



Rubis Energy PLC [Formerly Kenolkobil Limited] v Muli (Employment and Labour Relations Appeal E033 of 2022) [2023] KEELRC 3045 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 3045 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E033 OF 2022**

**AN MWAURE, J
NOVEMBER 24, 2023**

**BETWEEN
RUBIS ENERGY PLC [FORMERLY KENOLKOBIL LIMITED] APPELLANT
AND
JOSEPH NZIOKI MULI RESPONDENT**

(Being an Appeal from the Judgment and Orders of the Chief Magistrates Court at Milimani Law Courts, Hon. D.W. Mburu, Senior Principal Magistrate issued and/or delivered on 11th February 2022 in respect of the Claimant/Respondent's Statement of Claim dated 19th September 2018 as filed in CMEL Cause No. 294 of 2018 – Joseph Nzioki Muli -vs- Kenol Kobil Limited)

JUDGMENT

1. The Appellant filed this appeal vide an Amended Memorandum of Appeal dated 21st July 2023 which appeal being dissatisfied with the judgment of the Hon. D.W. Mburu delivered on 11th February 2022 on the grounds that:
 1. the learned trial magistrate erred in fact and law by failing to evaluate and consider the Appellant's pleadings and tendered evidence.
 2. the learned trial magistrate erred in fact and law by failing to evaluate and consider the Appellant's written submissions.
 3. the learned trial magistrate erred in fact and law by determining that the Respondent's termination was unfair and unlawful.
 4. the learned trial magistrate erred in fact and law by failing to evaluate and consider the Appellant's counterclaim with costs.



5. the learned trial magistrate erred in fact and law by determining that the Appellant had not demonstrated that it had extended a car loan to the Respondent.
 6. The learned trial magistrate erred in fact and law by determining that the Appellant had not established that the sum of Kshs 1,641,505/- plus interest calculated at commercial interest, was outstanding in respect of the car loan extended to the Respondent.
 7. the learned trial magistrate erred in fact and law by determining that the Respondent did not owe the Appellant an outstanding car loan in the sum of Kshs 1,641,505/- plus interest calculated at commercial interest rate.
 8. the learned trial magistrate erred in fact and law by determining that the Appellant had not shown the efforts it had taken to recover the car loan.
 9. the learned trial magistrate erred in fact and law by determining that the Appellant should release, to the Respondent herein, the logbook to Motor Vehicle Registration Number KCH 601A.
 10. the learned trial magistrate erred in fact and law by determining that the Appellant should pay costs of the suit.
2. The Appellant prayed for orders that: -
- a. The Appeal be allowed with costs to the Appellant.
 - b. The judgment delivered on 11/02/2022 be set aside; and
 - c. The Appellant's counter claim be allowed with costs.

Appellant's Submissions

3. The Appellant submitted that it is not disputed that the Respondent applied for a loan facility to purchase a motor vehicle, however, since the separation of the parties in June 2018, the Respondent has failed to finance the loan without any justification. The Respondent has made no effort to pay the loan balance of Kshs 1,641,505 and it continues to accrue an annual interest at 15% per annum.
4. The Appellant submitted that in instances where an employer has issued an employee with a car loan and the employment relationship between the two is severed, this court has found that such employee ought to pay the employer any outstanding amounts payable. The Appellant relied on *George Otiemo Rambo v Nation Media Group Limited* [2021] eKLR in which Hon. Justice Kebira Ocharo held: -

“The Claimant admitted that at the time of termination of the employment, he had not fully liquidated the car loan. The Respondent's claim to this extent is admitted. The reasons given as to why the Claimant thinks he should not pay this balance is unconvincing and make little sense. To accede to the line of thinking, would be tantamount to take it that there is a right to employment for life. Consequently, I award the Respondent Kshs.1,040,625.00 being the balance of the car loan.”
5. The Appellant submitted that it is immaterial that the car is registered in the Respondent's name and not the Appellant's as the fact that it financed the purchase of the vehicle under a car loan facility creates a beneficial interest over the vehicle in favour of the Appellant until the loan is fully paid. It relied in the Court of Appeal case, *Jared Magwaro Bundi & another v Primarosa Flowers Limited* [2018] eKLR.



6. The Appellant submitted that were it to release the original logbook of the vehicle as ordered by the learned trial magistrate, it risks losing Kshs 1,641,505 together with accrued interest at its prejudice.
7. The Appellant submitted that the Respondent absconded duty without probable cause on 22/06/2018 and after days of absence, the Appellant was forced to summarily dismiss the Respondent for desertion offence and therefore the termination was substantively sound.

Respondent's Submissions

8. The Respondent submitted that reasons for his termination given by the Appellant were mere fabrications that did not exist at the time of termination. That when an employer alleges absconding as a ground for summary dismissal, he needs to show the efforts put in place to try and trace the employee as echoed in *Wilson Kibande Abai vs Kenya Tents Limited* [2019] eKLR.
9. The Respondent submitted that the Appellant did not make any attempts to uphold the procedure laid before terminating his employment and the Appellant merely demanded that he resigns and prepared the summary dismissal letter dated 27/6/2018 as an afterthought. No hearing, investigations and/or inquiries were ever conducted.
10. The Respondent submitted that his termination was unfair as the reason for termination was invalid and unfair as highlighted by section 45 of the *Employment Act*.
11. The Respondent submitted that during the life of his employment, he qualified to be part of the Appellant's car benefit scheme, which was given to a few deserving hardworking employees. That the Respondent was issued a vehicle registration number KCH 601A, registered in his name and no monthly deductions were made in relation to his salary as confirmed by the Appellant's witness.
12. The Respondent submitted that in the event an employee wished to take up a car loan with the Appellant, the business car purchase policy guideline provides that the employee needed to satisfy the following conditions:
 - a. Car was to be jointly registered in the name of the company and loan recipient
 - b. The loan recipient shall complete and execute a car loan agreement, a chattel mortgage and one blank transfer form.
13. During cross examination, the Appellant's witness confirmed that the aforesaid conditions were never carried out in relation to the Respondent to justify that it to fall under a car loan. Further, the car was registered in the Respondent's name and a chattels mortgage was never executed by the parties.
14. The Respondent submitted that in the unlikely event that the benefit was a car loan, the Appellant ought to have specifically pleaded it and proven the amount due. The car loan data reveals as of June 2018, the outstanding loan stood at Kshs 1,289,046 in contrast to the Appellant's claim of Kshs 1,641,505 in its counter claim.
15. The Respondent submitted that amount pleaded by the Appellant in the counter claim is speculative and cannot be granted by this honourable court as held in *Richard Muriuki Wabeire v Kenya Power & Lighting* [2021] eKLR:

“In short, the court could not award the appellant what he had not incurred; what was pleaded as special damages were, largely, speculative. In the ultimate, the appellant did not prove his case on a balance of probabilities; it follows, therefore, that this appeal has no merits and it is hereby dismissed with costs.”



Analysis and Determination

16. The first issue before this court is whether the trial court erred in fact and law by determining that the Respondent's termination was unfair and unlawful.
17. The Appellant submitted that the Respondent was not traceable after absconding duty therefore the Appellant was not allowed an opportunity to undertake the requisite procedure of issuing notice to show cause and/or conducting disciplinary hearing.
18. The trial court pronounced itself as follows on this issue:

“In the instant claim, the Respondent stated that it did not know the whereabouts of the Claimant. However, it has not shown what measures it used or how it tried to reach and/or communicate with the Claimant before concluding that his whereabouts were completely untraceable to it. In the absence of any such evidence showing that the Respondent tried to reach out but was unable to, the Respondent fail to dispense the onus placed on it when alleging that the Claimant absconded duty.”
19. In [*Julius Kyalo Malonza v Ruth Osolo t/a Eraeva Catering Services*](#) [2021] eKLR, the court observed:

“The Court has been consistent on the duty of an employer who relies on desertion or absconding duty as a defence to the Claimant's case.

In the words of Nzioki Wa Makau J. in *Boniface Francis Mwangi v B.O.M. Iyego Secondary School* [2019] eKLR

“It is good practice for an employer to take the initiative of contacting the employee where an employee absconds work and find out the reason for the failure to present themselves for work.”

According to Abuodha J. in [*Simon Mbitshi Mbane v Inter Security Services Ltd*](#) [2018] eKLR

“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 [*Joseph Nzioka v Smart Coatings Limited*](#) [2017] eKLR Nduma J. observed that

“Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employer concerned and that a 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.”
20. The Appellant has not shown this court that it made any attempt to contact the Respondent or served him with a show cause letter to explain the reasons for his absenteeism and why he should not be terminated.
21. Therefore, this court agrees with the trial court's decision that the Respondent's termination was unfair and/or unlawful for failure to demonstrate efforts made to trace the employee and warning him that the abscondment was likely to lead to disciplinary action. That is the trite law in matters of desertion of duty.



22. The second issue for determination is whether the trial magistrate erred in ordering the Appellant releases the original logbook of the motor vehicle to the Respondent without the Respondent clearing his outstanding loan.
23. The Respondent submitted that the car was a product of the Appellant's car benefit scheme given to deserving hardworking employees. Further, it did not qualify as a car loan as it did not satisfy the conditions of a car loan set out in the Appellant's business car purchase policy guide that requires such a car be registered jointly in the name of the company and recipient and the recipient executes a car loan agreement, chattel mortgage and blank transfer form.
24. The trial court observed and held as follows:
- “It is pertinent to note that neither party produced either a payslip or bank statement showing the salary being remitted to the Claimant. This would have helped in determining whether deductions were being made from the Claimant's salary to service the said loan. The Claimant denied that this was the case and the Respondent did not tender documentary evidence to show the same was being deducted.
- Further the Respondent herein has not shown any effort it undertook to try and recover the said loan from the Claimant during the term of employment.
- I find the subsistence of the said loan have not been proved as the terms governing the same was produced and there was also no proof of deductions being made to service the same.”
25. The Appellant submitted that the onus of proving that the Respondent was paying his loan fell on the Respondent. However, in *Matsesho v Newton* (Cause 9 of 2019) [2022] KEELRC 1554 (KLR) (29 July 2022) (Judgment) the court observed:
- “Again, under *section 112 of the Evidence Act*, the employer being the ultimate custodian of records of payments of staff emoluments should ordinarily be able to provide evidence to establish payment of any emolument to an employee in the event of a dispute about such payment. This is because by virtue of his control of employment records in terms of *section 10(6) of the Employment Act*, the employer has, under *section 112 of the Evidence Act*, special knowledge of such facts.”
26. The court however noted clearly that the respondent applied for a car loan of Kshs 1,800,000 to purchase a toyota fielder 1490 cc. The same was being sold by World Automobile Ltd. The claimant signed the application form on 1st September 2006 and his supervisor signed the same as well as department manager and human resource manager and group manager. There was a loan agreement.
27. Thereafter after due diligence was done including providing AA assessment report the respondent proceeded to release the payment vide two cheques of kshs 950,000 dated 8th September 2016 and kshs 850,000/- of the same date to World Automobile (K) Ltd.
28. The car would appear was registered in the respondent's name but the log book was held by the appellant.



29. The respondent admits he continued to pay for the car as per his admission in his memorandum of claim paragraph 6 where he says:-
- “the claimant proceeded to take the car loan scheme and purchased his vehicle registration number KCH 801A whereas the same was amortized every month from the claimant’s salary”
30. From his admission the claimants had taken a loan and he would pay for it till his termination.
31. Similarly, the appellant in his response to the claim admitted they amortized kshs 899,262 for the car loan from 11th August 2018.
32. The respondent states total to be paid for the car was kshs 2,569,312 but there is no explanation why the same changed from kshs 1,800,000 to 2,569,312/-. This figure is not supported in anyway. The correct figure owed by the claimants going by the admission of the appellant is kshs 900,738/-.
33. The court is satisfied the respondent therefore had been given a loan to buy a vehicle and the outstanding amount is kshs 900,738.
34. The reliefs granted by the trial magistrate however are merited as follows and are upheld by this court:
- a. 4 months compensation at kshs 280,000/-
 - b. Unpaid leave of shs 115,500/-
 - c. One month pay *in lieu* of notice 70,000/-
 - d. Salary for the 21 days worked in June 2018 kshs 49,000/-
 - e. Total award to the appellant is kshs 514,500/- plus interest at court rates from date of judgment till full payment.
35. Costs will also be awarded to the respondent as he was unfairly and unprocedurally terminated.
36. The respondent will be entitled to receive his log book upon settling the balance of loan of kshs 900,000/-.
- 37' Costs of the lower court will still be awarded to the respondent.
- Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 24TH DAY OF NOVEMBER, 2023.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing

or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution



and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

