

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT MACHAKOS

APPEAL NUMBER E018 OF 2025

LEX OILFIELD SOLUTIONS LIMITEDAPPELLANT

VERSUS

JEREMIAH NGANGARESPONDENT

*(Being an Appeal from the Judgment and Decree of the Hon. E.K Suter (PM) delivered
on 13th March 2025 in Mavoko CMELRC No. E178 OF 2023)*

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

JUDGMENT

1. The Appellant herein, being dissatisfied with Judgment and Decree of the Hon. E.K Suter (PM) delivered on 13th March 2025 in Mavoko CMELRC No. E178 OF 2023 between the parties filed a Memorandum of Appeal dated the 3rd April, 2025 seeking the following orders:

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(a) The Appeal herein be allowed

(b) That Judgment and Decree of Hon. E.K Suter delivered on 13th March, 2025 be set aside and/or varied and substituted by an award as prayed in the Appellant's Memorandum of Appeal dated 03 April, 2025.

(c) That the costs of this Appeal and costs incurred in the subordinate Court be borne by the Respondent.

(d) Such further relief as the court may deem necessary

Grounds of the appeal

2. THAT the Learned Trial magistrate misdirected himself in law and in fact by failing to consider the significance of the documentary evidence tendered in support of the respondent's case.
3. THAT the Learned Trial magistrate failed to consider the Respondent/appellant's evidence and/or misapprehended the law in arriving at a decision that the Claimant/respondent was unlawfully, unprocedurally and unfairly terminated from employment.
4. THAT the Learned trial magistrate erred in law and or applied wrong principles and parameters by failing to consider and appreciate the provisions of Section 47 (5) of the Employment Act,2007 by finding and holding that the claimant/respondent was unfairly terminated from employment and that the termination was unlawful and unfair.
5. THAT the Learned trial magistrate erred in law and fact and/or applied wrong principles and/or failed to consider the evidence adduced by the respondent/appellant and parameters by awarding the Claimant/respondent Kshs. 270,000/- as compensation for unfair compensation.

6. THAT the Learned trial magistrate erred in law and fact and/or applied wrong principles and/or failed to consider the evidence adduced by the respondent/appellant and parameters by awarding the Claimant/respondent KShs. 90,641/ as unpaid leave allowance.
7. THAT the Learned trial magistrate erred in law and fact and/or applied wrong principles and/or failed to consider the evidence adduced by the respondent/appellant and parameters by awarding the Claimant/respondent Kshs. 45,000/- as notice pay.
8. THAT the learned trial magistrate erred in law and fact and/or applied wrong principles in awarding the Claimant/Respondent interest and costs.

Background to the appeal

9. The respondent filed a suit alleging unfair termination of employment against the appellant before the lower court by way of a statement of claim dated 18th August 2023 seeking for the following reliefs-
 - a. A declaration that the termination of the claimant by the respondent was wrongful, unfair and unlawful.
 - b. Notice pay at Kshs-45,000
 - c. Accrued Leave days not taken at Kshs.90,641
 - d. Certificate of service.
 - e. 12 months Compensation for unlawful and unfair termination.

- f. Costs of the suit and interest thereon.
- g. Any other relief that this court may deem fit to grant in the circumstances.
10. The claimant filed his witness statement of even date which he adopted as his evidence in chief and produced documents under list of documents of even date. (the claimant's case is at pages 4-19 of the ROA).
11. The claim was opposed by the appellant who entered appearance and filed response to the statement of claim, the respondent's witness statement of Emmanuel Kitusa dated 30th April 2024, list of documents dated 1st September 2024 and the bundle of documents (pages 20-65 of the ROA).
12. The respondent/claimant filed reply to the response (page 67 of ROA).
13. The claimant's case was heard on the 18th November 2024 where he testified on oath and adopted his witness and produced his filed documents as his evidence in chief. He was cross-examined by counsel for the appellant Mr. Muhoro and re-examined. The appellant's case was heard on even date with RW1 as Emmanuel Kitusa who testified on oath, adopted his witness statement and produced the respondent's documents as R-exhibit 1-6 as evidence in chief. He was cross-examined by counsel for the claimant Mr. Kiptanui and re-examined. (Typed proceedings at pages 92-96 of ROA).
14. The parties filed written submissions after the hearing. The trial court rendered its decision on the 13th March 2025 in favour of the respondent for the total sum of Kshs. 405641 comprising

of notice pay. Unpaid leave and compensation for unfair termination which is subject of the appeal.

DETERMINATION.

15. The appeal was canvassed by way of written submissions. Both parties complied.
16. As the first appellate Court, the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. In Selle & Another -V Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus: *"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions..."*
17. Further in the case of In the German School Society & Another-Vs- Ohany & Another (Civil Appeal 325 & 342 of 2018 (Consolidated) [2023] KECA894 (KLR) (24 July 2023) (Judgment) the Court of Appeal held that: *-"A first appeal is a valuable right of the parties and unless restricted by law, the whole case is open for reconsideration both on questions of fact and law. The judgment of the appellate court must reflect this court's conscious application of its mind and record findings supported by reasons, on all the issues arising along with the contentions put forth and pressed by the parties for decision of this Court. The first appellate court has jurisdiction to reverse or affirm the findings of the trial court. While reversing a finding of fact, the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a*

different finding. A first appellate court is the final court of fact ordinarily, and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage''.

Issues for determination

18. The court on reading the grounds of appeal found the issues for determination in the appeal to be—
- a. Whether the trial court erred in its finding of unfair termination
 - b. Whether the trial court erred in reliefs granted.

Whether the trial court erred in its finding of unfair termination

19. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the Employment Act to wit:- ‘45(2) A termination of employment by an employer is unfair if the employer fails to prove—
- (a) that the reason for the termination is valid
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.’’ To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the Employment Act (Walter Ogal Anuro v Teachers Service Commission [2013] eKLR).

Appellant's submissions

20. Ground 1: The learned trial magistrate erred in law and fact by failing to properly evaluate and analyse the totality of the evidence, thereby arriving at an erroneous finding that the Respondent was unfairly and unlawfully terminated. In Mombasa C.A.C.A. No. 3 of 2014: CFC Stanbic Bank v. Danson Mwashako Mwakuona [2015] eKLR, the Court of Appeal emphasized the importance of considering an employee's duties and responsibilities when assessing the fairness of their termination. The Respondent's case rested on the claim of unfair and/or unlawful termination. The evidence, however, adduced by the Appellant includes: a) Documentary evidence (minutes of discipline hearing, correspondences, attendance records). b) Oral testimony (from director, supervisors) showing repeated absenteeism, inconsistent excuses, delays in return to site. c) Evidence pointing to discrepancies in production/sales records, under-declaration, misrepresentation of load/weights, which amount to breach of duty and, arguably, theft or misconduct. Absent from the trial court's decision is a balanced, holistic assessment of all this evidence. The trial court appears to have accepted the Respondent's version without sufficiently scrutinizing the documentary and testimonial evidence put forward by the Appellant. Legally, gross misconduct (such as absence without leave, misrepresentation, theft) falls within the enumerated Category under Section 44(4) of the Employment Act, 2007: o Section 44(4)(a) of the Employment Act, 2007 provides: "Any of the following acts and omissions on the part of an employee shall constitute gross misconduct for which the employer may summarily dismiss the employee... if, without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work." The Appellant further gave evidence of glaring inconsistencies in the records of pozzolana production and sales, which did not tally with the actual weights of material delivered to clients. As the operations

manager, the Respondent was directly responsible for loading pozzolana onto the tipper truck and recording production figures. It was established that the Respondent willfully and intentionally misrepresented the actual load capacity in his reports, leading to the conclusion that there was theft of material. The Respondent's deliberate under-declaration of production units resulted in substantial loss of business and profits, ultimately causing the closure of the quarry. This gross negligence and breach of duty is a further justifiable ground for dismissal under Section 44(4)(c) and (d) of the Employment Act, 2007. Section 44(4)(c) and (d) of the Employment Act, 2007 provide: "An employee commits an act of gross misconduct if... 4 (c) he is guilty of gross misconduct by neglect or carelessness in the performance of his duties; (d) he knowingly fails, or refuses, to obey a lawful and proper command." In *Ochieng v Kenya Ports Authority* (E075 of 2024), the court accepted that repeated absences, despite warnings, may amount to summary dismissal under Section 44(4)(a). The Appellant submits that once such misconduct is established, the legal consequences follow, provided fair procedure was followed (which we address in Ground 2).

21. Ground 2: The learned trial magistrate misapplied the law governing fair termination under the Employment Act, 2007 (in particular Sections 41, 43, 45, and 47(5)), by disregarding procedural compliance by the Appellant, and by misplacing the burden of proof. 12. The Employment Act, 2007 sets out mandatory procedures for fair termination. Section 41 provides for the right to a fair hearing, Section 43 requires proof of reason for termination, and Section 47(5) distributes the evidentiary burden between employer and employee. The Court of Appeal in *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* [2017] KECA 446 (KLR) clarified that under Section 43, an employer must prove the reasons for termination to the standard of genuine belief based on the balance of probabilities and not proof beyond reasonable doubt. The court held: "Under Section 43 of the Act, the onus is on

an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he “genuinely believed to exist,” causing him to terminate the employee’s services. Wasike was unable to explain that anomaly to the satisfaction of his superiors or the disciplinary committee. That provided KPLC with a reasonable basis to act as it did and it is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before he can take appropriate action subject to the requirements of procedural fairness⁵ that are statutorily required. The learned Judge was wrong to find that the termination was unfair for want of valid reasons.” The Appellant fully complied with these legal requirements. The Respondent was repeatedly warned about his persistent absenteeism, and a disciplinary hearing was conducted in his presence where he was given an opportunity to respond to the allegations. The Appellant documented every step taken in line with the law including allowing the Respondent to be in the presence of his fellow employees. Despite this, the trial magistrate ignored these procedural safeguards and wrongly placed the entire evidentiary burden on the Appellant, contrary to the clear provisions of Section 47(5). At the disciplinary meeting on 15/10/2022, the Respondent could not give a satisfactory explanation for the glaring inconsistencies between pozzolana production and sales, despite being solely responsible for loading and management. The records clearly showed that the figures for production, sales, and actual weights delivered to clients did not tally. Given these facts, the Appellant had a reasonable and genuine belief that the Respondent was engaged in theft and willful misrepresentation. In *Lumanyasi v West Kenya Sugar Company Limited* (ELR Appeal 22 of 2023), the Court emphasized that an employee must first establish a prima facie case that termination did not meet the four corners of Section 45 (conduct, capacity, compatibility, or operational requirements; fair procedure) before burden shifts to employer.

In *G4S Kenya Ltd v Khawanga* (Appeal E046 of 2022), the court reiterated the requirement that once the employee establishes unfair dismissal or termination, then employer must show valid reason and fair procedure.

22. The Appellant submits that in the present case:- The Respondent was given warnings and opportunity to be heard; Disciplinary hearing was held; Respondent had chance to respond to allegations; Documentary evidence of production and attendance was presented. The trial court erred in effectively reversing the burden of proof, expecting the Appellant to prove that the misconduct did not occur rather than requiring the Respondent first to show unfair termination. Also, expecting proof beyond what is required in civil employment claims (i.e. proof beyond reasonable doubt) when standard is on balance of probabilities. This is contrary to authorities such as *Lumanyasi; Ongori v G4S Kenya Ltd* (Appeal E284 of 2024), where standard reiterated. The Appellant's actions were firmly grounded in both fact and law. The trial court's failure to appreciate these requirements led to an erroneous and unsustainable conclusion. The Appellant respectfully urges this Honourable Court to find that the termination was fair and lawful in both substance and procedure. We rely on the case of *Kenya Power & Lighting Company Limited -Vs- Aggrey Lukorito Wasike* (Supra) where the court held: "Much as courts are right to be solicitous of the interests of the employee, they must remain fora where all, irrespective of status, can be assured of justice. Employers are Kenyans, too, and have rights which courts are duty bound to respect and uphold. As is often stated, justice is a two-way highway."

Respondent's submissions

23. Whether the trial Court erred in holding that the Respondent was unlawfully, unprocedurally and unfairly terminated from employment- it is the Respondent's submissions that the trial Court findings that the Respondent was wrongfully and unfairly terminated from his

employment was justified and the same should be upheld by this Honourable Court. That when the matter came up for hearing, the Respondent herein testified before Court whereby he adopted his witness statement and produced documents. He confirmed to the trial Court that he was neither subjected to any disciplinary nor given the reasons for termination of his employment. (That is exhibited at page 92 and 93 of the Record of Appeal). The Appellant on the other hand called one witness who testified in support of their case. The said witness confirmed to the Honourable Court that the justification for termination of employment were not clear and that no disciplinary proceedings had been initiated against the Respondent herein. (That is exhibited at page 94.95 and 96 of the Record of Appeal). The trial Court considered the rival submissions and found that there was no justification as to why the Respondent's had been terminated from employment. No sufficient reasons were adduced to support the same. For instance, a perusal of the Appellant's witness statement clearly shows that he made several allegations therein without any justification. (That is exhibited at page 27, 28 and 29 of the Record of Appeal). The Response to the Statement of Claim on the other hand introduced new aspects which were never substantiated at all either through the evidence of the witness or vide documentary evidence. (That is exhibited at page 21 to 24 of the Record of Appeal) It is still the Respondent's submissions that the dismissal from employment was not in any way justified, and that the instant appeal should thus be dismissed with costs. The Court in the case of *Kibos Distillers v Juma* (Appeal E081 of 2024) [2035] KEELRC 2613 (KLR) held us follows:

"Equally, the letter of termination of employment did not identify the reason(s) for termination of the respondent's employment. To that extent, the court is not persuaded that the appellant demonstrated that it had a substantive justification or valid and fair reason to terminate the respondent's employment. "The grounds under which the Appellant herein

purported to have been the reasons for termination of the Appellant's employment were so flimsy and none was justified whatsoever. We thus urge this Honourable Court to disregard the averments being made in the instant appeal. The Court of Appeal in the case of Postal Corporation of Kenya v Andrew K. Tanui [2019] KECA 489 (KLR) (copy annexed) held as follows: The respondent faced serious indictments which could torpedo his entire career and destroy his future. In our view, this was a matter in which oral hearing was necessary, but none was held. Instead, all the respondents had a technical appearance of less than five minutes with the Board, which evidence was not seriously challenged. For all those reasons, we agree with the trial court that the procedure adopted by the appellant was short of a fair one. We so find."

24. It is also imperative to note that the allegations of summary dismissal were never justified and this Honourable Court should thus proceed and disregard the same. We urge this Honourable Court to adopt the position taken by the Supreme Court in the case of Kenfreight (E.A) Limited v Benson K. Nguti [2019] eKLR (copy annexed) when it held as follows: "As to whether the Appellant's summary dismissal of the Respondent was lawful or whether it amounted to unfair termination of services it held that the burden of justifying the ground of summary dismissal lies upon an employer, and that the Appellant failed to prove that the Respondent used abusive language towards the Human Resource Manager, consequently dismissing the Respondent summarily. The Court agreed with the trial Court that the Respondent was entitled to an opportunity to be heard in any event."

Decision on issue 1

25. The court finds that the decisions cited by the parties were all relevant and proceeds to determine on merit the two aspects of fair termination namely, substantive fairness and procedural fairness.
26. Substantive fairness relates to the reasons for termination which reasons are elaborated under section 45(2)(b) of the employment Act to wit - (b) that the reason for the termination is a fair reason— (i) related to the employee’s conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer; “The burden to prove the validity of the reasons for the termination of the employment lies with the employer according to the provisions of section 43 of the Employment Act to wit- “43. Proof of reason for termination (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45. (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.” The court upheld the decision of the Court of Appeal in *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* [2017] KECA 446 (KLR) clarified that under Section 43 and held: “Under Section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he “genuinely believed to exist,” causing him to terminate the employee’s services. Wasike was unable to explain that anomaly to the satisfaction of his superiors or the disciplinary committee. That provided KPLC with a reasonable basis to act as it did and it is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable

doubt as in a criminal trial before he can take appropriate action subject to the requirements of procedural fairness 5 that are statutorily required. The learned Judge was wrong to find that the termination was unfair for want of valid reasons.”

27. The court is guided on how the claim is to be proved by section 47(5) of the Employment Act to wit- “(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.” The respondent gave particulars of the claim for wrongful dismissal, which he stated occurred on the 14th February 2023 ,under paragraph 7 of the claim as follows-

“a. No particulars were given for the Claimant's termination;

b. No reason(s) were proffered for the termination of the Claimant contrary to section 43 and 45 of the Employment Act as well as the ILO Convention No. 158 of 1982;

No explanation was sought from him before termination or opportunity to be heard and defend himself contrary to section 41 of the Employment Act, article 47 of the Constitution and Section 4 of the Fair Administrative Actions Act, 2015; c.

d. No notice was served upon him prior to the termination in contravention of section 35 of the Employment Act;

e. No formal communication in form of a letter was issued in line with the termination and

f. No Notice to show cause was served to him or any warning letter prior to his termination. ‘

(Pages 4-5 of ROA). Among the documents produced by the claimant/ respondent before the trial court was the prove of employment which included the contract and pay slips. The appellant admitted the employment. In paragraph 8 of the Statement of response, the appellant justified the termination to be closure of the quarry due to theft by the claimant and meagre profit following the short fall. In support of the defense the appellant relied on the witness statement of Emmanuela Kitusa dated 30th April 2024 to support the above. To support the defence, the Appellant produced before the lower court, among others, general meeting minutes dated 15th October 2022 and a timesheet detailing the respondent's attendance and work schedule. Under the minutes, the court established the following: The meeting was stated as held on 15th October 2022, and the respondent was stated as having attended. It listed 8 agenda items. Mr Kitusa made it official that the Engurunga quarry works had been closed permanently. It was stated that Jeremiah's absenteeism was addressed, with several persons attesting that he was not on site on separate occasions. Emmanuel stated that he had gone for tea break on all occasions it was resolved that he was not on site. The issue of material loss on quarry was addressed. The court did not find that the blame was placed on the respondent. The 6 agenda items under the minutes resolutions were to the effect that-‘ the following cease being staff at the adjournment of the meeting – Wambua, Nzuki, Karanja, Ng'ang'a, Wamuta and Onsongo.’’(Pages 35 of the ROA). During cross-examination, the claimant denied attending the meeting.

28. At the trial court the RW1 was Emmanuel Kitusa who produced the documents filed by the appellant. Emmanuel told the court that he employed the appellant. He said there were investigations and audit done. He said the reason for the termination was gross misconduct and willful negligence of duty. He had made an impromptu visit and found the claimant missing, but the dates were not recorded. He did not give the employee a notice to show cause. The minutes of 15th October 2022 were not signed. He had not produced the audit report. He said the audit report was lost.
29. The trial court found no valid reason for the termination. This court discerned that the appellant advanced various positions on the termination, one being closure of the quarry of which the trial court found there was no compliance with redundancy process. Other reasons were absenteeism. The appellant relied on minutes (pages 34-35 of ROA). The minutes are not signed. The appellant produced a receipt of meals from TOT Hotels, of which the date appeared to the court to have been 25th October 2022, and with an overwrite of 15th October 2022. The printed receipt was whited off. The court read that the said receipt of TOT was not authentic, hence the white out. The court finds that the minutes were titled General Meeting. The court finds that the said minutes, even if they were authentic, would not meet the threshold of section 41 of the Employment Act, as the respondent was not given notice in advance that this was a meeting to discuss his conduct or accorded the right to bring his witnesses. The reason for the termination on account of theft was not supported as the alleged audit report was not tabled in court. The court finds that the Appellant did not prove before the court the reason for the termination to have been valid or the basis of its belief the reason existed.

30. Further, the court upholds the decision of the trial court that there was no procedural fairness. “To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the Employment Act” (Walter Ogal Anuro v Teachers Service Commission[2013]eKLR. The appellant’s termination failed in both ways. The court finds no basis to interfere with the trial court's finding.

Whether the trial court erred in reliefs granted.

Appellant’s submissions

31. Ground 3: The award of compensation, notice pay, leave allowance, interest, and costs was manifestly excessive, unsupported by either law or evidence, and founded on misapplication of legal principles.
32. Compensation for unfair termination. As per Section 49(1)(c) of the Employment Act, courts may award “equivalent of a number of months’ wages or salary not exceeding twelve months” based on gross monthly salary. Further, Section 49(4) of the Employment Act requires the court to consider the conduct of the employee, among other factors, before making any award for unfair termination. Where evidence shows gross misconduct, an award of compensation is not tenable. In *Ongori v G4S Kenya Limited* (Appeal E284 of 2024), the maximum compensation of 12 months’ salary was awarded, but only after consideration of the factors under section 49(4), including length of service, loss suffered, and impracticability of reinstatement. In the present case, the trial court awarded a higher amount without sufficient findings or justification under Section 49(4) e.g., did not properly assess length of service; the degree of the Respondent’s misconduct; the chances of mitigation; or whether reinstatement was practicable.

33. Notice Pay- Under summary dismissal for gross misconduct (Section 44), an employee is generally not entitled to notice or salary in lieu of notice. If misconduct is established and brought forth, awarding notice pay may be inconsistent with the law.
34. Leave Allowance -The Respondent did not produce any credible evidence to prove that he was owed unpaid leave. The Appellant, on the other hand, adduced leave application forms that were duly filled and signed and email correspondence approving the claimant's leave which adequately demonstrate that the Respondent had utilized his annual leave entitlements as per company policy. The principle onus probandi (he who alleges must prove) under Section 107 of Evidence Act means that any award for unpaid leave must be supported by credible, sufficient evidence (leave forms, approved leave, records). Where the Respondent cannot produce evidence, such claim should fail.
35. Interest and Costs - Interest and costs are discretionary and are properly awarded only where justice so demands. Courts have reduced or denied costs or interest in cases where employee's conduct was the main cause of litigation or where award was excessive.

The Respondent's submissions

36. Notice pay at Kshs. 45,000/= - it is the Respondent's submissions that the trial Court was justified in awarding and the same should be upheld by this Honourable Court. We urge this Honourable Court to be persuaded by the decision of the High Court in the case of WALTER OGAL ANURO V TEACHERS [2013] KEELRC 386 (KLR) (copy annexed) when it awarded the Claimant one month SERVICE COMMISSION salary upon its findings that the termination was unfair and unlawful.

37. Unpaid leave days at Kshs. 90,641/= - Section 74(1) of the Employment Act stipulates as follows: An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars-f) of an employees annual leave entitlement, days taken and days due specified in section 28. The Appellant herein never produced any document to support their assertions that then Respondent had taken or utilized his leave days. We also urge this Honourable Court to adopt the position taken by the Employment and Labour Relations Court in the case of Yahuma v Jianxi Water Limited (Cause 768 of 2018) [2024] KEELRC 329 (KLR) (23 February 2024) (Judgment) (copy annexed) when it held as follows: "In the absence of evidence by the employer showing that the Claimant did indeed utilize his leave days, or that he was compensated for earned but unutilized leave days, I find and hold that the Claimant is entitled to leave pay as prayed." We thus urge this Honourable Court to uphold the trial Court award under this heading.
38. Six(6) months' salary as compensation for wrongful and unfair termination in the sum of Kshs. 270,000/=. - it is the Respondent's submissions that the trial Court findings were justified and the same should be upheld by this Honourable Court. The Respondent had submitted for an award of 12 months compensation and the Court opted to do half which is justified. We urge this Honourable Court to be persuaded by the decision of the Court in the case of Loice Otieno V Kenya Commercial Bank Ltd [2013] KEELRC 271 (KLR) when it awarded the Claimant 6 months compensation for unlawful and unfair termination of employment. It is The Respondent's submissions that the trial Court findings were justified and should be upheld.

Decision

39. On Notice pay- the same is due under section 36 of the Employment Act and is upheld.
40. On Compensation for the unfair termination. The trial court took into account the length of service from May 2018 to February 2023 and awarded the equivalent of 6 months salary. The court found no valid reason existed for the termination. Taking into account the factors under section 49(4) of the Employment Act the award is held as not inordinately high. There was no evidence that the respondent contributed to the termination. The court is guided by the authority in the case of *Butt vs Khan (1977) 1KAR Law JA* stated that-

“An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and arrived at a figure which was either inordinately high or low.”

41. On payment of Leave in lieu- The appellant presented evidence of leave forms and email correspondence from supervisors on the leave. It was not in dispute that the respondent was working in a remote place, a quarry. The court found the basis by the respondent’s denial of the documents produced by the respondents was that he had not signed the forms. The court found the email correspondence was not disputed to be untrue. The correspondence covered various years of employment. The trial court picked one day of leave of 13th December 2018 but this court did not find a leave request for the date. The court noted that the email correspondence was supported by the leave form. The court found no reason to doubt the authenticity of the documents produced by the appellant. This court relying on the documents produced by the appellant established that the respondent had 36 outstanding leave days as per the last leave form and email of 11th March 2020 (pages 64-65 of the ROA). The appellant did not provide any leave forms for the subsequent period and relied on the analysis.

The court drew an adverse conclusion that the said forms did not exist as the respondent never proceeded on leave in 2021 and 2022. Nothing would have been easier than the appellant to produce similar records on leave for 2021 and 2020 as it did for previous years 2018-2020. Taking into account the respondent was entitled to 42 days in the period(2021-2022) plus the previous 36 days, the court finds no basis to interfere with the leave awarded. The court upheld the award on leave.

42. In conclusion, the appeal is dismissed for lack of merit. The Judgment and Decree of the Hon. E.K Suter(PM) delivered on 13th March 2025 in Mavoko CMELRC No. E178 OF 2023 is upheld.

43. Costs of the appeal to be paid to the respondent by the appellant.

44. 30 days stay granted.

45. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 17TH DAY OF DECEMBER, 2025.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant-Ms Onunga h/b Muhoro

Respondent: Kiptanui h/b Waiganjo