



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kaluworks Limited v Kichindo (Appeal E015 of 2025)
[2025] KEELRC 2624 (KLR) (29 September 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2624 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E015 OF 2025
M MBARÚ, J
SEPTEMBER 29, 2025**

BETWEEN

KALUWORKS LIMITED APPELLANT

AND

LIVERSON KILIMO KICHINDO RESPONDENT

*(Being an appeal from the judgment of Hon. M. Nabibya in
Mombasa CMELRC No. 499 of 2018 delivered on 21 January 2025)*

JUDGMENT

1. The appeal arises from the judgment delivered on 21 January 2025 in Mombasa CMELRC No. 499 of 2018. The appellant is seeking that the judgment be set aside.
2. The background of the appeal is a claim filed by the respondent, who alleges that the appellant employed him as a machine operator from April 2006 until 27 October 2017. His working days were 6 in a week, and the wage was calculated at Ksh. 141 per day and paid weekly. In 2017, the daily wage had increased to Ksh. 355. He claimed that he was not allowed to take a rest day or annual leave. His employment was verbally terminated on 27 October 2017, which was unlawful and unfair without payment of terminal dues. He claimed the following:
 - a. Notice pay Ksh. 25,125;
 - b. Leave pay for 11 years Ksh.138,336;
 - c. 12 months' compensation Ksh. 301,824;
 - d. Underpayments from September 2012 to October 2017 Ksh.536,760;
 - e. Severance pay Ksh.138,336;



- f. Certificate of service;
 - g. Costs and interests.
3. In reply, the appellant's case was that they have a plant in Mariakani, Kilifi County. The respondent was employed as a casual worker, specifically as a charging workman, to repair the furnace in the Spouts Foundry Department within the Mariakani plant. Work was not continuous and was based on availability. When engaged, the respondent would work 8 hours a day and was paid weekly for 48 hours. The daily wage of Ksh. 385 included a house allowance based on a piece rate. Any amount paid over and above was as prescribed under the Wage Orders. Through a show-cause notice dated 28 October 2017, the respondent was warned for gross misconduct. On 31 October 2017, he was issued a disciplinary notice, which was held on 6 November 2017. He refused to accept or sign it in acknowledgement, as witnessed by his supervisor, Mwangi.
 4. The response was that on 2 November 2017, the appellant issued a notice to the labour officer in Mombasa, reporting that the respondent had absconded from duty and a presumption of termination of employment had arisen. The disciplinary hearing was held in the respondent's absence, and a notice of summary dismissal was issued and served on the labour officer on 12 January 2018. Final dues would only be paid upon clearance, which the respondent failed to do. The claims made are not justified and should be dismissed.
 5. The learned magistrate heard the parties and held that there was an unprocedural termination of employment and awarded;
 - a. Compensation at Ksh.251,520;
 - b. Underpayments Ksh.408,976.80;
 - c. Costs and interests.
 6. Aggrieved by the judgment, the appeal is filed on the grounds that the learned magistrate erred in law and fact in calculating underpayments based on the Regulations of Wages (General) Amendment Order for Mombasa, as opposed to other areas, since the appellant is based in Kilifi County. The award of Ksh. 408,976.80 did not account for the fact that the daily wage paid was inclusive of a house allowance.
 7. The learned magistrate established that the respondent absconded from duty, which justified summary dismissal, but held that there was unfair termination of employment and awarded notice pay and compensation. This was despite the labour officer having been notified of the notice to show cause and the notice of summary dismissal. The claims for underpayment were time-barred under Section 90 of the *Employment Act*; hence, the judgment should be set aside. There was no written contract for a machine operator as alleged, and the daily wage paid exceeded what was due in Kilifi County.
 8. Both parties filed detailed written submissions, which are analysed in the findings.
 9. What emerges to the court is that the employment relationship between the parties was not based on any written terms. The respondent would attend work and be recorded in the casual sheets.
The appellant filed the Casuals Payment Sheet.
 10. The respondent was paid a daily wage, which was accumulated and paid out weekly.



11. Under section 37 of the *Employment Act* (the Act), an employee who is engaged continuously and for work that is not likely to end at the end of the day is protected. The employee is entitled to the rights and benefits under the Act.
12. In the case of *Kenyatta University v Maina* [2022] eKLR, the court held that an employer cannot employ an employee under the guise of being casual, as it operates with peak and off-peak sessions. Subjecting the employee to such treatment is unfair because being laid off during off-peak season does not guarantee the employee permanency.
13. The essence of the decision in *Krystalline Salt Limited v Kwekwe Mwakele & 67 others* [2017] KECA 717 (KLR) and *Kleeners Limited v Kenya Plantation and Agricultural Workers' Union* [2021] KECA 352 (KLR) is that the dignity of the employee, whether casual, piece rate, or otherwise, must be preserved.
14. The employer, under the provisions of sections 10 and 37 of the Act, should secure itself by issuing written terms of employment. Where, indeed, the appellant engaged the respondent under piece-rate employment, this is permitted under section 18 of the Act; however, in this case, work was governed by unwritten terms.
15. The weekly payment converted the employment from casual to protected employment. The respondent's continuous engagement over a long period secured his employment with the appellant.
16. In this case, the respondent claimed notice pay, 11 years of leave, underpayments, severance pay, and compensation for the alleged unfair termination of his employment.
17. In reply, the appellant filed records to the effect that the respondent was issued with a notice to show cause dated 28 October 2017. The respondent had been directed to proceed on annual leave but declined. He was invited to show cause and failed to reply. He was invited to the disciplinary hearing and refused to attend.
18. I take it, the appellant had all along treated the respondent as a casual employee. Why then would a casual be sent on annual leave? Was he apprehensive that he would lose his job in the process of taking annual leave?
19. In his evidence in court on 17 April 2024, the respondent asserted that he had not been served with the termination notice and was unaware that he was supposed to collect any terminal dues.
20. Where the employer treats an employee as casual over the years, a gap is likely to arise. Some notable examples;
 - a. The show cause notice dated 7 April 2017 has no given address to the respondent.
 - b. The show cause notice dated 28 October 2017 is without a forwarding address.
 - c. The disciplinary hearing notice dated 31 October 2017 has no forwarding address.
21. If at all, the respondent is alleged to have absconded from duty, how was he served with this notice? The notice that was issued to the Labour Officer is a last resort of sorts. Where the employer makes all efforts to trace the employee but fails to do so, then notice must be given to the labour officer. In this case, the evidence that Joe Mwangi witnessed when the respondent refused to accept the notices issued to him, as well as the fact that he was treated as a casual, has bearing. The notices cannot have been served upon an absent employee whose postal address or contact details were unknown.

There was apparent abuse of process.



22. The procedures under sections 41 and 44 of the Act do not serve to sanction unfair labour practices. The attendant procedures serve fair labour relations as defined by the Supreme Court in the case of Kenya Ports Authority v Munyao & 4 others (Petition E008 of 2023) [2023] KESC that;
- ... 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. ...
23. In this case, convening a disciplinary panel without attempting to trace the respondent cannot sanitise the process. However gross his misconduct, the apprehension of loss of employment was real in the given circumstances.
24. The findings by the learned magistrate, as analysed, save for the reasons set out above, cannot be faulted. Termination of employment on the grounds that the respondent refused to take annual leave, being treated as a casual employee, he had no protection. He was justified in standing his ground and earning a living.
- This resulted in unfair termination of employment.
- Notice pay and compensation are due.
- The tabulation of the awards was based on the Wage Orders.
25. Indeed, an employee stationed in Kilifi County earns a different wage from one in Mombasa. The respondent’s daily wage of Ksh. 385 is supported by the worksheets and payment schedules that have been filed.
26. Under section 49 of the Act, the last page paid is the applicable rate for tabulating terminal dues.
- Notice pay of 30 days amounts to Ksh. 385 x 30 + Ksh. 11,550.
- For the 10 months’ compensation award, the total is Ksh. 115,500.
27. Regarding the claims for leave pay for 11 years, under Section 28(4) of the Act, this can only accrue for 18 months; all due is 33 days. The pay is Ksh. 385 x 33 = Ksh. 12,705 in leave pay.
28. Regarding the claim for underpayments from September 2012 to October 2017, as submitted by the appellant, an underpayment indeed constitutes a continuing injury. For the respondent, this accrued daily based on his daily wage and should have been addressed within the provisions of section 90 of the Act as held in Rift Valley Railways (Kenya) Ltd v Hawkins Wagonza Musonye & another [2016] KECA 213 (KLR) and the case of The German School Society & another v Ohany & another [2023] KECA 894 (KLR) that benefits such as allowances in housing, overtime and work hours accrue daily, weekly or monthly and must be addressed within the meaning of a continuing injury under section 90 of the Act.
29. The respondent was last on the shop floor on 27 October 2017. He filed his claim on 10 December 2018.
30. The continuing injuries should have been addressed on or before 26 October 2018. These claims are time-barred.



31. Regarding the claim for severance pay, this was not a redundancy case. The facts addressed in the claim pertain to the unfair termination of employment due to unjustified summary dismissal.
32. A certificate of service should be issued under section 51 of the Act for the time worked.
33. Regarding costs and interests, the claim before the lower court was largely successful; costs were justified, but interests were not. Employment claims aim to restore the employee to the position they would have held had employment been terminated appropriately. The appellant invited the respondent to attend and collect his terminal dues. This should be done, considering the appeal and lower court proceedings.
34. Accordingly, the appeal is partially successful and the judgment in Mombasa CMELRC No. 499 of 2018 is reviewed in the following terms;
 - a. Employment terminated unfairly;
 - b. Notice pay KSh. 11,550;
 - c. Compensation Ksh. 115,500;
 - d. Costs of the trial court;
 - e. The respondent is allowed to attend and clear with the appellant, and any unpaid dues to be processed and paid in accordance with the notice terminating his employment;
 - f. For the appeal, each party to bear its costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 29TH DAY OF SEPTEMBER 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

