

REPUBLIC OF KENYA

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT MOMBASA**

CAUSE NO. E045 OF 2025

ALFRED ONYANGO OGUTU
CLAIMANT

VERSUS

MILLY CLASS WORKS LIMITED
RESPONDENT

JUDGMENT

The claimant is a male adult. The respondent is a limited liability company.

The respondent employed the claimant as an electrical supervisor on 1 March 2004, earning Ksh. 25,560 per month. The claimant was a member of the Kenya Chemical Workers Union, which had a collective agreement (CBA) with the respondent.

The claimant claims that on 11 March 2024, they requested 10 days off to attend a funeral, which was granted. He resumed work on 19 March 2024 and worked until 2 April 2024, when he asked for 4 days off to address personal issues. He was to report back to work on 8 April 2024, but due to personal problems, he asked his head of department, Govinande, for more time to proceed on unpaid leave for the month.

The claim is that on 19 April 2024, the respondent reported to the labour officer that the claimant had absconded from duty. When he asked to resume his employment, the respondent barred him.

The claimant learnt from the grapevine that the respondent had terminated his employment on 31 March 2024, which the respondent later confirmed when he issued a certificate of service alleging that the claimant had voluntarily left his employment. This was not correct since 31 March 2024 was his day off and he was at work on 1 and 2 April 2024.

Before termination of employment, there was no notice. The respondent did not adhere to the CBA terms and conditions. This resulted in unfair termination of his employment, and he claimed the following:

- a) 2 months' notice pay Ksh. 51,320.000
- b) Gratuity pay for 20 years ksh. 353,908.

- c) Adjusted basic salary arrears 2019 to March 2024 for 63 months Ksh. 65,193.66
- d) Salary arrears January 2023 to March 2024 for 14 months, KSh. 49,980.
- e) 12 months' compensation for unfair termination of employment.
- f) Costs of the suit.

The claimant testified that on 11 March 2024, he received information that his father had died. He took leave for burial and was to resume on 19 March 2024. He worked until 1 April 2024, when he asked for 4 days off to address personal problems, which were granted. He was to resume on 8 April 2024.

The claimant testified that when he left for home in Busia, he was not able to address the personal matter; he called his head of department and asked for unpaid leave days. At the time, he had no pending leave days.

The department head directed him to return from Siaya and complete the leave application forms. He had no money at the time and could not return to Mombasa.

The claimant testified that he resumed work on 25 May 2024 after receiving information from his union that he had been dismissed from his employment. The respondent informed him about the termination of employment on 25 May 2024, when he was directed to clear. He was issued a certificate of service indicating that he had abandoned work on 31 March 2024, which was incorrect.

The respondent also issued a notice to show cause against the claimant, which was served upon his trade union. He was not personally served or invited to a hearing. His trade union was aware of the matter and tried conciliation, but the respondent declined.

The claimant testified that he was paid his wage for March 2024 Ksh. 1,400. The CBA salary arrears were paid on 4 June 2024, amounting to KSh. 144,000 and nothing else.

Reply and counterclaim

In reply, the respondent admitted that the claimant was employed on 3 January 2004 as a supervisor in the electrical department, earning a consolidated wage of Ksh. 11,000 per month. His wage graduated to Ksh. 24,471.80.

The claimant was entitled to 24 leave days each year. On 8 March 2024, the claimant applied for 8 leave days from 11 to 19 March 2024. This was approved, and he was to resume work on 20 March 2024.

The claimant worked until 2 April 2024. He requested for 4 leave days from 3 to 6 April 2024 to resume work on 8 April 2024. He failed to report for duty. On 15 April 2024, he was issued a notice to show cause for failing to report to work, which was a disciplinary issue. The matter was also reported to the labour officer and the trade union, as the claimant had absconded from duty.

The claimant reported back on 25 May 2024, opted to clear, and indicated that he had resigned from his employment. His terminal dues were processed in accordance with his voluntary resignation. This was without notice following the abscondment of duty.

On 18 June 2024, the respondent received a notice from the union stating that the claimant had complained of an unfair termination of his employment. The union asked for a meeting of the parties, which was held on 25 June 2024.

From the meeting, it emerged that the claimant had no formal application to extend his leave from 8 April 2024; hence, the respondent reported the absence to the labour officer. The claimant called Govinande on 8 April 2024, seeking a leave extension, and was directed to report to work and submit his application, which would be approved.

During the meeting, the respondent offered to withdraw the notice to show cause and allow the claimant to resume work. David Kenga and Alfred Ogutu, as his union officials, asked the claimant whether he wanted to resume work, but he refused, stating that his wage was too low compared to other supervisors.

The claimant cleared with the respondent and indicated that he had resigned from his employment on 25 June 2024. A certificate of service was issued on 25 May 2025.

The claimant terminated his employment voluntarily.

The claims made are without merit.

The claimant was paid all his terminal dues, including salary arrears of Ksh. 144, 207.60. The claims made are without merit and should be dismissed with costs.

The respondent further submitted that the court lacks jurisdiction under Legal Notice No. 6024 of 2018. The claimant should have filed his claim with the magistrate's court as his salary is below the Ksh. 80,000 threshold.

Counterclaim

In the counterclaim, the respondent's case is that the claimant abandoned his employment from 8 April 2024 without justification. He did not issue a notice or make a payment in lieu thereof. The respondent was forced to report the matter to the labour officer on 6 May 2024 that the claimant had abandoned duty. The claimant later resigned from his employment without notice on 25 May 2024.

Under clause 20(c) of the CBA, an employee who had served for over 5 years was entitled to 2 months' leave pay, and the employee who resigned should have given similar notice. The claimant should pay notice of Ksh. 48,943 with costs.

The respondent called John Mwalyo, the human resources manager, who testified that the claimant was an employee and entitled to 24 leave days, which he applied for as required under company policy. He was allowed to take his leave days to attend the burial and resume on 19 March 2024.

On 2 April 2024, the claimant was granted additional leave days to resume on 8 April 2024, but he did not resume until 25 May 2024. Following the failure to report to work, the respondent issued the claim and a notice to show cause, served the union and the labour officer on 15 April 2024.

On 25 May 2024, the claimant reported back, cleared, and indicated that he had resigned. He was paid his terminal dues at Ksh. 144,207.60.

The claimant's trade union requested a meeting over the claimant's case. A meeting was held on 25 June 2024, at which the claimant attended with his union officials and management. The respondent agreed to withdraw the notice to show cause to allow the claimant to resume his duties, but he declined, stating that his wages were too low. He cleared and was paid his dues.

Mwalyo testified that the claimant resigned without notice. The respondent has counterclaimed for notice pay due under clause 20(c) of the CBA. The claim is dismissed, and the counterclaim is allowed with costs.

The claimant submitted that, after being granted his leave days, he was to resume work on 8 April 2024, but could not do so because he had personal issues to resolve at home in Busia. He therefore contacted his head of department, who advised him to return to Mombasa and apply for leave extension, which he could not do as he had no money. He later learnt that his employment had been terminated without notice. This resulted in unfair termination of employment.

In the case of **Okode v Tejani [2025] eKLR**, the court held that where the employer alleges that an employee absconded duty, the employer bears the burden of proof that he had made efforts to trace the employee but failed.

In this case, the respondent did nothing to trace the claimant. No notice was issued as required under section 41 of the Employment Act (the Act), resulting in an unfair termination of employment.

Under clause 20(c) of the CBA, the claimant is entitled to 2 months' notice pay. Under clause 23 of the CBA, gratuity is payable at the end of employment at 18 days for each year worked.

There was a CBA review regarding salary arrears, which should be paid as claimed.

The respondent submitted that pursuant to Gazette Notice No. 6024 of 2018, the claimant was earning Ksh. 24,000, and the claim should have been filed before the magistrate's court. This court is without jurisdiction as held in **Ochieng Odinyo v University of Nairobi [2021] eKLR**.

The respondent submitted that, even if the court were to assume jurisdiction, the claimant absconded from duty on 8 April 2024. He was issued a notice to show cause, but he failed to reply. The matter was reported to his trade union and the labour officer.

The claimant later reported back on 25 May 2024 and cleared and paid his terminal dues. His reason was that he had resigned from his employment.

Later, the union requested a meeting of the parties on 25 June 2024. The respondent agreed to withdraw the notice to show cause and allow the claimant back to work, but he declined in the presence of the union official.

The claimant has failed to discharge his burden under section 47(5) of the Act. Upon his resignation, he failed to issue notice to the respondent. The counterclaim is justified and should be allowed with costs.

The respondent relied on the case of **Kotecha Wholesalers v Ochieng [2025] eKLR; Corrugated Sheets Limited v Ngao [2025] eKLR**.

Determination

The respondent has raised the question of jurisdiction pursuant to Gazette and Legal Notice No. 6024 of 2018, which allows the magistrates to hear employment disputes where the employee's wage is below Ksh. 80,000. The argument is that the claimant was earning Ksh. 24,000, and should have filed his claim before the lower court.

However, the claim is based on the facts that the claimant was unionised under the Kenya Chemical Workers Union and that a CBA resulted in the terms and conditions of employment. The claimant was a union member. Indeed, on 25 June 2024, the union representing the claimant requested a meeting to negotiate the matter.

Gazette and Legal Notice No. 6024 of 2018 concerns employment disputes, not trade disputes. The former is regulated under the Act, while the latter is regulated under the Labour Relations Act.

The court has exclusive jurisdiction over trade disputes where a CBA governs employment relations. Where the employee is a member of a trade union and relies on the terms and conditions of the CBA, even where the employee earns a wage below Ksh. 80,000, the court is the primary forum to file his claim.

In this case, the court has jurisdiction.

The claimant asserts that the respondent terminated his employment without due process. His case is that on 8 April 2024, he was unable to resume work since he could not travel from Busia to Mombasa to apply for leave extension. He informed his head of department, who accepted his explanation but directed him to travel back and formalise his application, which would then be allowed. He did not submit a leave application form after 8 April 2024.

According to grapevine information, the claimant returned on 25 May 2024 and learnt that his employment had been terminated and that a notice had been issued to the labour officer.

The claimant admitted that he has since been paid his terminal dues of Ksh. 144, 207.60. The dues owing include notice pay, salary arrears, and gratuity.

The respondent's case is that, upon being granted his leave days to resume work on 8 April 2024, the claimant failed to do so. He was issued a notice to show cause but refused to address it. The matter was reported to his trade union and the labour officer.

On 25 May 2024, the claim was cleared, and it was noted that his reason for exit was resignation. His trade union scheduled a meeting for 25 June 2024. The respondent agreed to withdraw the notice to show cause and allow the claimant to resume his employment, but he declined and has since been paid his terminal dues.

The respondent counterclaimed for two months' notice pay from the claimant.

An employee who fails to report to work when required by the employer is in breach of a fundamental condition of his employment contract under section 44(3) of the Act. Further, such conduct is defined as gross misconduct under section 44(4)a) of the Act. The employer is justified in issuing a summary dismissal notice. However, under section 41(2) of the Act, the employee should be issued with notice to attend and make his representations.

In this case, the respondent issued the claimant with the notice to show cause dated 15 April 2024.

The notice filed is to the claimant, employee No. 126 and has no forwarding address.

Under section 10(3) of the Act, the employment records the employer should keep of the employee include the postal address. Such an address becomes relevant in a notice such as the one dated 15 April 2024.

The claimant testified that he heard from the grapevine and through his trade union that his employment had been terminated.

Without the due process of sections 35 and 41 of the Act, the notice to the labour officer dated 6 May 2024 was premature.

The respondent issued no notice of termination of employment.

Instead, on 25 May 2024, the claimant reported to the respondent that he was wet through, had cleared, and had resigned from his employment. He testified that he had resigned by error and that he should be paid his wages.

However, the claimant is unorganised, and he reported the matter to his union. A meeting was called for 15 June 2024, and he was invited back to work, but declined.

Where his resignation was in error, the claimant did correct such fact.

In this case, the claimant resigned from his employment with the respondent.

Upon his resignation, the CBA governing his employment required him to give two months' notice under clause 20(c). This is due in two months to the respondent in Ksh. 48,947.60.

Upon his voluntary resignation, the respondent, having failed to invoke the summary dismissal right under section 44 of the Act, the claimant is entitled to the benefits under clause 23 of the CBA, including payment of his gratuity at 18 days for every year worked.

The terminal dues were paid on 4 June 2024 at Ksh. 144,207.60 only included salary arrears. There is no gratuity included with the resignation.

From 1 March 2004 to 8 April 2024, the claimant served for 20 full years. Under the CBA, he is entitled to 18 days' pay at his last wage of Ksh 24, 471.80 = Ksh . 293,661.60 in gratuity pay.

For a claim for salary arrears from 2019 to March 2024, this type of claim should be pursued by a trade union representing the collective. There are various wage dynamics under a given CBA for unionised and unionisable employees, which can only be factored in if the trade union addresses them. However, the claimant has since been paid KSh. 144,207.60 in wage arrears, together with his March wages.

As to costs, the claim, as assessed above, each party should pay its own costs.

Accordingly, judgment is entered for the claimant for payment of the gratuity in the amount of Ksh. 293,661.60 to be paid upon application of section 49(2) of the Employment Act.

The counterclaim is with merit and is allowed, and judgment is entered for the respondent against the claimant for the sum of Ksh. 48, 947.60.

Parties shall offset the payments, whichever is higher.

Each party to bear its costs.

Delivered in open court at Mombasa, this 30th day of October 2025.

M. MBARŪ
JUDGE

In the presence of:

Court Assistant: Japhet

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