



REPUBLIC OF KENYA



KENYA LAW
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**Hakika Transport Services Limited v Musango (Appeal E059 of 2025)
[2025] KEELRC 2536 (KLR) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2536 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E059 OF 2025
M MBARÚ, J
SEPTEMBER 25, 2025**

BETWEEN

HAKIKA TRANSPORT SERVICES LIMITED APPELLANT

AND

FELIX MWANGELA MUSANGO RESPONDENT

*(Being an appeal from the judgment of Hon. J. B. Kalo delivered
on 6 March 2025 in Mombasa CMELRC No. E636 of 2023)*

JUDGMENT

1. The appeal arises from the judgment delivered on 6 March 2025 in Mombasa CMELRC No. E636 of 2023. The appellant is seeking that the judgment be set aside.
2. The background of the appeal is a claim filed by the respondent on the grounds that he was employed by the appellant as a driver in April 2015 at a wage of Ksh. 14,943 per month. The wage increased to Ksh. 710 by January 2023. His case was that his duties included collecting and delivering cargo from the appellant's CFC facilities at Kenya Ports Authority yards. He worked until 10 March 2023. On 22 February 2023, a warning was issued over alleged underperformance and fuel shortage. The same notice included a show cause for disciplinary action within 24 hours and an invitation to a hearing on 24 February 2023. Through a notice dated 1 March 2023, the appellant invited the respondent to a further disciplinary hearing, which led to a notice of summary dismissal. His claim was that the termination of employment was based on unproven allegations. He was not paid his terminal dues and thus claimed the following:
 - a. notice pay Ksh.27,710;
 - b. House allowance for 84 months (May 2015 to February 2023) Ksh.272,000;
 - c. Overtime pay for 4 hours per day Ksh. 163,820;



- d. Unpaid leave days for 7 years Ksh. 193,970;
 - e. Unpaid public holidays for 7 years Ksh. 45,259.60;
 - f. Refund of unremitted NSSF deductions for 30 months Ksh.6,000;
 - g. Severance pay for 7 years Ksh.96,985;
 - h. 12 months' compensation Ksh.332,520;
 - i. Certificate of service;
 - j. Costs.
3. In reply, the appellant denied the claims and stated that the driver's salary was not changed as alleged. The wage paid was by agreement. The respondent's employment was marked with dishonesty and gross misconduct. Upon being notified to show cause, he was invited to respond and attend a disciplinary hearing, which could lead to termination of his employment, and the claims should be dismissed.
4. The learned magistrate heard the parties and held that there was an unlawful and unfair termination of employment, and the respondent was entitled to the following;
- a. Notice pay ksh.27,710;
 - b. House allowance was 3 years Ksh.180,000;
 - c. Overtime for 12 months Ksh.166,260;
 - d. Accrued leave ksh.193,970;
 - e. Unremitted NSSF dues Ksh.22,600;
 - f. Unremitted NHIF Ksh.6,000;
 - g. 6 months compensation Ksh.166,260;
 - h. Costs and interests after 45 days.
5. Aggrieved by the judgment, the appellant argues that the learned trial magistrate failed to consider evidence presented during cross-examination and took into account extraneous matters not before the court. The issue of alleged unfairness was not resolved, and no reasons were given for the awards. There was no deduction from the award of the statutory deductions subject thereto; hence, the judgment should be set aside.
6. The appellant argued that the overall evidence was not considered in the findings, which stated that there was an unfair termination of employment. There was no basis to award house allowance for three years, as the record and pay slips submitted show that the house allowance in 2015 was Ksh. 2,150 per month. In January 2023, the respondent was paid a house allowance of Ksh. 3,000; therefore, the award represents double payment and is not justified.
7. The appellant submitted that no overtime was proved. If any, this is a continuing injury that should have been addressed within 12 months.
8. Accrued leave is not due since there was evidence that the respondent applied and was allowed to take his annual leave.



9. The unremitted NSSF and NHIF dues should be paid to the statutory body. The award of six months' compensation was excessive and without any reasons to justify it.
10. The respondent submitted that there was no due process in the termination of his employment. He discharged his burden of proof and testified to the fact that he was denied his natural justice and right to a hearing when he was ambushed with a notice to show cause and disciplinary hearing for unsubstantiated grounds. In the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] EKLRC, the court held that even where the employer has valid reasons to justify termination of employment, due process must be adhered to. The employee must be taken through a disciplinary hearing and allowed to attend and defend himself.
11. The award made by the trial court is justified and ought to be affirmed.

Determination

12. Since this is the first appeal, the court is permitted to review the record, reassess the findings, and draw its conclusions.
13. Through a notice dated March 10, 2023, the appellant terminated the respondent's employment through summary dismissal. The reasons were that, following a disciplinary hearing held on 24 February and 4 March 2023, management established that the respondent did not provide a satisfactory explanation concerning the shortage of 196 litres of diesel that occurred in January 2023. The work records showed that the respondent had made 34 trips in October 2022, 37 trips in November, 17 visits in December 2022, and 26 trips in January 2023. These trips fell below the monthly target of 50 visits and did not align with the diesel usage. These acts were found to be in gross misconduct contrary to Section 44 of the *Employment Act* (the Act).
14. In reply to the notice to show cause on 24 March 2023, the respondent noted that regarding the allegations of a shortage of diesel, he had not kept the daily record. If allowed to retain his employment, he committed to being serious and keeping all his work records.
15. During the hearing, the respondent testified that the supervisor was responsible for maintaining the fuel records. Where the driver spent more than allocated, this was deducted from the wage.
16. The respondent further testified that he had no written contract specifying the number of trips he was required to make each month. The matter of 50 trips was never discussed with him.
17. Under sections 41 and 44 of the Act, the employer is permitted to terminate employment through summary dismissal after notifying the employee to attend and defend themselves. The employer can implement a workplace policy based on business needs and address conduct and actions that may justify summary dismissal. In the case of *Juma v United Millers Limited* (Appeal E009 of 2024) [2025] KEELRC, the court ruled that although the employer is allowed to expand the grounds listed under section 44(4) of the Act, such rules, regulations, or policies must be brought to the employee's attention. The policy cannot be used to punish an employee who is unaware of its existence.
18. In the case of *Omolo v Maseno University* (Cause E066 of 2021) [2023] KEELRC, the court held that the employer bears the legal burden of proof to demonstrate that the employee was apprised of the workplace policies and procedures.
19. The provisions of Section 12 of the Act require that the employee be issued the disciplinary policy and that it be explained in a language they can understand.



20. The accusations levelled against the respondent were that there was underperformance and a fuel shortage. He made fewer trips and therefore could not have used fuel as he claimed. It was also noted that the respondent performed his duties carelessly and improperly.
21. However, there are no details. No particulars of the allegations.
22. The respondent, in his response to the show cause on 24 February 2023, observed that;

... for sure 196 lts short in one month is a lot of fuel, and for my explanation for this is, in each and every day I attend job, the fuel that was applied in my tractor I used it according to the work of that day and if the tractor left with fuel I left with it and informed my reliever about it. ...
23. As the employer, the duty to keep the records cannot be vested in the employee. The particulars of the allegations made were unsubstantiated.
24. The underperformance sheet submitted by the appellant was not brought to the respondent's notice before the disciplinary hearing. There is no evidence indicating that he was aware of its contents.
25. In any event, there is the Shop Indent/Debit Instruction Note. Did the appellant recover lost fuel? Was there a surcharge on the respondent?
26. To apply the reasons given to terminate employment by summary dismissal was a resource to reasons devoid of validity and reasonableness.
27. In the case of *Mbeka v Kenya Power & Lighting Co. Ltd* [2025] KEELRC 2283 (KLR), the court held that the employer must demonstrate that it had a substantial justification to terminate the employee's employment.
28. Without a justified explanation for the reasons behind the employment termination, the trial court's conclusion remains correct that there was an unlawful and unfair termination of employment.

notice pay and compensation are due.
29. The respondent stated that his last salary was Ksh.27,710. He submitted payment statements for January 2023, June 2015, and May 2015.
30. The last wage was a basic of Ksh. 19,700 plus a house allowance of Ksh. 3,000 per month, for a total of Ksh. 22,700. The benefits of a daily earnings are different for each month.

Notice pay is due at KSh. 22,700.
31. On the award of 6 months' compensation, indeed, as submitted by the appellant, 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.
32. In this case, the finding of unfair termination of employment is upheld; however, the award of 6 months is reviewed to 3 months on the basis that the respondent was invited to show cause, he replied, and did not request additional time to prepare his response. He attended a disciplinary hearing and had a previous warning over the conduct of his duties.

On the wage of Ksh. 22,700 x 3, the due award is Ksh. 68,100.
33. Regarding the claims for a house allowance, this is paid in addition to the monthly wage.



34. Regarding the claim for overtime pay, the respondent argued that he worked an additional four hours daily for a period of 84 months. He testified in court that during the day shift, he would report to work at 6.30am and leave at 5pm, while during the night shift, he would work from 5pm to 6.30 am.
35. However, the respondent had a written contract that clearly outlined his work hours, including the regular shift and night shift. Any overtime worked was based on the work or trips performed. The payment statement for January 2023 includes a payment of KSh 5,010 for trips.
The overtime awarded is not justified.
36. On the claim for unpaid leave for 7 years, under section 28 of the Act, annual leave is a right. The leave application sheets filed by the appellant for 2022, 2021, and 2019 were not challenged.
37. The last leave taken was in May 2022. From June 2022 to March 2023, under section 28(2) of the Act, the respondent accumulated 10 months of annual leave that are not accounted for. He is entitled to 21 leave days per year, and for the 10 months, he is entitled to 19 days based on the basic wage last earned of Ksh.19,000, with a total due of Ksh.12,035.
38. On the claim for unpaid public holidays, these are not general days and must be specified.
39. Regarding claims for refund of NSSF and NHIF, these are statutory dues that must be remitted to the statutory body, not to the employee. Under section 35(5), where statutory dues are not remitted, the employee must claim for service pay.
40. The payment statements filed indicate deduction and remittance of statutory dues. Where there is no evidence of remittance, this is a labour offence.
41. Regarding the claim for severance pay, this only arises in cases of redundancy. This was a case of unfair summary dismissal. Severance pay is not payable.
42. The appeal analysed above, judgment in Mombasa CMELRC No. E636 of 2023 is reviewed as follows:
 - a. Employment terminated unfairly;
 - b. Compensation KSh. 68,100;
 - c. Leave pay KSh.12,035;
 - d. Certificate of service;
 - e. Costs at the trial court;
 - f. For the appeal, each party 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

