



REPUBLIC OF KENYA



**Omusundi v Kitui Flour Mills Limited (Appeal E049 of 2025)  
[2025] KEELRC 2664 (KLR) (2 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2664 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E049 OF 2025  
M MBARŪ, J  
OCTOBER 2, 2025**

**BETWEEN**

**RASHID OMUKANGU OMUSUNDI ..... APPELLANT**

**AND**

**KITUI FLOUR MILLS LIMITED ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. G. Sogomo delivered  
on 7 March 2025 in Mombasa CMELRC No. E749 of 2023)*

**JUDGMENT**

1. The appeal arises from the judgment delivered on 7 March 2025 in Mombasa CMELRC No. E749 of 2023. Aggrieved by the judgment, the appellant is seeking that the judgment be set aside and the claim be allowed.
2. The appellant claimed that he was employed as a plant mechanic on 6 February 2017 at Majengo, Mombasa County. His wage was Ksh. 40,762 per month. He worked until 30 September 2023, when he was dismissed. On 23 September 2023, the chief miller, Mustafa, instructed the appellant to fix the roller machine using bearings. He established that he did not need the two bearings required. However, he was arrested at Makupa police station on allegations of theft by a servant, and it was claimed that he had stolen the two bearings. He was arrested on 19 October 2023 and released on cash bail. He reported back to work and was served with a show cause letter on 25 September 2023 and a summary dismissal notice dated 30 September 2023. Through a letter dated 12 October 2023, he was paid his dues, a certificate of service, and was directed to wait for payment of his terminal dues at Ksh. 34,095. This resulted in unfair termination of employment, and he claimed the following dues;
  - a. Notice pay ksh.40,762;
  - b. Unpaid salary for September 2023 Ksh.40,762;



- c. House allowance for 79 months Ksh.483,029;
  - d. Unpaid leave for 7 years Ksh. 199,773;
  - e. 12 months compensation Ksh.489,144
- Less what was paid Ksh.34,095.
3. In response, the respondent's case was that the appellant was employed on 1 July 2019 as a plant mechanic earning Ksh. 24,083 per month. He was found guilty of gross misconduct on the basis that, on 23 September 2023, while at work, he was caught with two roller bearings hidden in a bucket, attempting to steal or sneak them out. The matter was reported to Makupa Police Station; he was arrested and charged with the offence of stealing by servant under sections 268 and 281 of the Penal Code. On 25 September 2023, the appellant was served with a notice to show cause as to why he should not be dismissed for gross misconduct; however, he failed to submit a response. He was paid his dues and lawfully dismissed from his employment, and the claims made should be dismissed.
  4. The learned magistrate heard the parties and, in judgment, held that the termination of employment by summary dismissal was justified, except that the claim for unpaid wages was justified up to KSh. 33,149.
  5. Aggrieved, the appellant seeks to have the judgment set aside on the grounds that the trial magistrate failed to award compensation for the unlawful termination of employment, despite finding that such termination was illegal. The conclusion that the appellant was bound by the discharge voucher dated 12 October 2023 is incorrect. The failure to award house allowances was an error which should be reviewed. There was no proof of taking leave days that are owed.
  6. This is a first appeal. The court must review, reassess, and make findings.
  7. The appellant asserts that on 23 September 2023, he was arrested over allegations of theft by a servant and charged in court. He was released on cash bail, and upon his return to work, he was issued a notice to show cause. He did not reply. What followed was a notice of summary dismissal on 30 September 2023.
  8. The respondent has confirmed these facts and added that the claimant was found hiding two roller bearings in a bucket; this incident was subsequently reported to the police. He was arrested and charged with the criminal offence of stealing by a servant. He was issued a notice to show cause, which he failed to respond to, leading to his summary dismissal.
  9. Parties addressed the claim before the trial court through written submissions.
  10. Under paragraph 2.14 of the Memorandum of Claim, the appellant asserted that upon release from custody on 19 October 2023, he returned to work and was served with a notice to show cause dated 25 September 2025. He was also served with a notice of summary dismissal dated 30 September 2023.
  11. The appellant argued that he was not served with the notice to show cause. However, his pleadings acknowledge this fact. He received the show-cause notice, but there is no reply to it.
  12. An employee who is served with a notice to show cause and fails to respond commits a grave error, as held in *Ogotu v Kenya Export Promotion and Branding Agency (Cause E551 of 2024) [2025] KEELRC*. The notice dated 25 September 2023 to the appellant required him to give an explanation why his employment should not be terminated following the criminal charges over theft of the respondent's property. He did not reply.



13. In *Bernard E.N. Gachuri v Jamii Bora Bank Limited* [2020] KEELRC 606 (KLR), the court held that once a notice to show cause is issued, the employer has effectively fulfilled the requirements of section 41 of the *Employment Act*. If the employee fails to respond, they cannot later claim that their employment rights have been breached. Consequently, he is precluded from seeking relief under section 47(5) of the Act. See *Kamundia v National Cement Company Limited* (Cause E070 of 2021) [2025] KEELRC.
14. In this case, the appellant's failure to respond to the notice to show cause resulted in his losing his employment. The resulting summary dismissal was justified. He cannot claim notice pay or compensation.  
The unpaid salary for September 2023 was assessed and awarded.
15. On the claim for house allowance for 79 months, the appellant was under a written contract dated 1 July 2019 at a salary of Ksh. 24,083 per month.
16. The position of a plant mechanic is not specified under the Wage Orders. Although the contract does not state a house allowance, the payment of Ksh. 24,083 is not considered a minimum wage.
17. However, in the payment statement for June, July, August and September 2023, there is a provision for a house allowance of Ksh. 4,972. This evidence is not challenged.
18. On the claim for unpaid leave for 7 years, the contract filed was from 1 July 2019. Employment terminated on 30 September 2023. The respondent filed a leave application form for 21 consecutive days, running from 16 September to 11 October 2022. There is no record of leave days taken from October 2022 to September 2023.
19. However, in the discharge voucher dated 12 October 2023, there is a payment of Ksh. 33,469 for accrued leave days.
20. The terminal dues paid factored in accrued leave days, as well as days worked. The appeal is without merit and is hereby dismissed with costs to the respondent.

Orders accordingly.

**DELIVERED IN OPEN COURT AT MOMBASA, THIS 2<sup>ND</sup> DAY OF OCTOBER 2025.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

