

REPUBLIC OF KENYA

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

APPEAL NO. E124 OF 2025

ABSON MOTORS LIMITED APEPELLANT

VERSUS

ALI ATHMAN MWATUJI RESPONDENT

**[Being an appeal from the judgment of Hon. Lewis Gatheru delivered on 5 June 2025 in
Mombasa CMELRC No. E097 of 2024]**

JUDGMENT

The appeal arises from the judgment delivered by Hon. L. Gatheru on 5 June 2024 in Mombasa CMELRC No. E097 of 2024. The appellant is seeking the judgment to be set aside.

The background to the appeal is the respondent's claim. His case was that he was employed by the appellant as a parts assistant in June 2010 at a wage of Ksh. 26,667. The wage rose through the years to Ksh. 37,247 when his employment was terminated on 22 November 2023. His case was that his employment was unfairly terminated because no disciplinary process was held, and no witnesses were called. Efforts to have terminal dues paid were not addressed, and he claimed the following:

- a) 12 months completion Ksh. 446,964.
- b) House allowances for 3 years Ksh. 37,247.
- c) Leave balance Ksh. 31,039.15
- d) Salary for October 2023 KSh. 37,247.
- e) Sales commission for October 2023 Ksh. 15,000.
- f) Costs of the suit.

The appellant replied and denied the claims, and that the respondent was employed on 21 May 2010 as an assembler at a wage of Ksh. 10,500. His became the parts assistant at a wage of Ksh. 26,667, plus commissions paid depending on how much sales he made. The wage would thus vary each month. He failed to discharge his duties diligently and ignored

company policies. He was not invited to the disciplinary meeting on 28 September 2023, where he attended late without good cause. In the meeting, the internal audit was shared with the respondent, and he was asked to explain why there was a significant discrepancy between the system selling prices and the invoiced prices for the spare parts he had sold, and why customers were being given discounts of up to 80%. There was no proper response or explanation for the variances and discrepancies. He only indicated that the sales were done by a colleague, Joseph Mwandawiro, who shared the computer codes. He did not explain why he gave his credentials to another person.

The response also stated that the respondent was issued a notice to show cause why disciplinary action should not be taken against him on 9 October 2023. He was notified to explain on 12 October 2023. There was no response given. On 16 October 2023, the respondent attended the disciplinary hearing. He admitted that the appellant allowed only a 15% discount on the selling price to sub-dealers, and he failed to explain why he gave such large discounts. He insisted that Joseph Mwandawiro used his computer. Without providing any satisfactory explanation, the appellant found the respondent in contravention of the policy and issued a notice of termination of employment. All terminal dues were paid, and the respondent had used all leave days. He has failed to collect his certificate of service.

The learned magistrate heard the parties and held that the disciplinary process was unfair because the appellant failed to comply with the mandatory provisions of section 41 of the Employment Act. No representative of the respondent was present at the disciplinary hearing. The trial court awarded the respondent the following;

- a) 7 months' compensation Ksh. 186,669.
- b) House allowance 144,000.
- c) Salary for October 2023 Ksh. 26,667.
- d) Costs of the suit plus interests.

Aggrieved by the judgment, the appellant grounds of appeal are that the learned magistrate erred in law and fact in failing to consider that the respondent had been given a hearing before the summary dismissal on 19 October 2023. He was invited to attend the disciplinary hearing on 28 September 2023, which he did. This was after the notice to show cause dated 9 October 2023, inviting him to file a response, which he failed to address. There was thus a second chance to attend a hearing on 19 October 2023.

Other grounds of appeal are that the learned magistrate erred by allowing the claim for house allowances for 36 months as opposed to 12 months per section 89 of the Employment Act (the Act). The leave pay was awarded despite being time-barred. Costs and interests were not due and should be set aside. There were valid reasons leading to the termination of employment.

The appellant submitted that the respondent was granted the right to a hearing on two occasions. He was issued a notice to show cause and failed to appear. In **Okoti v Judicial Service Commission & another Petition E408 of 2020**, the court held that section 41 of the Act allows the employer to give the employee the right to a hearing by written or physical attendance. In this case, the appellant allowed both written and physical attendance. The respondent failed to give a satisfactory response to the charges **made against him, as held in Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**.

The awards made for house allowance and leave pay are time-barred and should be set aside. Costs and interests are not justified. The award of 7 months' compensation is excessive in the given circumstances of the case.

The respondent submitted that during the disciplinary hearing on 16 October 2023, the appellant relied on an audit report alleging the granting of extravagant discounts. There was no evidence. The explanations given were not considered. The appellant had a discount policy, which the respondent applied.

The disciplinary process lacked procedural fairness as required under section 43 of the Act. There was no valid, genuine, or good cause for termination of employment. The disciplinary hearing did not meet the threshold of section 41 of the Act; hence, it was unlawful and unfair. The awards by the real court were justified and should be confirmed with costs.

Determination

This is a first appeal. The court is required to review the record, reassess the trial court's findings and make its conclusions. However, take into account that the court did not hear or see the witnesses and make this allowance.

By a notice dated 19 October 2023, the appellant terminated the respondent's employment for failing to demonstrate honesty and trust by awarding customers exorbitant discounts without authorization, thereby denying the company revenue. Termination of employment was to take effect from 23 October 2023. Within this time, the respondent was to take his 24 leave days.

The respondent had been issued with a notice to show cause dated 9 October 2023. He was required to respond by 12 October 2023. He did not.

In response, the appellant admitted that the respondent was invited to the disciplinary hearing on 16 October 2023, and that the respondent attended in the presence of the general manager and the human resources manager. Indeed, the learned magistrate analyzed these procedures and applied the provisions of section 41 of the Act. The employee must be accompanied by another employee of his choice at the disciplinary hearing. In the case of **Ndegwa v Sogea-Satom Kenya [2025] KEELRC 2517 (KLR); Tutana v County Government of Isiolo & another (Employment and Labour Relations Cause E037 of 2024) [2025] KEELRC; and Gakenia v Lion Landscapes [2025] KEELRC 2264 (KLR).**

The motions of section 41 of the Act are mandatory. The employer should ensure the employee's rights are protected during the disciplinary hearing. This lapse negated the disciplinary process. It resulted in unlawful and unfair termination of employment.

The learned magistrate well addressed the matter and rationalised the award of 7 months' gross wages in compensation. This court finds no reason to fault the discretion to award compensation under section 49 of the Act.

On the award of house allowances, the position of spares assistant is not regulated under the wage orders. Under the contract of employment. The wage paid is above the minimum; hence, the separate allocation of a house allowance for 3 years is not justified.

Regarding the award of annual leave, the notice dated 19 October 2023 directed the respondent to take 24 days of leave. Under section 28 of the Act, the employer is required to be proactive in ensuring that the employee has taken leave days.

Upon the directions to proceed on annual leave, the respondent did not address. He cannot turn around and assert that he was denied taking his leave days. Such a claim is not justified in light of the 30-day notice terminating employment and the direction to take 24 leave days.

On the salary due in October 2023, employment was terminated effectively on 23 November 2023. The October wage is due. There is no record of the payment.

On the award of costs and interests, indeed, under section 12(4) of the Employment and Labour Relations Court Act read with Rule 73 of the Employment and Labour Relations Court (Procedure) Rules, costs awarded in employment disputes should be with reasons and

do not follow the cause. Justification for the award of costs should be given, which is lacking in this case. Such an award is not due.

According to the appeal analyzed above, the judgment in Mombasa CMELRC No. E097 of 2024 is reviewed with the award of compensation at KSh. 186,669 and the wage for October 2023 at KSh. 26,667 only. Each bears its costs for the appeal and trial court.

Delivered in open court at Malindi, this 11th day of December 2025.

M. MBARŪ
JUDGE

In the presence of:

Court Assistant: Davis Wekesa

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