

**REPUBLIC OF KENYA**

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

**APPEAL NO. E154 OF 2025**

**SIDOMAN INVESTMENTS COMPANY LIMITED..... APPELLANTS**

**VERSUS**

**ISHMAEL NYAMBU MCHARO ..... RESPONDENT**

**[Being an appeal from the judgment of Hon. J. B. Kalo delivered on 4 August 2025 in  
Mombasa CMELRC No. E267 of 2023]**

**JUDGMENT**

The appeal arises from the judgment delivered on 4 August 2025 in Mombasa CMELRC No. E267 of 2023. The appellant is seeking that the judgment be set aside and the respondent's suit be dismissed with costs.

The background to the appeal is a claim filed by the respondent before the trial court. His case was that he was employed by the appellant as a heavy commercial driver on 1 October 2019. He worked for 3 ½ years, ending in March 2023, when his employment was terminated due to alleged disciplinary issues and because the business was down. However, there was no warning, notice or hearing. The allegations that businesses had gone down were an afterthought, as the company continued operations during COVID and transportation businesses were doing well. When work was reduced, there was no criterion for terminating employment. This resulted in unfair termination of employment. At the time, the respondent was earning Ksh. 20,000 per month instead of Ksh. 34,302.75, which was an underpayment, and hence claimed the following dues:

- a) Compensation 12 months x Ksh. 34,302.75 Ksh. 411,633.
- b) Service pay Ksh. 51,453.
- c) Underpayments ksh. 600,715.
- d) Notice pay Ksh. 34,302.75
- e) House allowances Ksh. 185,230.75

- f) Leave days Ksh. 72,035.75.
- g) Certificate of service.
- h) Costs of the suit.

In reply, the appellant filed a response and counterclaim. The case was that the respondent was employed as a driver on 1 October 2019. He worked until 1 April 2023. His duties included driving the appellant's trucks within Kenya. Termination of employment was lawful upon issuance of notice. The respondent had a myriad of disciplinary issues, including insubordination, negligence and incompetence. He was issued a statement dated 28 February 2023, a show cause letter dated 2 February 2023, and a previously issued warning letter dated 10 May 2020. Termination of employment was because of failure to perform employment duties properly, leading to loss of business, insubordination, and poor performance. Notice of the disciplinary meeting was issued before the termination of employment. The allegations made are not justified. The respondent was not underpaid as alleged. He was earning a basic wage of KSh. 21,210 plus house allowances and mileage, with an aggregate of Ksh. 25,000 with a total of KSh. 45,000 per month. The respondent was registered with NSSF, hence service pay is not due. There was no work during public holidays. During is employed as a driver; the respondent caused the applicant various losses due to negligence while driving vehicle registration No. KCL 784D causing wanton breakage and perpetual expenditure. From 1 October 2019 to 31 March 2023, the respondent subjected the appellant to an expenditure of Ksh. 2,563,285. He was invited to a meeting to hand over his motor vehicle upon termination of employment, which he failed to address. The truck is valued at Ksh. 6.5 million, its trailer Ksh. 2 million, spare tyres Ksh. 41,000, jack Ksh. 10,000, radio accessories ksh. 21,000. The total value of the goods that were not handed over was Ksh. 113,000.

The claims made should be dismissed with costs.

The counterclaim was that due to the respondent's acts of negligence and abandoning the truck registration No. KCL 784D, the appellant incurred a loss of Ksh. 2,563,285. He never handed over his tools of trade, which included:

- a) Spare wheels,
- b) Jack,
- c) Radio accessories.

These goods are valued at KSh. 113,000, which amount is counterclaimed.

The counterclaim was also that the respondent exposed the appellant to a loss of Ksh. 2,214,256 for extra fuel for claiming Ksh. 6,798,625 against the fuel monitoring report, indicating Ksh. 4,584,368. The counterclaim should be allowed with costs.

The learned magistrate heard the parties and found that the employment was terminated unfairly. There was an underpayment of wages, which should have been Ksh. 34,302.75 for a heavy commercial driver. The claims were assessed and awarded as follows:

- a) 10 months' compensation Ksh. 343,027.50
- b) Service pay Ksh. 51,453.
- c) Underpayments for 3 years, Ksh. 579,339.
- d) Notice pay at KSh. 34,302.75
- e) House allowance for 3 years, KSh. 185,234.50
- f) Leave pay KSh. 72,035.75.
- g) Costs plus interests.

Aggrieved by the judgment, the appellant has filed an appeal on the ground that the trial court erred in law and fact by failing to find that the employment was correctly terminated. The award of 10 months' compensation to the respondent, after 3 years of service, was excessive. The award of leave was not justified as it went contrary to section 28(2) of the Employment Act (the Act).

The learned magistrate failed to consider the counterclaim.

Other grounds of appeal are that the trial court erred in failing to consider that the respondent had a consolidated salary and was registered with NSSF. That service pay was therefore not due under section 35(6) of the Act.

The appeal is that the trial court erred in finding that the respondent was employed as a heavy commercial driver and was therefore underpaid. This was contrary to the fact that employment was an ordinary driver.

The appellant submitted that the respondent was employed under a written contract as a driver on 1 October 2019. His wage was paid in accordance with the wage guidelines.

Before termination of employment, the respondent committed various acts of gross misconduct. He was issued a notice but failed to address it. Termination of employment was

justified and lawful. Notice pay and compensation are not justified as held in **Togom v Radar Limited, ELRCA No. E003 of 2023.**

The award for leave days went contrary to section 28(4) of the Act. Where this was found justified, it should not go beyond the 18-month threshold under the law as held in **Radar Limited v Daniel Jomo Machera [2022] eKLR.**

The appellant submitted that there was no underpayment of wages as alleged. The respondent was under a written contract as a driver. He was never employed as a heavy commercial driver to justify the award of underpayment. No evidence was submitted on the alleged underpayment.

The wage paid included the house allowance, which is allowed under section 31 of the Act, as held in **Shanga Kitsao Mumba v Mabati Rolling Mills [2017] eKLR.** The respondent was paid the agreed-upon wage.

The claim for work during public holidays was without particulars. This was not proved. Hence, the awards for notice pay and compensation, and, in totality, the claim, were not justified.

The appellant submitted that the trial court did not address the counterclaim. Under section 19 of the Act, the employer is permitted to deduct any loss incurred through the employee's negligence. Without any challenge to the counterclaim, this should have been allowed with costs.

The respondent submitted that the learned magistrate addressed the claim on the merits and the appeal should be dismissed with costs. The work duties involved driving a truck, KCL 784D, with a trailer. Such is defined as a heavy commercial vehicle, and the wage paid was an underpayment.

Termination of employment was unfair and did not follow due process. The appellant called witnesses who testified that through a notice dated 2 February 2023, the respondent abandoned his vehicle at Mariakani on 1 February 2023. This means that there was no disciplinary hearing as alleged. As the custodian of work records, the appellant did not produce any minutes for the disciplinary hearing. This was contrary to section 45 of the Act, resulting in unfair termination of employment.

The wards by the trial court are justified and lawful.

Regarding the counterclaim, the respondent submitted that this is an afterthought. There is no proof that any accessories were in the allocated vehicle. The counterclaim should be dismissed with costs.

#### Determination

Being a first appeal, the court is alive to its role as a retrial of the case, as expounded in previous decisions. See **Selle & another V Associated Motor Boat Co. Ltd [1958] EA 123, Peters V Sunday Post [1958 EA 424 and Williams Diamonds Ltd V Brown [1970] EA.**

For termination of employment to be held unfair, the employee must discharge his duty under section 47(5) of the Act. Prove that there was an unfair termination of employment. The employer, too, is required to justify the reasons for termination of employment under section 43 of the Act.

The appellant called various witnesses, including the human resources manager. The evidence was that termination of employment arose after the respondent had abandoned his allocated vehicle at Mariakani. The vehicle KCL 784D had a trailer. As a result, various vehicle accessories were not handed over. The appellant also analysed the fuel records and established a huge loss that was controlled.

This evidence is crucial.

To begin with, the respondent was driving a truck, KCL 784D, with a trailer. Although the employment contract defined his roles as a driver, the duties allocated were to drive a truck with a trailer. This is a heavy commercial vehicle.

Under the Wage Orders, the wages are paid in Ksh. 20,000 per contract, dated 1 October 2019, and was an underpayment.

A heavy commercial driver's wage is regulated in law at ksh. 34,302.75 plus a 15% house allowance at Ksh. 5,148.12 total wage being KSh. 39,450.86.

There was an underpayment of Ksh. 19,459.86 per month.

Additionally, where the respondent is alleged to have abandoned his allocated vehicle at Mariakani on 1 February 2023, he was only summoned to hand over the meeting and not to attend a disciplinary hearing. Under sections 35 and 41 of the Act, even where the employee has committed serious acts of misconduct or gross misconduct that justify summary dismissal under section 44 of the Act, notice to attend and address is mandatory as held in Churchill

Winstones Ochieng v I & M Bank Limited [2025] KEELRC 3338 (KLR) Where the appellant was not able to reach the respondent after the alleged abandonment of the allocated vehicle, this should have been demonstrated to the court.

Where the appellant alleges that they issued notice upon the respondent and he refused to sign, under section 18(5) (b) of the Act, notice should have been served upon the labour officer.

The failure to invite the employee to attend and address the alleged misconduct resulted in unfair termination of employment contrary to sections 41 and 45 of the Act.

The learned magistrate well addressed the facts, the law, and arrived at a proper conclusion.

On the award of 10 months' compensation under section 49 of the Act, the decision to allocate the award is discretionary. Unless such discretion is not applied judicially, there being no reason in this regard, to fault the learned magistrate is not justified. The court considered the circumstances leading to the termination of employment. There are reasons and justifications for the award.

Under section 49 of the Act, the tabulation of compensation should be based on the gross wage. The respondent's due wage, inclusive of house allowance, is Ksh. 39,450.86. The award of 10 months amounts to KSh. 394,508.60.

Upon the finding that there was no due process leading to unfair termination of employment, notice pay is due at the gross wage of Ksh. 39,450.86.

On the award of service pay, the learned magistrate held that the payment statement did not reflect any statutory payments. The only pay slip produced was a post-employment one.

The payment of statutory dues is a legal requirement. It is meant to cushion the employee during and after employment. This cannot be circumvented once employment has been unfairly terminated.

The award of service pay in lieu of proof that there were statutory payments in accordance with section 35(5) and (6) of the Act is well analysed and justified.

For the 3 full years worked, for 15 days each, the respondent is entitled to service pay at Ksh.  $39,450.86/30 \times 15 \times 3 = \text{Ksh. } 59,221.15$ .

On the claims for underpayments, as addressed above, the respondent was a heavy commercial driver. The duties allocated were to drive a truck with a trailer that was allegedly abandoned at Mariakani on 1 February 2023. In the vehicle, the appellant asserts that various accessories were not handed over.

The wage due for a heavy commercial driver in February 2023 is 39,450.86. There was an underpayment of Ksh. 19,459.86 per month.

In tabulating the due underpayments, this being a monthly accruing injury, under section 90 of the Act, it is defined as a continuing injury. The same should be claimed within 12 months from the date of cessation, as held in Muthee v Kenya Power & Lighting Company Ltd [2025] KEELRC 3342 (KLR) and the case of **The German School Society & another v Ohany & another [2023] KECA** that:

*The principles underlying continuing wrongs and recurring/successive wrongs have been applied in employment disputes. A ‘continuing wrong’ refers to a single wrongful act that results in a continuing injury, while ‘recurring or successive wrongs’ are those that occur periodically, with each instance giving rise to a distinct and separate cause of action.*

Therefore, upon termination of employment in March 2023, the respondent filed his claim dated 5 May 2023. He can only claim for underpayments and for due house allowances as a continuing injury, and only for the last 12 months.

The underpayment of Ksh. 19,459.86 x 12 is Ksh. 233,518.32 in underpayment of wages, inclusive of house allowances.

Regarding the claim for annual leave, indeed, as submitted by the appellant, accrued leave days are regulated under section 28 of the Act. Where the employee fails to apply for his annual leave, it can only accumulate for up to 18 months. This translates to 33 days.

On the basic wage of Ksh. 34,203.75 for 33 leave days, the respondent is entitled to ksh. 37,653.85.

On the submissions that there was a ward for public holidays, indeed, this must be particularised. It cannot form a general claim. The Minister publishes each public holiday. Any claim that the respondent was at work during such special days should have been stated.

Accordingly, the award due to the respondent is:

- a) Compensation to KSh. 394,508.60.

- b) Notice pay Ksh. 39,405.86.
- c) Service pay Ksh. 59,221.15.
- d) Underpayments Ksh. 233,518.32
- e) Accrued leave pay Ksh. 37,653.85.

On the counterclaim, indeed, once pleaded, the same ought to be addressed on the merits. The record does not have any response to the counterclaim by the respondent.

Upon notice dated 10 March 2023, the appellant sent the respondent on compulsory leave to allow for investigations into his truck No. KC 784D. Although there was no due process in the termination of employment, the respondent, as the employee, was accountable to the employer for the tools of work allocated to him.

Upon the counterclaim, the loss incurred while using the allocated motor vehicle registration No. KCL 784D, he was responsible under section 19 of the Act. Without any response to the counterclaim, there is no justification for the loss of Ksh. 2,563,285 caused by negligence and the failure to account for or hand over the vehicle accessories, amounting to Ksh. 113,000, which is due to the appellant.

The learned magistrate did not address the counterclaim on the merits despite the appellant calling witnesses who testified to the facts and the losses incurred after the respondent negligently handled the vehicle and failed to hand over his duties.

The counterclaim is found with merit. The appellant is entitled to the sum of Ksh. 2,563,285 for the loss and negligence occasioned by the respondent and for items not handed over, amounting to KSh. 113,000.

On the question of costs, the appeal was partially successful; each party should pay its costs for the trial court and this appeal.

**Accordingly, judgment of the trial court in Mombasa CMLECR No. E276 of 2023 is reviewed in the following terms:**

- a) Compensation to KSh. 394,508.60.**
- b) Notice pay Ksh. 39,405.86.**
- c) Service pay Ksh. 59,221.15.**
- d) Underpayments Ksh. 233,518.32**
- e) Accrued leave pay Ksh. 37,653.85.**

**The counterclaim is allowed in the following terms:**

- a) Loss to motor vehicle KCL 784D Ksh. 2,563,285.**
- b) Costs of items not handed over KSh. 113,000**

**And**

- a) The payments above shall be offset whichever is higher.**
- b) For the appeal and trial court, each party to bear its costs.**

Delivered in open court at Nairobi, this 18<sup>th</sup> day of December 2025.

M. MBARŪ  
JUDGE

In the presence of:

Court Assistant: Marion

..... and .....