

REPUBLIC OF KENYA

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

APPEAL NO. E252 OF 2024

TRANSWAY KENYA LOGISTICS COMPANY LIMITED APPELLANT

VERSUS

GEORGE OCHING AKECH RESPONDENT

**[Being an appeal from the judgment of Hon. Nabibya Maureen delivered on 1 August
2024 in Mombasa MCELRC No. E024 of 2023]**

JUDGMENT

The appeal arises from the judgment delivered on 1 August 2024 in Mombasa MCELRC No. E024 of 2024.

The appellant is seeking that the judgment of the trial court be set aside and replaced with an order dismissing the claim with costs.

The background to the appeal is a claim filed by the respondent, who alleges that he was employed by the appellant as a mechanic from 3 January 2020 until 11 January 2023, when his employment was unfairly terminated. His case was that he suffered an injury to the thumb and left index finger on 26 November 2022 while at work. He was treated at Port Reitz Hospital and verbally given sick leave by the manager, Ndegwa, to enable him to recover and report back on 28 December 2022. His case was that Ndegwa also allowed him to report back on 9 January 2023 since the company had closed its office owing to the December 2022 holidays. On 5 January 2023, as the respondent was leaving, he received a phone call from Ndegwa, who asked him to meet at Karomaindu Bar in Chaani, where he was a resident. They shared alcoholic drinks, and later, Ndegwa asked him to accompany him to the appellant's premises. The respondent was surprised to be taken to Changamwe Police Station, where he was arrested and charged with a theft committed by a servant. He was detained until 8 January 2023, when he paid cash. He was not charged in court, and when he reported to work on 11 January 2023, Ndegwa told him to go away. This resulted in summary dismissal without pay for December 2022 and January 2023. There was no due process, and for the unfair termination of employment, the respondent claimed the following terminal dues:

- a) 12 months' compensation Ksh. 300,000.
- b) Salary for January 2023 Ksh. 14,285.
- c) Salary for December 2022 Ksh. 25,000.
- d) Notice pay KSh. 25,000.
- e) Service pay for 2 years, KSh. 25,000.
- f) Compensation for unlawful detention Ksh. 400,000.
- g) Annual leave for 2 years, Ksh. 50,000.

h) Costs of the suit.

In reply, the appellant denied the claims, save that the respondent was arrested by the police and charged with the offence of stealing by a servant. This was after he was involved in the theft of spare parts together with other employees. There was no summary dismissal as alleged. The claim for non-payment of wages for December 2022 and January 2023 lacks proof. The respondent executed an agreement stating that he was not owed any terminal dues. The respondent was invited to a disciplinary hearing but chose not to attend. A show-cause notice was issued, but no response was received. The respondent signed an agreement admitting his involvement in the theft, and such agreement absolved the appellant from any liability. The claims made are without merit and should be dismissed.

The appellant filed various work records, including;

- a) Notice to show cause dated 19 January 2023.
- b) Minutes of disciplinary hearing.
- c) Settlement agreement.

The learned magistrate heard the parties and held that there was unfair termination of employment and hence awarded as follows:

- a) 6 months' compensation Ksh. 150,000.
- b) Salary for December 2022 and January 2023 KSh. 25,000 and Ksh. 15,000 respectively.
- c) Notice pay KSh. 25,000.
- d) Service pay for 3 years, Ksh. 37,500.
- e) Leave for 2 years, KSh 35. 000.

Aggrieved by the judgment, the appellant has five grounds that the learned trial magistrate erred in law and fact in failing to consider the settlement agreement between the parties despite the respondent admitting to the theft that occurred at the appellant's company, and the appellant was involved. The trial court erred in failing to consider the appellant's testimony that the respondent willfully failed to attend his disciplinary hearing, despite being served with a show-cause notice and evidence from his colleagues of his involvement in theft.

The appellant submitted that the respondent, together with his colleagues, was suspected of stealing spare parts from the appellant. He was arrested and presented at Changamwe Police Station. The respondent admitted to the theft and agreed to forfeit his December 2022 and January 2023 salary payments, as well as all terminal dues. Despite being served with a notice to show cause and an invitation to attend a disciplinary hearing, he failed to respond or attend.

The appellant submitted that the trial court failed to consider the evidence presented and therefore arrived at an incorrect decision. Had the settlement agreement been considered, the trial court's findings and judgment would have been to dismiss the claim.

The respondent submitted that the claim was determined on merit. The appeal is without merit and should be dismissed.

Determination

This is a first appeal. The court is required to review the record, reassess the findings and make its conclusions. However, it is worth noting that the learned magistrate had the opportunity to hear and see the witnesses and form an impression of what they stated in court.

The main contention in the appeal is that the trial court failed to consider the Release Settlement Agreement (Agreement) between the parties dated 7 January 2023.

In the Agreement, the respondent, as the employee, has agreed to forfeit his salary for the loss occasioned to the appellant.

The *Agreement* filed with the court is incomplete. A crucial part of the signatures is missing.

There is no signature by a representative of the appellant.

The appellant has heavily relied on this agreement. It is not registered on its letterhead, similar to the show cause notice dated 19 January 2023.

The records filed by the appellant do not add up.

Whereas the respondent is said to have been issued with a show cause notice, invited to attend a disciplinary hearing, and failed to participate in it, the show cause notice is dated 19 January 2023. In contrast, the alleged *Agreement* is dated 7 January 2023. Suppose the respondent had admitted to the allegations made against him on 7 January and sanctioned to forfeit his wages for December 2022 and January 2023. What was the purpose of the notice to show cause dated 19 January 2023?

The manipulation of the record is apparent to the court.

The alleged disciplinary hearing on 17 January 2023 is two days after the notice to show cause was issued on 15 January 2023.

This reflects poorly on the respondent. This is a party willing to stop at nothing to sway the events and the court away from the curse of justice.

Events must be narrated as they occurred by the respondent. Ndegwa allowed him to go on sick leave and resume his duties after the December 2022 holidays. He was later arrested for alleged theft and dismissed without due process under sections 35, 41, and 44 of the Employment Act. This requires notice to allow the employee to file a response, and then attend a disciplinary hearing in the presence of another employee of his choice, as held in **Pius Machafu Isindu v Lavington Security Guards Limited [2017] KECA 225 (KLR)** that:

There can be no doubt that the Act, enacted in 2007, imposes heavy legal obligations on employers in cases of summary dismissal for breach of employment contract and for unfair termination involving a breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5)), amongst other

provisions. A mandatory and elaborate process is then set up under section 41, requiring notification and a hearing before termination. ...

In this case, the respondent's employment was terminated unfairly. The alleged Settlement Agreement is a mere shroud to deceive and manipulate records. Such cannot stand the test of authenticity.

The learned magistrate well addressed the claim before the court, considered all the facts, and arrived at a well-reasoned judgment.

Salaries for December 2022 and January 2023 are due.

For unfair termination of employment, the trial court awarded 6 months. The reasons for such allocation are not given as required. The respondent worked for the appellant for under 3 years. A compensation of 3 months' gross salary of KSh. 25,000 is hereby found appropriate, all at KSh. 75,000 in compensation.

The claim for service pay is due when there is no evidence of remittance of statutory dues. The respondent filed his NSSF statement to confirm his registration. Under section 35(5) of the Employment Act, service pay is not due.

Regarding the claim for compensation for unlawful detention, the detention was by the police, not the appellant. Such matters should be addressed separately. Where there was alleged theft by a servant, the appellant had a duty to report to the police. Such civic duty is a requirement.

On the claim for annual leave pay, there are no work records on how the appellant treated the annual leave day owed to the respondent. The claim for the two years is justified.

On costs, the appeal is essentially without merit. Costs are due to the respondent as awarded by the trial court.

Accordingly, the judgment in Mombasa CMELRC No. E024 of 2023 is affirmed in the following terms;

- a) Compensation 75,000.**
- b) Notice pay KSh.25, 000.**
- c) Salary for December 2022: KSh. 25,000.**
- d) Salary for January 2023: Ksh 14. 285.**
- e) Service pay for 2 years, Ksh. 25,000.**
- f) Annual leave for 2 years, Ksh. 50,000.**
- g) Costs of the lower court.**
- h) For the appeal, each party to bear its costs.**

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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