nairobi and presented his medical documents to the HR Manager Mr.Hitesh who told him that he had already been dismissed from employment. He contended that the gesture of sending staff to visit him in the hospital and also at home did not indicate that he had been dismissed.

7. The appellant's General Manager Mr.Paul Kiriu testified as RW1. He also adopted his written statement and produced 3 documents as exhibits. In brief, he reiterated that the respondent resigned from his employment and his terminal dues were paid to him through his wife Ann Njeri Kabuthi. The total was Kshs.19,731 and it comprised one month notice and 7 days worked. He contended that the lady was indicated in respondent's employment records as his wife.

8. He admitted that the respondent did not serve any resignation letter to the company but contended that the respondent stayed away for two years before showing up to ask to resume work but with no medical documents. RW1 admitted that the appellant never served the respondent with show cause notice and no disciplinary hearing was conducted.

9. After considering the evidence and submissions by both sides the trial court (Hon.Angima SRM) concluded that the appellant had a valid reason for terminating the respondent's employment but still found the termination unfair and unlawful because the procedure followed was unfair. The trial court held that before dismissing the respondent for absenteeism, the appellant ought to have accorded him a hearing under section 41 of the *Employment Act*. The court also faulted the appellant for not producing employment records to prove that Ann Njeri Kabuthi was the respondent's wife as alleged.

10. In the end, the trial court awarded the respondent one-month salary in lieu of notice, unpaid leave for four years, public holidays for four years and three months salary as compensation for the unfair termination equaling to Kshs.231,544. He was also awarded certificate of service, costs and interest.

11. The appellant was aggrieved and brought this appeal. The appeal was disposed of by written submissions.

12. It was submitted for the appellant's on whether the dismissal of the respondent was fair and lawful; and whether he is entitled to the reliefs sought. On the first issue, it was submitted that an employee is entitled to sick leave under section 30 of the *Employment Act* including the first seven days with full pay, then followed by 7 days with half pay. However, for the employee to be entitled to the said sick leave he must notify the employer or cause the employer to be notified as soon as possible, his absence and produce a certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting on behalf of the practitioner in charge of a dispensary or medical aid Centre.

13. It was submitted that the purpose of the medical certificate is to validate the employee's claim of illness and justify the absence from work. Reliance was placed on Hassan t/a Big Road Enterprises v Juma (2023) KEELRC 1262 (KLR) and Caroline Gathoni Gikonyo v Kenya Association of Investment Groups (2015) KEELRC 37 (KLR) to fortify the above submission.

14. It was submitted that the respondent led to the termination by his conduct when he stayed away from work for two years and failed to avail certificate of incapacity to work. It was further submitted that his absence for two years without the certificate of incapacity made the appellant to assume that the respondent's contract of employment had ended by operation of the law. Reliance was placed on Bernard Omondi Kwambi v Bedi Investment Limited (2020) eKLR where the court found that the employee removed himself from employment by staying away for two months without a medical certificate.

15. It was further submitted that the trial court erred by failing to consider meaning of section 45(5) of the *Employment Act* and further ignored the principle of stare decisis by failing to follow the decisions of this court which ranks above it. Therefore, the appellant urged the court to find that the respondent's absence from work without certificate of incapacity signed by a qualified medical practitioner explaining his absence from 2019 to 2021, amounted to termination of employment by operation of the law.

16. As regards the issue of the reliefs sought, it was submitted that the award of damages granted by the trial court amounted to rewarding gross misconduct. For emphasis, reliance was placed on Ngoka v Motrex Limited (2023) KEELRC 1255(KLR). Consequently, the appellant prayed to allow the appeal with costs.

17. On the other hand, it was submitted for the respondent that he never resigned and the RW1 admitted in evidence that there was no resignation letter received. It was submitted that the respondent's employment was terminated on 30th September 2019 without following fair procedure because no show cause notice or prior warning was served on him before the termination. He was further not accorded disciplinary hearing to enable him defend himself and therefore the termination was unfair.

18. Finally, the court was urged to find that the judgment by the trial court was sound and well-reasoned, and dismiss the appeal with costs.

19. This being a first appeal, my mandate is to re-evaluate the evidence on record and proceed to make my own independent conclusions while taking into account that I never saw the witnesses testifying. I am guided by Selle v Associated Motor Boat Company Ltd (1968) EA 123 where 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."

20. I am also guided by Kenya Ports Authority v Kunston (Kenya) Limited (2009) 2EA 212, the Court held that:

> " On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

21. Guided as above, I have carefully considered the evidence on record and the rival submissions summarised above. The employment relationship between the parties is not in dispute nor is the fact that the respondent's last working date was 9th September 2019. The issues in dispute are:

    a. Whether the respondent resigned or he was dismissed.

    b. If the answer to (a) is dismissal, whether it was unfair and unlawful.

    c. Whether the award of damages by the trial court should stand.

Resignation v dismissal

22. The respondent never received any termination letter and also the appellant never received a resignation letter. There is, however, evidence on record that the appellant paid one-month salary in lieu of notice to the respondent plus salary for 7 days vide cheque dated 7th November 2019. There is also a document titled as "PAY OFF" indicating that the respondent was leaving the company on account of sickness/ accident. The document was signed by Ann Njeri on 7th November 2019 acknowledging the payment as full and final settlement and waived further claim from the appellant.

23. The said document was not signed by the respondent. RW1 admitted that the respondent was visited in hospital and one wonders why he was not made to sign the settlement agreement above. Suffice it to say that, the appellant has by its own evidence confirmed that it paid the respondent one-month salary in lieu of notice which in the circumstances is sufficient proof that it took responsibility for terminating the respondent's contract of employment.

24. In view of the foregoing observation, I find that the respondent never resigned but his services were terminated by the appellant on account of physical incapacity due to an accident. This position is fortified by the fact that when he reported back to office, Mr.Hitesh demanded for certificate to confirm that he was fully recovered. Mr.Hitesh also told him that he had already dismissed him. The foregoing evidence was never rebutted as Mr.Hitesh never testified during the trial.

Unfair and unlawful termination

25. Section 45 (1) and (2) of the *Employment Act* provides that: -

> " 45. . Unfair termination
>
> (1) No employer shall terminate the employment of an employee unfairly.
>
> (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 employee's conduct, capacity and compatibility; or
>
> (ii) based on the operational requirements of the employer; and
>
> (c) that the employment was terminated in accordance with fair procedure."

26. It is clear from the above provision that for termination to pass muster, it must be grounded on valid ground and fair procedure must be followed. In this case the reason for termination was absenteeism due to physical incapacity. The respondent's condition was well known to the employer and RW1 confirmed the same.

27. Section 30 of the *Employment Act* provides that: -

> " 30. Sick leave
>
> 1. After two consecutive months of service with his employer, an employee shall be entitled to sick leave of not less than seven days with full pay and thereafter to sick leave of seven days with half pay, in each period of twelve consecutive months of service, subject to production by the employee of a certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting on the practitioner's behalf in charge of a dispensary or medical aid Centre."

28. The above provisions require employee to notify the employer as soon as possible about his absence and then provide a certificate of incapacity signed by a qualified medical practitioner, or authorised officer of a medical facility. He never did so as at 7th November 2019 when his terminal benefits were paid bringing to an end his employment. Instead, he stayed away until 2021 when he allegedly went to

see the appellant's HR Manager on an unspecified date. Consequently, I must agree with the finding of the trial court that the respondent failed to comply with section 30 above and that rendered the reason for termination valid.

29. However, the procedure followed is what went wrong. Section 41 of the *Employment Act* provides that: -

> "(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."

30. The above mandatory procedure was never followed. It is now an emerging jurisprudence that before dismissing an employee for absenteeism, the employer must first take steps to reach out to the employee and warn him of the consequences of his absence. I gather support from Joseph Nzioka v Smart coating Limited (2017) eKLR where Abuodha J held: -

> " Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employee concerned and that show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties."

31. In view of the fact that the appellant did not follow the above procedure, before terminating the employment on 7th November 2019, I agree with the trial court that the appellant terminated the respondent's employment unfairly and thus unlawfully.

The awards by the trial court

32. In Butt v Khan (1978) eKLR the Court of Appeal held that: -

> " An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material aspect, and so arrived at a figure which was either inordinately high or low."

33. Guided by the above binding precedent, I am satisfied that the award of compensation was founded on evidence. However, I fault the trial court for not giving any justification for the award as required under section 49(4) of the *Employment Act* which sets out the factors to consider in awarding reliefs under the section.

34. In this case, the respondent served for about four years before his dismissal and he did not contribute to the dismissal through misconduct. Taking into account the two factors, I find that the award of 3 months salary as compensation was reasonable. However, the award of one-month salary in lieu of notice went against the evidence. The respondent had produced documentary evidence to prove that

the respondent had been paid salary in lieu of notice through his wife Ann Njeri. The respondent never denied in his pleadings or evidence that Ann Njeri Kabuthi was his wife.

35. The claim for leave and public holidays for 4 years were not specifically controverted by the appellant in its defence and in the submissions filed in the appeal. The appellant dedicated his case and submissions both here and in the lower court to blaming the respondent for absence without complying with section 30 of the *Employment Act*. In the circumstances, I find that no reason has been demonstrated for me to disturb the award of leave and public holidays for 4 years.

conclusion

36. I have found that the respondent never resigned but he was dismissed by the appellant on 8th November 2019 for absenting himself from work without certificate of incapacity under section 30 of the *Employment Act*. I have further found that the termination was unfair and unlawful because fair procedure was not followed. Finally, I have affirmed the judgment of the trial court plus the damages awarded save for Kshs.25,949 which I have set aside because the same was paid to the respondent on 8th November 2019. Consequently, I partially allow the appeal and make the following orders: -

    a. The lower court judgment is varied by setting aside the award of Kshs.25,949 being one-month salary in lieu of notice.

    b. The rest of the awards in the lower court's judgment are not disturbed.

    c. The award shall be subject to statutory deductions.

    d. Since the appeal only succeeded partially, I will not condemn any party to pay costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 13TH DAY OF AUGUST, 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.