



**Kitui Flour Mills Limited v Abdulla (Appeal E097 of 2024)  
[2024] KEELRC 13572 (KLR) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13572 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E097 OF 2024  
K OCHARO, J  
DECEMBER 17, 2024**

**BETWEEN**

**KITUI FLOUR MILLS LIMITED ..... APPELLANT**

**AND**

**ABDULSWAMAD ALI ABDULLA ..... RESPONDENT**

*(Being an appeal from the judgment and/or decree of Hon. G. Sogomo – PM in  
CM-ELRC Cause No. E023 of 2023 in Mombasa delivered on 26th April 2024)*

**An employee’s length of service could not be used as justification for the award of maximum compensation for unfair termination**

*The appeal arises from a judgment of the Chief Magistrate’s Court in Mombasa, where the respondent was awarded compensation for unfair termination by Kitui Flour Mills Ltd. The respondent claimed he was verbally dismissed without due process after an incident involving a traffic accident and subsequent detention. The employer contended he deserted duty without notice. The trial court found in favour of the respondent, awarding notice pay and twelve months’ salary as compensation. On appeal, the Employment and Labour Relations Court upheld the finding of unfair termination but reduced the compensation to six months’ salary for lack of justification for the maximum award.*

Reported by John Ribia

**Labour Law** – employment – unfair/wrongful termination – burden of proof – shifting burden from employee to employer - who bore the burden of proving a complaint of unfair/wrongful termination of employment - who bore the burden of proving the reasons for termination were valid – at what point did the burden of proof shift from the employee to prove unfair dismissal to the employer to prove that the reasons for termination were valid – Employment Act (cap 226) sections 35(1)(C), 43, 47(5), and 49(1)(c).

**Labour Law** – employment – unfair termination – conditions for termination to be considered fair – maximum award for unfair termination being 12 months’ salary - what factors must one demonstrate for termination of employment to be considered fair - whether an employee’s long length of service could be used as justification for



*the award of maximum compensation for unfair termination, being 12 months' salary - Employment Act (cap 226) sections 35(1)(C), 43, 47(5), and 49(1)(c).*

### **Brief facts**

The respondent was employed by Kitui Flour Mills Limited as a heavy commercial driver. His employment lasted until July 26, 2022, when a dispute arose regarding the circumstances of his exit from the company. According to the respondent, while on duty driving from Malindi to Mombasa, he was informed by his supervisor that he had allegedly damaged a third-party vehicle. He was instructed to report the incident at Makupa Police Station, where he was unexpectedly detained and required to pay Kshs. 3,500 for his release. Upon returning to work, his assigned truck was withdrawn, and he was verbally dismissed without any disciplinary process.

The respondent filed a claim before the Chief Magistrate's Court in Mombasa, seeking compensation for unfair termination, notice pay, and payment for work allegedly performed on Sundays and public holidays. He contended that his dismissal was not only abrupt but also procedurally and substantively unfair.

The appellant maintained that the respondent had deserted duty without notice or explanation, and that multiple efforts to reach him were unsuccessful. The appellant denied terminating the respondent's employment and argued that the separation resulted from abandonment of duty.

The trial court found in favour of the respondent, holding that he was unfairly terminated and awarding him one month's salary in lieu of notice and compensation equivalent to twelve months' gross salary. Aggrieved by the award, the appellant lodged the instant appeal challenging, among other things, the finding of unfair termination and the justification for the maximum compensation awarded

### **Issues**

- i. Who bore the burden of proving a complaint of unfair/wrongful termination of employment?
- ii. Who bore the burden of proving the reasons for termination were valid?
- iii. What factors must one demonstrate for termination of employment to be considered fair?
- iv. Whether an employee's long length of service could be used as justification for the award of maximum compensation for unfair termination, being 12 months' salary.

### **Held**

1. Section 47(5) of the Employment Act was couched in a manner suggesting a sequential discharge of the respective burdens it imposed on the employee and the employer. The employee must first discharge his or her burden, demonstrating *prima facie* that an unfair termination or wrongful dismissal occurred, then a requirement shall fall on the employer to prove to the requisite standard the reasons for the termination or dismissal and that the reason(s) was valid and fair and that consequently the termination or dismissal was substantially justified. Further, the statutory cannons of procedural fairness were adhered to.
2. In the context of section 47(5) of the Employment Act, the former employee was obligated to first demonstrate that termination occurred by an act of the employer before moving further to show that it was unfair.
3. Where an employer alleged desertion against the affected employee, the employer must demonstrate to court with sufficient evidence that he or she made genuine efforts to trace the employee, to ascertain why he or she was not reporting to duty and bring it to the attention of the employee the repercussions the continued absence would visit on him, if the employer was of the view that the absence was unjustified. The insistence by the law was in accord with the statutory protection and rights accorded to employees. It to a large extent checked arbitrary dismissals by employers and kept them on track to exercise fair labour practices.
4. The appellant did not demonstrate it made efforts to contact the respondent. The separation did occur following the alleged absconding of duty by the respondent. He was dismissed from employment in the



- manner alleged. The trial court did not err in finding that the claimant was dismissed from employment and that he did not desert duty.
5. For a termination of employment to be considered fair, it must be demonstrated that;
    1. there was a reason for the termination (section 43 of the Employment Act (the Act)),
    2. that the reason(s) was valid and fair (section 45(2) of the Act); and that
    3. there was due compliance with the edicts of procedural fairness (sections 41 and 45(2) of the Act).
  6. The appellant advanced the position that the respondent absconded his duty. In the context of section 43 of the Act, the reason for the termination could be desertion/absconding. The desertion not being proved, the appellant did not discharge its legal burden under sections 43 and 45(2) of the Act. The termination of his employment was not substantively unfair.
  7. No effort was made to establish that there was an adherence to procedural fairness in the dismissal of the respondent's employment. The procedure contemplated under section 41 of the Act was not complied with. The termination was procedurally unfair. The dismissal being unfair, the Employment and Labour Relations Court had no reason to disturb the award for notice pay.
  8. Section 49(1)(c) of the Employment Act bestowed the court with authority to grant an employee who had successfully assailed the decision of his or her employer to terminate his employment or summarily dismiss him or her from employment a compensatory relief. The maximum amount awardable was set by the provision as twelve (12) months' gross salary. However, the authority was discretionarily exercised depending on the circumstances of each case. Where a court decided to grant that figure or the other as compensation under section 49(1)(c), it must give the reasons for the award. The factors to be considered were set out thereunder.
  9. The respondent was a truck driver, he did not assert that he did not get employed elsewhere or was not likely to get employed after he was dismissed. The respondent had worked for the appellant for 7 years, however that length of service could not reasonably be a justification for grant of the maximum award.
  10. The award was excessive; one that was arrived at without consideration of all that the law required the trial court to consider in the circumstances of the matter that was before him.

*Appeal partly allowed.*

### **Orders**

*The trial court's award of twelve (12) months' gross salary pursuant to the provisions of section 49(1)(c) of the Employment Act was set aside, and in place thereof, an award of six (6) months gross salary, Kshs. 248,588.*

### **Citations**

#### **Cases**

#### **Kenya**

1. *Hema Hospital v Wilson Makongo Marwa* Civil Appeal 72 of 2014; [2015] KECA 190 (KLR) - (Followed)
2. *Kenfreight (EA) Limited v Benson K Nguti* Civil Application 31 of 2015; [2016] KECA 409 (KLR) - (Explained)
3. *Mutashi v Enterprises* Cause 2110 of 2016; [2023] KEELRC 2471 (KLR) - (Explained)
4. *Mutike, Protus Wanjala v Anglo African Properties t/a Jambo Mutara Lodge Laikipia* Cause 30 of 2019; [2021] KEELRC 1084 (KLR) - (Explained)
5. *Nzioka, Joseph v Smart Coatings Limited* Cause 898 of 2014; [2017] KEELRC 591 (KLR) - (Followed)
6. *Onchwari, Stanley Omwoyo v Board of Management Nakuru YMCA Secondary School* Cause 295 of 2014; [2015] KEELRC 1130 (KLR) - (Followed)
7. *Standard Group Limited v Jenny Luesby* Civil Appeal 291 of 2014; [2018] KECA 353 (KLR) - (Followed)

#### **Statutes**



## **Kenya**

Employment Act (cap 226) sections 35(1)(C); 41; 43; 47(5); 49(1)(c) — (Interpreted)

### **Advocates**

*Ms. Waitbera* h/b for *Mr. Mohammed* for the appellant.

*Mr. Mokaya* for the respondent

## **JUDGMENT**

1. In the appeal, the appellant (Kitui Flour Mills Ltd) is aggrieved by the judgment and consequential decree of G. Sogomo (PM) delivered in Mombasa Chief Magistrates Employment and Labour Relations Cause No 23/2023, in which the Learned Magistrate allowed the respondent's claim partially and awarded him notice pay and compensation for unfair termination of employment, twelve months gross salary.
2. Through its memorandum of appeal dated 15 May 2024, the appellant assails the judgment of the lower court setting forth the following prime grounds.
  - a. The Learned Magistrate erred in law and fact by holding that the Appellant unfairly terminated the respondent's employment.
  - b. The Learned Magistrate erred in law and fact by holding that the Respondent did not desert his duty and that the desertion was not supported by evidence.
  - c. The Learned Magistrate erred in law and fact by awarding the maximum compensation for unfair termination being the equivalent of 12 months' pay without laying sufficient legal basis for the same.
3. Pursuant to this court's directions, the parties have filed their respective written submissions for and against the appeal.

The case before the lower court.

### **i. The Respondent's Case**

4. It was the respondent's case that he first came into the employment of the appellant in the position of a heavy commercial driver. He so worked for the appellant up to 26 July 2022 when they terminated his employment.
5. In mid-July 2022, he was informed by the respondent that while driving from Malindi to Mombasa he had knocked a third party's car and damaged its side mirror. Mr Talal his "boss" instructed him to go and report the incident at the police station. He obliged and proceed to Makupa police station for the said purpose. On arriving at the police station, he was hurriedly thrown into the cells.
6. He was forced to spend a night in the cells. Mr Talal insisted that his release was conditional upon him paying kshs 3500. It was only after paying the sum that he as released.
7. On reporting for duty after the release, the truck he was driving was taken away from him and his employment terminated. No disciplinary hearing was undertaken against him prior to the termination. The termination was orally done.
8. The respondent refused and or rejected to pay him his terminal dues thus: -



- i. One month salary in lieu of notice.....kshs 41,498.00
  - ii. Compensation for unlawful/unfair termination of his employment .....kshs. 497,976.00
  - iii. Compensation for public holidays worked ...kshs 134,070.00
  - iv. Compensation for Sundays worked .....kshs. 239,411.00
  - ii. The appellant's case
9. The appellant contended that on or about July 26, 2022, the respondent absented himself from work without providing any valid reason or prior notice. Following the desertion, it undertook several attempts to reach out to him and inquire about the reasons for his sudden absence, but the attempts did not bear fruit following the respondent's failure to respond to phone calls.
10. As such, the respondent's assertion that his employment was terminated by the appellant couldn't be untrue. His employment came to an end when he deserted duty.
11. Considering that he deserted duty, his claim for notice pay and compensation for unfair termination stood on quicksand.
12. The Respondent did not work on public holidays and Sundays, any reliefs sought on the basis that he did, were unavailable for him, therefore.

### **Judgment**

13. After hearing the parties on their respective cases, the learned trial magistrate rendered himself on the matter, and awarded the respondent: -
- a. One month's salary in lieu of notice.....kshs 41,498.00
  - b. Compensation for unfair termination, twelve months' gross salary .....kshs 497,976.0

### **The Appeal**

14. Aggrieved by the judgment of the learned trial magistrate, the appellant impugned the same through the appeal herein setting forth the grounds put forth hereinabove.

### **The Appellant's Submissions**

15. The appellant's counsel submitted that the Learned Trial Magistrate failed to consider, appreciate and apply the stipulations of section 47(5) of the Employment Act and as a result erroneously failed to conclude that the respondent did not prove that the appellant orally terminated his employment, on a balance of probabilities. His evidence to the effect that his employment was terminated by the appellant ought to have been collaborated. It was not. Counsel urged this court to be persuaded by the decision in the case of Mutashi v Enterprises (2016) eKLR.
16. Further, the respondent did not as required under the provisions of section 47(5) of the Act establish that this employment was unlawfully terminated and as such his case ought to have failed at this hurdle. To buttress this submission, reliance was placed on the case of Protus Wanjala Mutuke v Angelo African Properties t/a Jambo Mutara Lodge Laikipia (2021) eKLR.



17. The appellant's witness's evidence demonstrated that the respondent deserted duty and attempts to reach him failed as he never picked calls.
18. On the 3<sup>rd</sup> ground of appeal, counsel submitted that from the material on record, there is no doubt that the respondent absconded duty considering the elaborate definition of desertion in the case of *Stanley Omwoyo Onchari v Board of Management Nakuru YMCA Secondary School* [2015] eKLR.
19. It was submitted further that as elaborated in the case of *Stanley Omwoyo Onchari* (*supra*) an employer asserting that the employee deserted duty must demonstrate that it made attempts to reach out to the employee to establish his whereabouts and make reasonable inquiries as to the absence from duty. These, the respondent proved through the evidence of its witness.
20. This court was urged to note that the respondent did admit in his evidence under cross-examination before the trial court that he was contacted by the appellant but never returned calls. By reasons of the premises this court should find that the respondent deserted duty and the learned trial Magistrate erred in law and fact when he did not so conclude.
21. On the award of the compensatory relief under section 49(1)(c) of the *Employment Act*, counsel submitted that the learned magistrate erred in law when he made an award of twelve months' gross salary, the maximum awardable under the provision without according any justification for the same. He did not give any reasons for the maximum award, yet the law enjoined him to.
22. In any event, considering the circumstances of the matter, the amount awarded was excessive.
23. The respondent having deserted duty could not be availed the remedy of notice pay. The Learned Magistrate erred in law and fact when he awarded him one month's salary in lieu of notice.

### **The Respondent's Submissions**

24. Counsel for the respondent submitted that it was the respondent's testimony before the trial court, that his employment was terminated by the supervisor Mr Talal. Mr. Talal was at the centre of the termination. He was a vital witness whom the appellant could have called to testify. Inexplicably, the respondent did not call him. The court should draw an adverse inference that had he been to testify, he could have given evidence to the prejudice of the appellant's case.
25. The respondent's evidence was not controverted, therefore.
26. Despite assertion that the respondent's employment was not terminated, the appellant did not place forth any documentary evidence from where it can be concluded that he did.
27. It is clear from the evidence on record that the respondent was not subjected to any disciplinary hearing before Mr Talal terminated his employment. The termination was therefore procedurally unfair. To buttress this point, counsel placed relevance on the case of *Standard Group Ltd v Jenny Luesby* [2018] eKLR.
28. The respondent's employment was terminable by notice under section 35(1)(c) of the *Employment Act*. The same was not issued to the claimant. The Learned Magistrate correctly found that he was entitled to notice pay.
29. In the circumstances of the matter, including that the reasons for the termination were not proved, the manner of termination, the circumstances leading to the termination; and the length of service by the respondent all which the learned magistrate considered, he correctly awarded compensation to the extent of twelve months' gross salary.



30. Lastly, the lower court properly dismissed the appellant's assertion that the respondent absconded duty. The appellant as the learned magistrate correctly pointed out did not prove that it made efforts to reach the respondent before making the decision to terminate his employment. It did not initiate any process to discipline the respondent on account of absenteeism. Thus, the appellant failed to prove its assertion of desertion as was required in law. Reliance was placed in the case of [\*Joseph Nzuki v Smart Coating Limited\*](#) [2017] eKLR.
31. The appeal should be dismissed with costs.

### **Analysis and Determination**

32. This being a first appeal, I am obliged to evaluate the evidence on record and arrive at my own conclusion. Upon considering the entire record, I find the following issues fall for determination: -
  - a. How did the separation between the respondent and the appellant occur?
  - b. If by termination of the respondent's employment was at the initiation of the appellant, was the termination fair?
  - c. Was the respondent entitled to the reliefs awarded in his favour by the learned trial magistrate?

### **How did the separation occur?**

33. Inarguably, the rival parties took diametrically opposite positions regarding how the separation in their employer-employee relationship occurred. While the respondent asserted that his supervisor Mr Talal, terminated his employment orally and when he took away the truck assigned to him, the appellant contended that the respondent absented himself from duty without authority. However, there was one point of convergence, the respondent was last at his place of work on or about July 26, 2022.
34. The appellants' counsel submitted that the respondent did not by the material he placed before the learned trial magistrate prove on a balance of probabilities that his employment was terminated by the appellant. Therefore, he did not discharge the legal burden that was on him pursuant to the provision of section 47(5) of the [\*Employment Act\*](#).
35. Undeniably, for some time the applicability and scope of application of section 47(5) of the [\*Employment Act\*](#) was quite unsettled. Immense confusion reigned within the litigants, Advocates and even courts. However, I take the view that the confusion is gone. There are trite principles now concerning the applicability and scope.
36. The provision is couched in a manner suggesting a sequential discharge of the respective burdens it imposes on the employee and the employer. The employee must first discharge his or her burden, demonstrating prima facie that an unfair termination or wrongful dismissal occurred, then a requirement shall fall on the employer to prove to the requisite standard the reasons for the termination or dismissal and that the reason(s) was valid and fair and that consequently the termination or dismissal was substantially justified. Further, the statutory cannons of procedural fairness were adhered to.
37. In the context of section 47(5) of the [\*Employment Act\*](#), the respondent was obligated to first demonstrate that termination occurred by an act of the employer before moving further to show that it was unfair.
38. The respondent was categorical throughout that Mr Talal verbally terminated his employment and referred him to the Huma Resource Manager's office for processing of his dues. He further took away



his truck, thereby expressing that the appellant no longer had the intention of discharging one of its primary duties as an employer, supply of work to the respondent, its employee.

39. This court took the view that in the circumstances, Mr Talal was at the centre of the alleged termination. He was a vital witness who could discount the respondent's version. Inexplicably, the appellant did not present him as a witness. This leaves this court to make two conclusions. First, the respondent's account on how his employment was terminated was not controverted by any cogent evidence. Second, had the witness testified his evidence couldn't have aided the appellant's case. It could have been prejudicial instead,

40. Addressing a situation as is here, where the employer failed and or ignored to call a crucial witness to testify on crucial events in relation to a controversy before court, the Court of Appeal in the case of *Hema Hospital v Wilson M Marwa* (2015) eKLR stated:-

“it is not clear to us why Dr Manduku who could have had firsthand knowledge of critical and controversial points of May 6, 2013 was not called to testify. The Hospital chose to rely instead on the second-hand version of events as narrated by Simiyu. That it is even more puzzling considering that when this appeal was called out for hearing before us, counsel for the Appellant applied to have the hearing of the appeal adjourned in order for Dr, Manduku to be present. One would have expected Dr. Manduku to have been as enthusiastic, if not more to attend the trial before the lower court where his testimony would have been of great benefit. In the result, it is not surprising that as between the doctor and that of Simiyu, the Judge preferred the evidence of the doctor as more probable account of the events of the May 6, 2023.....”

41. It is trite law that where an employer alleges desertion against the affected employee, the employer must demonstrate to court with sufficient evidence that he or she made genuine efforts to trace the deserted employee, to ascertain why he or she was not reporting to duty and bring it to the attention of the employee the repercussions the continued absence would visit on him, if the is of the view that the absence is unjustified. In my view this insistence by the law is in accord with the current statutory protection and rights accorded to employees. It to a large extent checks arbitrary dismissals by employers, and keep them on track to exercise fair labour practices.

42. In the case of *Joseph Nzioka v Smart Logistics Ltd* [2017] eKLR Nduma J, held and I agree: -

“.....dismissal on account of absconding/desertion must be preceded by evidence showing that reasonable attempt was made to trace the employee concerned and that a show cause letter was issued to such an employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties.”

43. I have carefully considered the evidence of the appellant's witness before the lower court and hold that it did not demonstrate that the appellant made efforts to contact the respondent. All that the witness did was make hear assertions. If indeed there were any calls made by the respondent nothing could have been easier than to give the phone number[s] through which that happened and details of when.

44. By reason of the foregoing premises, just like the Learned magistrate, I am not persuaded that the separation did occur following the alleged absconding of duty by the respondent. I am however, of a clear view that he was dismissed from employment in the manner explained in his evidence.

45. Consequently, the learned trial magistrate did not err in finding that the claimant was dismissed from employment and that he did not desert duty as the appellant alleged.



### **If whether the termination was fair**

46. Having found as I have hereinabove that the claimant's employment was verbally terminated by the respondent's supervisor, I now turn to consider the fairness or otherwise of the termination.
47. Invited to render itself on fairness or otherwise of termination of an employee's employment, the court immediately gets enjoined to consider two statutory aspects, substantive fairness and procedural fairness. For a termination of employment to be considered fair, it must be demonstrated that; there was a reason for the termination (section 43 of the *Employment Act*), that the reason(s) was valid and fair (section 45(2) of the *Act*, and that there was due compliance with the edicts of procedural fairness (section 41 and 45(2) of the *Act*).
48. In the Court of Appeal case, *Kenfright [EA] Ltd v Benson K Nguti* [2016] eKLR the court held: -
- “it is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee's conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure...
- Apart from issuing a proper notice according to the contract (or payment in lieu of notice), an employer is duty bound to explain to an employee, in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract.
- In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is made.”
49. Hereinabove, I concluded that the appellant advanced the position that the respondent absconded his duty. In my view, in the context of section 43 of the *Act*, the reason for the termination could be desertion/absconding. Having found that the desertion was not proved, it is easy for me to conclude, as a result, that the appellant did not discharge its legal burden under section 43 and 45(2) mentioned hereinabove. The termination of his employment was not substantively unfair.
50. In the appellant's witness's evidence, not even the slightest effort can be seen to have been made to establish that there was an adherence to procedural fairness in the dismissal of the respondent employment. As was argued by the latter, the procedure contemplated under section 41 of the *Act* was not complied with. In conclusion, the termination was procedurally unfair.

### **Of the Reliefs**

51. The respondent's employment was terminated under section 35 of the *Employment Act* by a twenty-eight days' notice. Having found that he was verbally and summarily dismissed, therefore, without notice and that the dismissal was unfair, as did the learned magistrate, I have no reason to disturb the award of notice pay.
52. Section 49(1)(c) of the *Employment Act* bestows court with authority to grant an employee who has successfully assailed the decision of his or her employer to terminate his employment or summarily dismiss him or her from employment a compensatory relief. The maximum amount awardable is set by the provision as twelve (12) months' gross salary. However, it is pertinent to state that the authority is discretionarily exercised depending on the circumstances of each case.



53. Therefore, where a court decides to grant that figure or the other as compensation under section 49(1)(c), it must give the reasons for the award. The factors to be considered are set out under the provision. Other than just stating that the respondent served the appellant for seven years the learned trial magistrate did not give any other reasons. It was therefore wrong for counsel for the respondent to misleadingly in his submissions before this court, list other grounds besides this single ground that the learned trial magistrate considered and allege that they were considered, hence his decision to award the maximum award.
54. I have carefully considered, the nature of the respondent's profession, a truck driver, and the fact that he did not assert that he did not get employed elsewhere or was not likely to get employed after he was dismissed. I also consider that he had worked for the appellant for 7 years but hold that, that length of service cannot reasonably be a justification for grant of the maximum award contemplated under the stated provision.
55. I find the award excessive, one that was arrived at without consideration of all that the law required the learned trial magistrate to consider in the circumstances of the matter that was before him. As a result, this appeal shall partially succeed. I hereby set aside the learned trial magistrate's award of twelve (12) months' gross salary pursuant to the provisions of section 49(1)(c) of the Employment Act, and in place thereof, make an award of six (6) months gross salary, kshs. 248,588.
56. Each party to bear its own costs.

**READ, SIGNED AND DELIVERED THIS 17<sup>TH</sup> DAY OF DECEMBER 2024.**

**OCHARO KEBIRA**

**JUDGE**

In the presence of

Ms. Waithera for Mr. Mohammed for the Appellant.

Mr. Mokaya for Respondent

