**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MALINDI**

**ELRC APPEAL NO E001 OF 2021**

**MILANO ELECTRONICS LIMITED.....APPELLANT**

**VERSUS**

**DICKSON NYASI MUHASO.....RESPONDENT**

**(Being an appeal from the judgment of Honourable D Wasike, SRM**

**dated 15th day of January 2021 in Malindi CMELRC No. 37 of 2019)**

**BETWEEN**

**DICKSON NYASI MUHASO.....CLAIMANT**

**VERSUS**

**MILANO ELECTRONICS LIMITED.....RESPONDENT**

**JUDGMENT**

1. This appeal arises from the decision of the Principal Magistrate in Malindi CMELRC No 37 of 2019. The decision was rendered on 15th January 2021.

2. In the Claim before the trial court, the current Respondent had sued the current Appellant for wrongful termination. The court found in favour of the current Respondent and ordered compensation as appears from the impugned judgment.

3. Aggrieved by the decision, the Appellant instituted this appeal. The appeal was instituted on 28th January 2021.

4. The appeal raises seven (7) grounds of appeal. However and as rightly pointed out by counsel for the Appellant, the grounds can be condensed into fewer but broad grounds. I consider the broad grounds to be as follows: -

> ***a) The trial magistrate erred in law and fact in failing to hold that the Respondent had failed to prove his claim in terms of the dictates of section 107 of the Law of Evidence Act.***
>
> ***b) The learned trial magistrate erred in law and fact in accepting the uncorroborated evidence of the Respondent to arrive at the impugned decision.***
>
> ***c) The learned trial magistrate erred in law and fact in failing to take into account the Appellant's evidence that the Respondent had absconded duty thereby arriving at an erroneous decision that the Respondent had been unlawfully terminated.***
>
> ***d) The learned trial magistrate erred in law and fact in making an award of damages in favour of the Respondent notwithstanding that the Claim had not been proved.***

5. Although the foresaid characterization does not necessarily agree word for word with that proposed by the Appellant, there is nevertheless no material difference in the two sets of condensed grounds of appeal. I will therefore analyze this appeal on the basis of the foregoing characterization.

6. I am alive to the fact that this is the first appeal in the cause. Therefore, and as rightly pointed out by both counsel, the court is called upon

to re-evaluate all the material on record and arrive at its own conclusions on the disputed facts. However, I am also aware that I must keep in mind the fact that I did not have the opportunity of assessing the demeanor of the witnesses as did the trial magistrate. Thus, I should be reluctant to upset the trial court's decision that turns on assessment of the credibility of witnesses unless there are compelling grounds to do so (see ***Top Tank Company Limited v Amos Ondiek Wandaye [2018] eKLR***).

7. The brief facts of the matter are that the Respondent was employed by the Appellant as a technician. On 17th November 2018, the Appellant sent the Respondent to Mambrui to resolve some problem which one of the Appellant's customers was experiencing. While there, the Respondent received a telephone call from Mrs. Rakesh, the wife to one of the Appellant's directors. This is said to have been around 1pm. The purpose of the telephone call was to require the Respondent to proceed to Kibokoni to fix yet another technical problem facing another client of the Appellant.

8. The Respondent testified that as he had not been done with the assignment at Mambrui, he did not proceed to Kibokoni by close of business on 17th November 2018. He stated that he could not visit the site at Kibokoni the following day as it was a Sunday,

9. The Respondent stated that he was asked by Mrs. Rakesh to ensure that the two assignments (Mambrui and Kibokoni) were accomplished on the 17th November 2018. That Mrs. Rakesh warned him not to report on duty if he did not accomplish the tasks aforesaid. As the Respondent had not managed to accomplish the tasks of 17th November 2018, he kept off work on 19th November 2018 in line with the direction by Mrs. Rakesh.

10. The Respondent further stated that when he went to the Appellant's workplace on 20th November 2018, he met the Appellant's director who sent him away. It is at this point that the Respondent reported the dispute to the local laour office.

11. The Appellant's sole witness, Mr. Rakesh (hereafter referred to as RW1) denied that the Appellant terminated the Respondent's contract of employment. It was his evidence that it was the Respondent who had absconded duty.

12. RW1 stated that when the Respondent did not report on duty on 19th November 2018, RW1 called him to inquire why he had not reported to work. It is at this point that the Respondent said he did not come to work because he had been asked not to report on duty if he did not accomplish the two assignments on 17th November 2018.

13. RW1 stated that the Respondent came to the workstation the next day (20th November 2018) round 10.00 a.m. When asked whether he was now ready to work, the Respondent is said to have made some hand gestures which RW1 construed to be rude before leaving.

14. In cross examination, RW1 confirmed that indeed his wife had called the Respondent on 17th November 2018 about the assignment at Kibokoni. He further confirmed that the Respondent was not expected to go to work the following day (18th November 2018) which was a Sunday.

15. RW1 stated that the Respondent had been assigned work which he failed to attend to. However, the Appellant did not take any disciplinary action against him as the Respondent left before this could be done.

16. It is noteworthy that both the Respondent and RW1 are in agreement that it is RW1's wife who called the Respondent on 17th November 2018 about the Kibokoni assignment. However, she was not called to testify in the cause. Yet, it is her whom the Respondent states directed him not to report to work if he did not clear the two assignments on 17th November 2018.

17. In my view, the evidence of this witness was critical to rebut the Respondent's position that he was asked to stay away from work if he did not accomplish the assignments of 17th November 2018. In the absence of this evidence, the evidence by the Respondent that he had, by these directions by RW1's wife and the subsequent directions of RW1, been unfairly terminated, remains uncontroverted. I shall come back to this issue later on in this judgment.

18. The trial magistrate believed the Respondent's version of events that led to the separation of the parties herein. This is notwithstanding the contrary position presented by the Appellant.

19. In my view, the fact that the Respondent asserted that he was on 17th November 2018 warned not to report to work if he did not finish the assignments of the day and that he was on 20th November 2018 asked to go away by RW1 and the fact that RW1 said that the Respondent absconded duty presents a scenario of a conflict in primary facts in the dispute. In such a case, the trial court is called upon to exercise its discretion to believe one of the parties. This discretion is of course to be exercised judiciously. It must be guided by a number of factors including the demeanor and credibility of the parties and their witnesses.

20. Where a trial court has been engaged in this exercise particularly in a matter where there was conflict in the primary evidence, the law is that an appellate court should not interfere with the trial court's discretion in this respect unless there are compelling reasons to do so. This is a position that has been expressed in a number of decisions.

21. Restating this principle the court in ***Erastus Onyango v Manoa Malenya [2015] eKLR*** said as follows: -

> ***'' an appellate Court will hardly interfere with the conclusion made by a trial Court after weighing the credibility of the witnesses in cases where there is a conflict of primary facts between witnesses and where the credibility of the witnesses is crucial.''***

22. In ***Ndiema Samburi Soti v Elvis Kimtai Chepkeses [2010] eKLR*** the Court of Appeal said as follows on the issue:-

> ***'' Moreover where there is a conflict of primary facts between witnesses and where the credibility of the witnesses is crucial the appellate court will hardly interfere with a conclusion made by the trial judge after weighing the credibility of witnesses. […….] The court will however interfere when the findings of fact are based on no evidence or on a misapprehension of evidence or where it is shown that a trial judge has acted on wrong principles in arriving at the finding in issue''***

23. In this case, the trial court considered the two opposing positions by the parties. The court observed that whilst the Appellant asserted that it never sacked the Respondent, it at the same time did not suggest that the position of the Respondent was still available. On the contrary, it was only willing to pay him for the seventeen (17) days he had worked in November 2018. Having regard to this, the court was of the view that the evidence on record pointed more to the fact of the Appellant having terminated the Respondent.

24. This was a decision informed by the trial court's analysis of the conflicting evidence on the issue. It has not been demonstrated that the decision was based on no evidence or that the court acted on the wrong principles of law in reaching this conclusion. In any event, the Appellant has not made any submissions to suggest that this is its case. In the premises, I am inclined not to interfere with the trial court's decision on this ground.

25. Going back to the issue in paragraph 17 of this judgment, one may ask what was the effect of failing to controvert the Respondent's evidence that RW1's wife asked him not to report on duty if he did not accomplish the assignments of 17th November 2018. That RW1's wife had some role in the running of the Appellant's affairs appears not contested by either of the parties. At the very least, she acted as an agent of RW1, one of the directors of the Appellant. I say this because RW1 readily admitted that his wife indeed called the Respondent and gave him instructions on the Kibokoni assignment.

26. The Respondent said that he did not report on duty on 19th November 2018 as he had been asked not to do so by RW1's wife. That on 20th November 2018 RW1 asked him to go away. This latter action by RW1to my mind was only ratifying the communication of 17th November 2018 by RW1's wife. Prima facie, the Appellant's position was that the failure to conclude the assignment of 17th November 2018 would disentitle the Respondent to continue working.

27. What is the effect of this in view of the provisions of sections 43, 45 and 47 of the Employment Act? These sections place the burden of justifying a termination on the employer. All that the law requires of an employee is to provide prima facie evidence of a wrongful termination. Once this is done, it is for the employer to provide evidence to demonstrate that the separation was lawful. To this extent, the Employment Act has reversed the concept of burden of proof as encapsulated in section 107 of the Evidence Act so as to adopt the reverse burden of proof.

28. Addressing this issue, the court in ***Peter Otabong Ekisa v County Government of Busia [2017] eKLR*** had this to say:-

> ***''The standard of proof is set out under Section 47(5) of the Act. In terms thereof, the employee shall adduce prima facie evidence that there was no valid reason to dismiss him from employment and once that is done the employer bears the burden of justifying the dismissal. In other words the respondent bears the evidential burden of rebuttal. If the employer is unable to rebut the evidence by the claimant, then the employee is said to have proven that there was no valid reason to dismiss him on a balance of probabilities.''***

29. In my view, the effect of the uncontroverted evidence by the Respondent: that RW1's wife asked him not to report on duty if he did not clear the two assignments of 17th November 2018; that the time left on 17th November 2018 when the Respondent was asked to proceed to Kibokoni for the 2nd assignment was not sufficient to allow him to complete the two assignments on that day; that the Respondent in reaction to RW1's wife's directions failed to report on duty on 19th November 2018 as he had not been able to clear the two assignments of 17th November 2018 present prima facie evidence of severance of the contract of service between the Appellant and the Respondent on account of demands by the Appellant that could not reasonably be met by the Respondent within the timelines he had on the material day.

30. This evidence established a prima facie case for unfair termination within the meaning of section 43 of the Employment Act. The burden of proof shifted onto the Appellant to justify the termination. That the Appellant elected to offer a flat denial of the alleged termination by pleading abandonment of the contract by the Respondent through absconding duty did not discharge the burden of proof placed on it by sections 43 and 47 of the Employment Act.

31. Indeed, my view is that the Appellant had an obligation, if it believed that the Respondent had absconded duty, to lawfully bring the contract of service to closure by invoking the provisions of section 44 of the Employment Act. The section permits an employer to terminate an employee who has absconded duty on ground of gross misconduct.

32. The law as currently designed does not appear to contemplate closure of employment contracts through unilateral abandonment of the parties' obligations under a contract of service. The contract can only be brought to closure as a result of the eventualities contemplated in sections 40 and 41 of the Employment Act (redundancy, incompetence, physical incapacity or gross misconduct) or through resignation or mutual agreement with or without notice under sections 35 and 36 of the Act or upon the insolvency of the employer under section 66 and 67 of the Act.

33. Desertion being a unilateral act of abandonment of the contract cannot operate to bring a contract of service to closure until the employer acts on it. In ***James Okeyo v Maskant Flower Limited [2015] eKLR*** the court observed as follows:-

> ***''……. the employee who deserts employment does not dismiss himself, so to speak. The decision to formally end the***

***employment relationship should come from the innocent party.''***

34. The Appellant was therefore obligated to invoke the provisions of section 44 to bring the relationship to closure. The trial magistrate in my view rightly relied on the case of ***Godfrey Anjere v Unique Suppliers Limited [2015] eKLR*** where the court said in cases where an employee is alleged to have deserted duty, it was necessary for the employer to show that it had taken steps to indicate to him that his employment could be terminated for unauthorized absenteeism. It was not open to the Appellant to simply say that the Respondent had abandoned work as a basis of justifying the separation. The court expressed itself in the following way on the issue:-

> ***''In a dismissal on account of absconding duties, the employer is required to show what steps it took to inform the employee that his or her dismissal would result if they did not report back to work. This is necessary to avoid any injustice to an employee who may be away from work for lawful or reasonable excuse such as illness or circumstances beyond their control and yet unable to communicate to the employer in good time.''***

35. George Ogembo in his publication titled ***''Employment Law Guide to Employers, 2016''*** offers further useful insights on how to handle an employee who is alleged to have absconded duty. He says thus: -

> ***''The fact that the employee has absconded work or has advanced unsatisfactory explanation [ for his absence] does not waive his right to be availed the fair process or procedure before termination of his contract of employment. The employer must make several attempts to inform the employee of his intention to terminate his service and invite the employee to a disciplinary hearing.''***

36. There is no evidence that the Appellant sought to bring the contract to closure in the manner suggested above. On the contrary, RW1 confirmed in cross examination that the Appellant did not summon the Respondent for a disciplinary action. This coupled with the uncontroverted evidence by the Respondent that RW1's wife asked him not to report to work, in my view points to unfair termination of the Respondent by the Appellant.

37. I therefore think that the trial magistrate properly held that the Respondent had established that he had been unfairly terminated to the required standard of law. Consequently, the ground that the trial magistrate failed to consider the effect of section 107 of the Evidence Act in relation to the burden of proof in the matter is respectfully not well founded.

38. The second issue in the appeal is whether the trial court was obligated to reject the evidence of the Respondent for want of corroboration. My understanding of the law on corroboration is that the duty to provide corroborative evidence arises either as a matter of law or as a matter of fact. Only in instances where it is called for by law is corroboration mandatory. Where it arises as a matter of fact, there is no obligation for evidence to be corroborated.

39. In the current case, there is no rule cited by the Appellant to back its contention that the Respondent's evidence required corroboration. At best, if there was such need, it would only have arisen as a matter of fact. And the trial magistrate had the discretion to determine the need for such additional or supportive evidence. In the absence of evidence that corroboration of the Respondent's evidence was required as a matter of law and in the absence of evidence that the trial court improperly exercised its discretion not to require corroboration of this testimony, I decline to reverse the trial court's decision on this ground.

40. The third broad ground of appeal contends that the learned trial magistrate erred in law and fact in failing to take into account the Appellant's evidence that the Respondent had absconded duty thereby arriving at an erroneous decision that the Respondent had been unlawfully terminated. I have already addressed the issue of absconding duty in the earlier part of this decision.

41. Suffice it to say that in my view, the trial court correctly observed that even though the Appellant pleaded abandonment of the contract of service by the Respondent through his acts of absconding duty, analysis of the available evidence pointed to a termination of the contract by the Appellant. The court analyzed judicial precedent indicating that an employer faced with a scenario of an employee who absconds duty needed to do more than merely plead absenteeism to bring the contract to closure. And that the Appellant had not done so in the current case. I will therefore decline this ground of appeal.

42. The final ground challenges the learned trial magistrate's decision to award the Respondent damages for wrongful termination notwithstanding that the claim had not been proved. As I have demonstrated above, I am of the view that the Respondent's claim was satisfactorily proved. Accordingly, the award of damages by the trial court was proper. Section 49 of the Employment Act as read with section 50 thereof grants the court powers to award various reliefs in the event of unfair termination. And this is what the court did in the current case. I therefore decline this ground.

**Conclusion**

43. In the final analysis, I find that the appeal has no merit. I dismiss it with costs to the Respondent.

**DATED, SIGNED AND DELIVERED ON THE 6TH DAY OF DECEMBER, 2021**

**B O M MANANI**

**JUDGE**

In the presence of:

Atiang for the Appellants

No appearance for the Respondent

**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 April 2020, this judgment has been delivered to the parties online with their consent, the parties 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.**

**B. O. M. MANANI**

**JUDGE**