



**Broadways Logistics Limited v Abdulkadir (Appeal E266 of 2024)  
[2025] KEELRC 2567 (KLR) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2567 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E266 OF 2024  
M MBARÚ, J  
SEPTEMBER 25, 2025**

**BETWEEN**

**BROADWAYS LOGISTICS LIMITED ..... APPELLANT**

**AND**

**ZUBERI HABIB ABDULKADIR ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. Nabibya delivered  
on 27 November 2023 in Mombasa CMELRC No. E184 of 2021)*

**JUDGMENT**

1. The appeal arises from the judgment delivered on 27 November 2023 in Mombasa CMELRC No. E184 of 2021. The appellant is seeking that the judgment be set aside and the matter be remitted to the trial court for hearing and determination by another trial magistrate other than Hon. Nabibya.
2. The grounds of appeal are that;
  1. The learned magistrate erred in law and fact in finding that the respondent's services with the appellant were terminated unfairly.
  2. The learned magistrate erred in law and fact in failing to find that indeed it is the claimant [respondent] who, being paid his salary for the month of November 2020, abandoned his assigned trailer truck registration No. KCB 599Y / ZE 5349 was unattended at a parking yard and thereafter refused to communicate with the appellant in any manner, only to make a claim for unfair termination of his services.
  3. The learned magistrate erred in law and fact in failing to make a determination on the appellant's counterclaim for the sum of Ksh. 300,000 by either allowing or dismissing the same.
  4. The learned magistrate erred in law and fact in failing to find that the respondent's terms and conditions of employment were mutually agreed in a written letter of appointment.



5. The learned magistrate erred in law and fact in failing to consider the evidence adduced by the appellant in its entirety.
6. The judgment goes against the material and the evidence that was placed before the court.
3. The background of the appeal is a claim filed by the respondent before the trial court.
4. The claim was that the respondent was employed on 11 March 2020 as a heavy commercial driver earning Ksh. 25,000 per month. This was an underpayment in contravention of the Minimum Wage Orders, 2018, which provided for Ksh. 30,627.45 per month. He claimed that he worked until 7 December 2020, when he was sent home and instructed not to report to work because the motor vehicle No. KCB 599Y, assigned to him, needed urgent repairs. The respondent left for home expecting to be recalled once the vehicle was repaired. This resulted in unfair termination of employment without notice or payment of terminal dues. He claimed the following:
  - a. Notice pay Ksh.30,627.45;
  - b. House allowance for 8 months Ksh. 36,752.94;
  - c. Pay for 7 days in December 2020 ksh.10,474.50;
  - d. Overtime pay of 4 hours for 8 months Ksh.247,251.20;
  - e. Rest days for 8 months Ksh.94,368;
  - f. Underpayments for 8 months Ksh.94,368.60;
  - g. 8 months compensation Ksh.245,019.69
  - h. Costs.
5. In response, the applicant submitted a reply and counterclaim.
6. The response was that the respondent was employed as a heavy commercial driver earning Ksh. 25,000 per month. In November 2020, he was assigned truck registration No. KCB 599Y /ZE 5349 from Mombasa port to DRC Congo, and the consignee of the said container was Vodacom R. The respondent returned from DRC but never submitted the delivery orders required for onward transmission to the shipper as evidence of delivery, so that the balance of Ksh. 300,000 could be paid. When Chiwai Katana asked about the delivery, the respondent indicated that he had forgotten it at Busia border point and was to ensure personal submission within a week. He kept giving excuses and contradictory excuses regarding the delivery order, which led to a reprimand stating that if there were no submissions, he would pay Ksh. 300,000 from his salary. After receiving his November 2020 salary, he left the assigned vehicle unattended at the Port-Reitz yard and then refused to answer calls from the manager. The appellant suffered a loss of Ksh. 300,000, which could not be paid for due to the lack of a delivery order. On 10 December 2020, the appellant held a board meeting regarding the respondent and decided to issue a summary dismissal notice. The claims for notice pay are not justified since he abandoned work. House allowance was inclusive of the wage paid. Wages for December 2020 are not due for work not done. Alleged overtime did not accrue. Rest days did not accrue since the respondent would take up to 7 days waiting for cargo loading. For abandoning work, no compensation should be paid.
7. The court claimed that the appellant lost Ksh. 300,000 due to the conduct of the respondent and his failure and refusal to submit the divorce order. Despite the demand and notice for consent being issued, he refused to submit the necessary documents. The appellant claimed for;



- a. Loss of income due to the gross misconduct of the respondent;
  - b. Interests on the loss of Ksh. 300,000;
  - c. Costs.
8. In reply to the counterclaim, the respondent asserted that on 4 December 2020, he returned to Mombasa and submitted the delivery order for motor vehicle No. KCB 559Y together with the container interchange to the appellant's messenger, Ben, at the Changamwe yard. Had he not done so, his November 2020 salary would not have been paid on 7 December 2020 via Mpesa on his phone No. 07017----1 by one Chai Katana. The practice was to hand over all original documents in exchange for payment of the salary.
  9. The learned magistrate heard the parties and, in judgment, held that there was unfair termination of employment and hence awarded as follows;
    - a. Notice pay ksh.30,627.45;
    - b. Underpayments for 8 months Ksh.45,019.60;
    - c. House allowance for 8 months Ksh.36,752;
    - d. 7 days worked in December 2020 ksh.10,475;
    - e. 5 months' compensation Ksh. 153,135.
  10. The counterclaim was not gone into.
  11. The appellant submitted that the respondent was its employee, serving as a commercial truck driver until 7th December 2020, when the employment relationship came to an end. Consequently, the respondent thereafter filed ELRC Cause No. E184 of 2021, Zuberi Habib Abdulkadir v Broadways Logistics Limited, in which the appellant filed a response and a counterclaim. The respondent then filed a reply, and both parties proceeded to file their submissions. The trial court delivered judgment in the said case. Aggrieved by the decision, the appellant lodged this appeal.
  12. The appellant argued that the trial court's failure to determine the appellant's counterclaim of Kshs. 300,000, which had been pleaded and acknowledged in the proceedings, rendered the judgment incomplete and unreliable.
  13. The appellant relied on Order 21 Rule 4 of the Civil Procedure Rules, 2010, which requires judgments in defended suits to address all issues raised. Failure to do so renders the judgment void. In support, the appellant cited the case of David Mureithi Kanyi v Irene Maina and Rahab Nyanjau Kariuki, where Justice Kibunja held that, since the trial court did not address itself to the question of jurisdiction that was apparent in the statement of defence and notice of preliminary objection filed, it would only be fair that the suit be remitted back for fresh hearing before another magistrate.
  14. The appellant further submitted that the respondent was awarded Kshs. 276,007.05. However, had the counterclaim of Kshs. 300,000 has been determined and allowed; the respondent would instead owe money to the appellant. This demonstrates the prejudice caused by the trial court's failure to address the counterclaim.
  15. In addition, the appellant contends that the trial court erred in its findings, which were against the weight of the evidence. The evidence given by Rodgers Chiwai Katana, Jaffer Mohamed, and Nassor Mohamed confirmed that the respondent abandoned the appellant's truck after receiving his salary for November 2020, forcing the appellant to send Nassor Mohamed to look for the respondent. On this



basis, the appellant argues that the respondent failed to prove his claim on a balance of probabilities as required under Sections 107 and 108 of the *Evidence Act*.

16. The appellant emphasised that Sections 41, 43, 45, and 47 of the *Employment Act* do not impose liability on employers in cases where an employee's actions amount to stubbornness, arrogance, and irrational behaviour. The respondent's behaviour on the material day showed such behaviour.
17. In the circumstances, the appellant urged that the appeal be allowed with costs. Furthermore, due to the trial court's failure to determine the counterclaim, the matter should be remitted for a fresh hearing before another magistrate.
18. The respondent opposed the appeal and maintained that the trial court had correctly found his termination to be unfair. He argued that the appellant alleged desertion of duty and misconduct but failed to issue a notice to show cause or comply with Section 41 of the *Employment Act*. The appellant then summarily dismissed the respondent from employment at its special board meeting held on 10 December 2020, with one of the resolutions being that the respondent had failed to attend a meeting scheduled for 2 December 2020. However, the appellant did not produce any invitation addressed to the respondent. Further, the respondent was never issued a written notice of dismissal.
19. The respondent further submitted that he arrived back in Mombasa on Friday, 4 December 2020, and on Monday, 7 December 2020, he was summoned to the office and sent home in the guise that his truck required urgent repairs. He stated that his M-Pesa statement showed a transaction of KShs 25,000, which was the respondent's salary for November 2020, that would not have been paid to him by the appellant had he not submitted all the requisite documents. This indicates that there was no desertion of duty or misconduct on the part of the respondent for failing to submit a delivery note upon his return to Mombasa.
20. On the counterclaim, the respondent argued that it was misguided and lacked documentary proof, which is why the trial court rightly disregarded it. He urged the appellate court not to remit the matter for retrial, noting Section 78 of the *Civil Procedure Act*. Sending the case back would only delay justice, mainly since the termination occurred in December 2020.
21. In conclusion, the respondent submitted that the judgment of the lower court be upheld, the counterclaim dismissed, and the appeal dismissed with costs.

### **Determination**

22. Appreciating that this is a first appeal, the court must re-evaluate and reconsider the evidence on record afresh and arrive at its conclusions and determination bearing in mind that it neither saw nor heard the witnesses, as succinctly captured by the Court of Appeal in *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR as follows:
23. An appeal to this court from a trial ... is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider 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.
24. The respondent's case before the trial court was that on 7 December 2020, his supervisor sent him home to allow for repairs of his vehicle. He was not recalled back and he claimed there was unfair termination of employment.
25. The appellant's case is that the respondent abandoned his employment after being directed to submit delivery orders upon return from the DRC Congo, where he had delivered cargo to Vodacom R.



- He refused to submit the necessary records, leading to non-payment by the shipper the sum of Ksh. 300,000, which was counterclaimed.
26. The records filed by the appellant to support its response and counterclaim before the trial court were;
    - Letter from Vodacom requesting a delivery order.
    - Minutes of 10 December 2020 leading to the respondent's summary dismissal.
    - Discharge voucher dated 4 December 2020.
  27. The response file, the letter of appointment dated 11 March 2020, the M-Pesa statement for March to December 2020, and the letter of authority to enter the port.
  28. There is no contestation that the appellant employed the respondent as a Truck Driver and was allocated KCB 559Y at a monthly wage of Ksh. 25,000.
  29. An employer who asserts that an employee has abandoned work and cannot be traced is under a duty to demonstrate that efforts were made to locate the employee without success. Mere assertions that there were calls to the employee without success, without any evidence, are insufficient.
  30. Abandonment of work without good cause is defined as gross misconduct under the *Employment Act* (the Act). For such gross misconduct, the employer is entitled to the sanction of summary dismissal, provided that adherence to Section 41(2) of the Act is ensured.
  31. In the case of *Njoki Jane Nyambura v Yong Li Casino & another* [2021] KEELRC 484 (KLR), the court held that whenever an employer relies on the defence of absconding duty, it must provide evidence demonstrating the reasonable steps taken to contact the employee to understand the reasons for abandoning work. If no explanation is provided, the employer should issue a show-cause letter and, if necessary, a termination letter. These steps are essential to resolve the matter.
  32. In the case of *Muema (The Chairperson of Vescon One Residents Welfare Group) v Nzai* [2025] KEELRC, the court held that the employee did not terminate his employment through absenteeism or abandonment of work. The employer must remain proactive and protect itself through the law. Absenteeism and absconding from duty are acts of gross misconduct that the employer must address.
  33. Absence from work without authorisation by the employer is defined under Section 44(4) (a) of the *Employment Act* as gross misconduct. The employee must be invited to attend and address. Where the employee refuses to address the gross misconduct, a notice of summary dismissal must be issued, as held in *Kensalt Limited v Mwaruwa* [2024] KEELRC 1367 (KLR). Under section 18(5) (b) of the *Employment Act*, the employer must close the employment relationship. If the employee is alleged to be absent from work upon notice to resume duty, yet the employee persists, the employer is required to issue notice and serve the labour officer:
    - b) by dismissal, the employer shall, within seven days, deliver to a labour officer in the district in which the employee was working a written report specifying the circumstances leading to, and the reasons for, the dismissal and stating the period of notice and the amount of wages in lieu thereof to which the employee would, but for the dismissal, have been entitled; and the report shall specify the amount of any wages and other allowance earned by him since the date of the employee's dismissal.
  34. The appellant's assertions that the respondent left his employment on 7 December 2020 and never returned are not contested. However, as the employer, the appellant held a board meeting and decided to terminate the employment by summary dismissal. The subject notice, following the board meeting on 10 December 2020, has not been filed.



35. There is no evidence that a notice to show cause was issued to the respondent before the board meeting, allowing him to attend and defend his employment. There is equally no notice to the labour officer.
36. This resulted in an unfair termination of employment. There was no due process. The motions of section 41(2) of the Act are mandatory. They were not adhered to.
37. The trial court's findings were justified to this extent.
38. On the claim for notice pay at Ksh. 30,627.45 due to underpayment at Ksh. 25,000 per month, the letter of appointment defined the respondent as a truck driver. He was assigned vehicle No. KCB 599Y / ZE 5349.
39. A truck driver, under the Wage Orders applicable in March 2020, had a basic pay of Ksh. 30,627.45 plus a 15% house allowance of Ksh. 4,594.11. The gross wage per month was Ksh. 35,221.55.
40. With a paid wage of Ksh. 25,000 per month, there was an underpayment of Ksh. 10,221.55 over 8 months, and the total due, including the underpayment and house allowance, amounts to Ksh.81,772.54.
41. The claim that a written agreement existed to pay Ksh. 25,000 per month, including the house allowance, cannot stand. An invalid employment contract cannot bind an employee. The wage payable cannot fall below the legal minimum set by the Minister under the Wage Orders.
42. The payment of Ksh. 81,772.54 is due.
43. On the claim for notice pay, based on the findings that there was no due process, notice pay is payable at the last gross wage of Ksh.35,221.55.
44. The claim for wages worked until 7 December 2020 is not provided. Regardless of the reasons for termination of employment, the employee must be paid for the work completed. Based on the gross wage of Ksh.35, 221.55 for 7 days, the respondent is entitled to Ksh. 8,218.20.
45. On the claim for overtime for 8 months, the parties agreed on the work hours taking into account that the respondent was a heavy commercial driver delivering goods up to DRC Congo.
46. The respondent did not dispute the response that he had up to 7 days to wait for the loading of cargo to balance his time and rest days. The claim for daily overtime spanning 8 months, lacking rest days throughout the entire period, is simply exaggerated. This cannot stand.
47. On compensation, the court has now over the years developed jurisprudence based on the Court of Appeal that the court is required to give reasons for the award of compensation, as held in *H Young & Co. (E.A) Ltd v Kobong* (Appeal E10 of 2024) [2025] KEELRC; *Riley Falcon Security Services v Adhiambo* [2023] KEELRC 3087 (KLR); and the case *G4S Kenya Limited v Khawanga* (Employment and Labour Relations Appeal E046 of 2022) [2024] KEELRC.
48. Without assigning any reasons for awarding 5 months, the discretion vested in the trial court can be reviewed.
49. The respondent worked for only 8 months. He left under circumstances where he failed to account for the delivery order while using vehicle No. KCB 599Y to DRC Congo. In the proceedings, he did not state where the delivery note is. The allegations that he handed it over to the messenger are lacking evidence, and he was not his manager. Such omission, taken into account under section 45(5) of the Act, resulted in a loss to the employer, the appellant.



50. To award compensation in the given circumstances would be to reward gross misconduct. Zero (0) award is issued.
51. Regarding the award of costs and interest in employment claims, unlike in commercial disputes, the award of costs is discretionary. The reasons for awarding costs or interest must adhere to the provisions of Section 12 of the *Employment and Labour Relations Court Act* and Rule 70 of the Court Rules. In this case, the trial court did not give any reasons for the award of costs.
52. The findings above indicate that each party should bear its costs.
53. On the counterclaim, indeed, there was an omission by failing to address the same.
54. At the end of employment, where the employee, through acts of omission, commission or misconduct and including gross misconduct, causes loss to the employer, the total loss is payable whether there is a counterclaim or not.
55. Under section 19(1) (b) of the Act; an employer may deduct from the wages of his employee—
- (b) a reasonable amount for any damage done to, or loss of, any property lawfully in the possession or custody of the employer occasioned by the wilful default of the employee;
56. For loss incurred by the employer due to negligence, misconduct, or failure to account to the employer, such loss is recoverable from the employee. The response to the counterclaim that the November 2020 wage was paid, and hence proof of submission of the delivery order, is without proof. Where the delivery order was submitted, the respondent did not address or demand that the same be produced by the person who received it.
57. For the loss of Ksh. 300,000 to the appellant, this is recoverable from the respondent. Such claim should be paid less what is owed.
58. Accordingly, judgment in Mombasa CMELRC No. E184 of 2021 is reviewed as follows:
- a. Employment terminated unfairly;
- b. Compensation Ksh. 0;
- c. Notice pay Ksh. 35,221.55;
- d. Underpayments, including house allowance Ksh. 81,772.54;
- e. Pay for 7 days worked in December 2020 Ksh. 8, 218.20.
- Counterclaim;
- The counterclaim is allowed in the following terms;
- a. The respondent owes the appellant Ksh. 300,000 in loss of income;
- b. Costs for the counterclaim;
- Dues above shall be offset accordingly.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**M. MBARŪ**  
**JUDGE**

In the presence of:



Court Assistant: Japhet

..... and .....

