



**Badar Hardware Limited v Wechuli (Appeal E030 of 2025)
[2025] KEELRC 2544 (KLR) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2544 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E030 OF 2025
M MBARŪ, J
SEPTEMBER 25, 2025**

BETWEEN

BADAR HARDWARE LIMITED APPELLANT

AND

ISAIAH MASINDE WECHULI RESPONDENT

*(Being an appeal from the judgment of N. R. Akee in Mombasa
CMELRC No. E508 of 2023 delivered on 28 February 2025)*

JUDGMENT

1. The appeal arises from the judgment delivered on 28 February 2025 in Mombasa CMELRC No. E508 of 2025. The appellant is seeking that the judgment be varied or set aside on the grounds that the learned magistrate erred in law and fact in holding that the appellant unfairly terminated the respondent's employment contrary to the evidence submitted. The award of 12 months' salary was excessive without justification. The award of service pay at Ksh. 227,500 was unlawful. The award of notice pay was without merit.
2. The case before the trial court was that the appellant employed the respondent as a long-distance driver on 12 June 2020 and was assigned vehicle registration No. KBU 794F and later vehicle No. KCC 490P ZE 6383. His wage was Ksh. 35,000 per month. However, on 12 June 2023, there was an unfair termination of employment. The respondent was allowed to take leave on 5 January 2023 and return on 30 January 2023. On 27 and 28 January 2023, he requested the respondent for an additional 17 days leave accrued in 2021, but the human resources manager did not reply. He reported back to work, but the workshop manager declined to provide him with his work vehicle on the basis that the director had instructed him not to do so. He was directed to go home until 9 February 2023, which he did when the director called him and stated his services were no longer required. His assigned vehicle was allocated to another employee. No reasons were given or payment of terminal dues. This resulted in unfair termination of employment, and he claimed;



3.

- a. Notice pay Ksh. 35,000;
- b. Accrued leave for 3 years Ksh.105,021;
- c. 12 months compensation Ksh.420,000;
- d. Service pay for 13 years Ksh.227,500;
- e. Costs.

3. In reply, the appellant admitted that the respondent was employed as a driver earning Ksh.35, 000 per month. He was allocated a motor vehicle. KAS 012A and later KBW 535k. The respondent had accumulated leave days and requested four days from 28 December 2022, returning on 3 January 2023. He subsequently requested a further 21 days, which were granted. He was scheduled to resume on 30 January 2023, but did not return until 11 February 2023, having submitted a letter of resignation dated 9 February 2023, which he served on the human resources manager. The respondent did not return until 25 April 2023 and made a demand for payment of his terminal benefits; however, he had not cleared his outstanding dues. A dispatch was sent to him on 4 May 2023. There was no termination of employment as alleged, and the claims are without merit. At that time, he had exhausted his leave days for 2021 and 2022, and accrued days for 2020 and 2019 are time-barred. Service pay is not due.

4. The learned magistrate heard the parties and held that there was unfair and wrongful termination of employment and hence awarded the following:

- a. Notice pay Ksh.35,000;
- b. Unpaid leave Ksh.105,021;
- c. Service pay Ksh.227,500;
- d. Maximum compensation Ksh. 420,000;
- e. Costs and interests.

5. The appellant thus submitted that the trial court's findings ignored the evidence and the respondent's resignation; hence, compensation and notice pay are not justified. In any case, 12 months' compensation was excessive, and no reasons were given. The appellant followed due process upon the respondent's refusal to attend work and subsequent resignation. These are lawful reasons for terminating employment.

6. On the award of leave pay, the respondent had exhausted his 17 days of accrued leave in 2021 and 2022. Leave beyond such time was time-barred.

7. There was no basis for awarding service pay. The appellant remitted all statutory dues as held in Board of Management Ng'arariga Secondary School v Kudheih Workers [2017] eKLR.

8. The award of costs and interest had no basis, as this was an employment claim.

9. The respondent stated that he took his accrued annual leave, which ended on 30 January 2023. He needed more time and therefore requested additional leave from the human resources manager, but received no response. He then decided to resume duty, but was not assigned any work and was sent away until 9 February 2023. Subsequently, he was dismissed from his employment without notice or payment of terminal dues. This action violated Section 41 of the *Employment Act* (the Act), and there



was no justification for it. The learned magistrate analysed the facts, applied the law, and made correct findings, as upheld in *Galgal Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR.

Determination

21. 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:

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.

22. The appellant's case is that the respondent resigned from his employment on 9 February 2023.
23. The respondent's case is that he took his annual leave and was due to return on 30 January 2023. He requested more time since he had additional days, but there was no reply. He reported back only to be directed to return on 9 February 2023, when his employment was terminated.
24. The appellant does not acknowledge the resignation letter dated 9 February 2023.
25. The respondent submitted his National Identity Card (ID) along with his claim; his signature is a thumbprint. The letter of resignation is written in an immaculate hand.
26. The variations in the letter of resignation and ID card lend credibility to the respondent's assertion that his employment was terminated without reason or due process.
27. Indeed, where the appellant claims that the respondent was due to resume duty on 30 January 2023 but failed to do so, nothing prevented the appellant from issuing a notice to show cause for the respondent to attend and explain the alleged gross misconduct. Under section 44(4) (a) of the Act, the appellant had every right to issue a notice of summary dismissal to the respondent, who allegedly remained absent after annual leave.
28. During the cross-examination of the respondent regarding his alleged resignation notice, he denied submitting the letter. The postal address or certificate was provided.
29. Taking annual leave is a right under section 28 of the Act. The employer should ensure the employee takes such rest when due.
30. Termination of employment under the guise that the respondent sought to take his accrued leave days is an unfair labour practice. This is a practice defined under section 45(4) (a) of the Act;

(4) A termination of employment shall be unfair for the purposes of this Part where—

a. the termination is for one of the reasons specified in section 46; or

31. Section 46 of the Act bans terminating employment because an employee has taken or proposed to take their entitled annual leave or accrued leave days. Section 46 (b) of the Act states;

The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty—

(a) ...



- (b) the going on leave of an employee, or the proposal of an employee to take, any leave to which he was entitled under the law or a contract;

32. In response to the claim, the appellant under paragraph (5) argued that the respondent had accumulated leave days. However, the leave days not taken in 2020 and 2019 were time-barred. This is why sections 28, 45, and 46 of the Act exist. The employer cannot justify refusing to allocate an employee their rightful, lawful leave days when the employee seeks to exercise their rights to take accrued leave to prevent the loss, which could lead to their employment being terminated through very clandestine procedures, such as a purported resignation.

33. This practice is not only outlawed under section 45 of the Act as being unfair, it is also judged under section 46 of the Act as unlawful. A proper definition of what constitutes unfair labour practices under Article 41 of *the Constitution*. A practice addressed by the Supreme Court in *Kenya Ports Authority v Munyao & 4 others* (Petition E008 of 2023) [2023] KESC that;

Examples of unfair labour practices by an employer include (1) interfering with protected employee rights, such as the right to self-organization, (2) discriminating against employees for union related activities, (3) retaliating against employees who have invoked their rights, and (4) ...

The court further held;

... the right to “fair labour practices” encompasses the constitutional and statutory provisions and the established workplace conventions or usages that give effect to the elaborations set out in article 41 or promote and protect fairness at work. These include provisions for basic fair treatment of employees, procedures for collective representation at work, and, of late, policies that enhance family life while making it easier for men, women and persons with disabilities to go to work. ...

34. The scenario of this case, viewed in light of the findings above, shows that the appellant acted wrongly, unfairly, and contrary to fair labour relations. Under section 28 of the Act, the employer has a duty to organise and allow the employee to take their annual leave. When the employer fails to do so, the employee is entitled to assert his right and apply to take his annual leave. Punishing an employee for taking yearly leave constitutes an unfair practice.

35. The magistrate's findings, although expressed differently, are not to be criticised.

The award of notice pay is justified to one month Ksh.35, 000.

36. The 12-month award is based on the reasons and justification provided. The rationale is provided, and the court finds no grounds to review the findings or the award of compensation.

37. On the award of service pay, indeed, where the employer has remitted statutory dues, service pay is not payable.

38. Regarding the claim for accrued leave days, based on the appellant's admission that the respondent had earned leave days that were not fully utilised, the reasons for termination of employment related to this claim, as per section 46 of the Act, justify the award for accrued leave days. However, Ksh.105, 000 pertains to leave accrued over three years. There is documentation of the respondent taking his annual leave in January 2023 and April 2022. He can only claim the amounts for 2020 and 2019, amounting to Ksh 70. 000, based on his last salary of Ksh 35. 000.



39. Regarding costs, this is at the discretion of the parties and based on unspecified reasons. However, the trial court considered the manner in which employment was terminated, which is acknowledged by this court. As discussed above, the application of unfair labour practices is unlawful. There is no claim for damages; instead, the costs awarded are justified.
40. Accordingly, the appeal is without merit save for the award of service pay. The awards of the trial court are confirmed as follows;
- a. Notice pay Ksh.35,000;
 - b. Unpaid leave Ksh.70,000
 - c. Maximum compensation Ksh. 420,000;
 - d. Costs and interests.
 - e. For the appeal, each party is to bear its costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 25TH DAY OF SEPTEMBER 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

