



Sinohydro Tianjin Engineering Company Limited v Kalee & another (Employment and Labour Relations Appeal E015 of 2024) [2025] KEELRC 3733 (KLR) (17 December 2025) (Judgment)

Neutral citation: [2025] KEELRC 3733 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
EMPLOYMENT AND LABOUR RELATIONS APPEAL E015 OF 2024**

**JW KELI, J
DECEMBER 17, 2025**

**BETWEEN
SINOHYDRO TIANJIN ENGINEERING COMPANY LIMITED APPELLANT
AND
FRANCIS WAMBUA KALEE 1ST RESPONDENT
WILLIS OTIENO ORUKO 2ND RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the Hon. D. Kuto (M)
delivered on 31st July 2024 in Mavoko CMEL Cause No. 055 of 2019)*

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. D. Kuto (M) delivered on 31st July 2024 in Mavoko CMEL Cause No. 055 of 2019 between the parties filed a Memorandum of Appeal dated the 22nd August 2024 seeking the following orders: -
 - a. The Appeal herein be allowed.
 - b. The Judgment and ensuing decree of the subordinate court be set aside.
 - c. The cost of this Appeal and the proceedings in the lower court be borne by the Respondent.
 - d. Such further orders as this court may deem fit and just to grant.

Grounds Of The Appeal

2. The Honourable Magistrate erred in law and fact by making the finding that the disciplinary process culminating to the Respondent's dismissal was unfair.



3. The Honourable Magistrate erred in law and fact by making a finding that the disciplinary process culminating in the Respondent's dismissal was unfair for reasons that the Respondents were never served with Notices to Show Cause.
4. The Honourable Magistrate erred in law and fact by holding that the Appellant had failed both the procedural and substantive test.
5. The Honourable Magistrate erred in law and fact in awarding the Respondents twelve (12) months gross salary as compensation for unfair termination which award was excessive in the circumstances.
6. The Honourable Magistrate erred in law and fact by in failing to appreciate that the Respondents were afforded a right to be heard on the allegations against them.
7. The Honourable Magistrate erred in law and fact by holding that the Respondents proved their claim to the required standard of probabilities.
8. The Honourable Magistrate erred in law and fact in otherwise failing to exercise his discretion in the proper manner resulting in injustice to the Appellant.

Background to the Appeal

9. The Respondents filed suit against the Appellant vide a statement of claim dated the 18th of April 2019 seeking the following orders: -
 - a. A declaration that the Respondent's act of terminating the Claimant's employment was unprocedural and amounted to unfair termination of the Claimants.
 - b. Kshs. 559,606.00 as particularized in paragraph 4 of this statement of claim.
 - c. Costs of the suit
 - d. Interest on (b) and (c) above.
 - e. Such further or other relief as this honourable court may deem fit.(pages 4-7 of Appellant's ROA dated 12th May 2025).
10. The Respondents filed their verifying affidavit sworn on 1st July 2014, a list of witnesses of even date, undated witness statement, and a list of documents with bundle of documents attached also dated 1st July 2014 (pages 6-19 of ROA).
11. The claim was opposed by the Appellant, who entered an appearance and filed a memorandum of response dated 20th September 2019 (pages 9-11 of ROA). The Appellant also filed a list of witnesses of even date, a witness statement from one Oliver Tambo dated 14th September 2023, and a list of documents with the attached bundle of documents dated 11th March 2024 (pages 12 and 18-41 of ROA).
12. To counter the memorandum of response, the Respondents filed a response dated 4th October 2019 (page 13-14 of ROA).
13. The Respondents' case was heard on the 6th of March 2024. The 1st Respondent testified in the case on his own behalf and on behalf of the 2nd Respondent with his authority, relied on his witness statement as his evidence in chief, and produced the documents attached to the Respondents' list of documents. The 1st Respondent was cross-examined by counsel for the Appellant, Mr. Ochieng (pages 81-82 of ROA).



14. The Appellant's case was heard on the same day, with the Appellant calling Oliver Tambo as its sole witness. He relied on his filed witness statement as his evidence in chief and produced the Respondent's documents. He was cross-examined by counsel for the Respondents, Mr. Okoth (pages 82-83 of ROA).
15. The parties took directions on the filing of written submissions after the hearing. The parties complied.
16. The Trial Magistrate Court delivered its judgment on 31st July 2024 allowing the Respondents' claim, plus costs of the suit and interest (judgment at pages 58-64 of ROA).

Determination

17. The appeal was canvassed by way of written submissions. Both parties complied.

Issues for determination

18. The Appellant submits that the Learned Magistrate erred in law and fact on several grounds as outlined in the Memorandum of Appeal.
19. In their submissions dated 4th July 2025, the Respondents identified the following issues for determination:
 - a. Whether the trial court erred in holding that the Respondents were unfairly terminated.
 - b. Whether the trial court erred in law and fact by awarding the Respondents 12 months compensation for unfair termination.
20. The court finds the issues for determination in the appeal to be –
 - a. Whether the trial court erred in holding that the Respondents were unfairly terminated.
 - b. Whether the trial court erred in relief granted

Whether the trial court erred in holding that the Respondents were unfairly terminated.

21. The grounds of appeal were as follows-
 - a. The Honourable Magistrate erred in law and fact by making the finding that the disciplinary process culminating to the Respondent's dismissal was unfair.
 - b. The Honourable Magistrate erred in law and fact by making a finding that the disciplinary process culminating in the Respondent's dismissal was unfair for reasons that the Respondents were never served with Notices to Show Cause.
 - c. The Honourable Magistrate erred in law and fact by holding that the Appellant had failed both the procedural and substantive test.
22. 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:-

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 - (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).

23. I cannot overemphasize the role of this court as a first appellate court, as held in *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira e KLR*, where the Court of Appeal stated as follows with regard to the duty of the first appellate court, "this being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way." At the outset, I restate that the parties are bound by their pleadings, and the documents produced in court ought to be for the purpose of proving the content of those pleadings. In the witness statement of the appellant's witness, Oliver Tambo, he stated that the respondents were arrested on site and their uniform taken away on 21st February 2019. Nowhere did Oliver Tambo for the appellant state that notices to show cause of even date were issued to the respondents (page 18 and 19 of the ROA is the witness statement). The Court finds that the produced notices to show cause dated 21st February 2019 are not supported by the pleadings and that the court concluded they were not served on the respondents. The court concluded that the produced notices were an unsuccessful attempt to lie to the court, which lacked intelligence, borrowing similar language from the Court in *Karuga v Style Industries Ltd (2023) KEELRC 3359 (KLR)*. On re-evaluation of the evidence, the court agreed with the trial court that it was not possible to have issued the notices to show cause on the same date as the arrest, yet Oliver Tambo, the witness for the appellant said the respondents' uniform was taken and thereafter they were both arrested. Both respondents denied having received the notices to show cause. The minutes of 26 February 2019 produced by the appellant had no attendance of the respondents, hence do not meet the threshold of procedural fairness according to section 41 of the [Employment Act](#). The court, on evaluation of the pleadings and evidence before the trial court, found no basis to interfere with the decision of the trial Hon. Magistrate on finding unfair termination.

Whether the trial court erred in the relief awarded

Appellant's submissions

24. The Learned Magistrate erred in awarding the Respondents twelve months' gross salary as compensation for unfair termination without providing any justification, as required under Section 49(1)(c) of the [Employment Act](#), 2007. The judgments lists the award but lacks reasoning for granting the maximum compensation, which is excessive and unsupported by evidence. The Respondents, employed as casual laborers for less than two years, contributed to their dismissal through theft, as admitted during the disciplinary process thus it is our contention that the maximum award of twelve months' salary was disproportionate. In *CMC Aviation Limited v. Mohammed Noor [2015] eKLR*, the court held that compensation under Section 49 must be proportionate to factors such as the employee's length of service, the nature of the breach, and the employee's contribution to the termination. It stated "40. We now turn to the award of US\$108,000 being twelve months gross salary as compensation for unlawful loss of employment. In arriving at that sum, the trial court computed the respondent's monthly salary at US\$9,000, although we have already established that the respondent's last salary was US\$5,075. We have already set out the remedies for wrongful dismissal and unfair



termination as stipulated under section 49 of the Act. The trial court did not state why it opted to give the remedy provided under section 49 (1) (c) that is, twelve months gross salary, and not the other remedies under section 49 (1) (a) or (b). The court should have been guided by the provisions of section 49 (4) but the trial judge said nothing about the reasons that led him to exercise his discretion in the manner he did. Although the respondent had prayed for an award of “damages” in the sum of US \$108,000 for unfair and wrongful termination of employment, it appears to us that in giving that award the trial court was not awarding damages as sought. The court stated that it was twelve months gross salary which is what section 49 (1) (c) provides as one of the remedies for wrongful dismissal. 41. The respondent was serving a two year contract of employment which was terminable by one month’s notice or one month’s salary in lieu of notice. Had the appellant complied with the requirements of sections 41 and 45 of the *Employment Act*, the summary dismissal would have been a fair one. But to the extent that the appellant did not follow the statutory procedure the dismissal was found to be unfair, which we agree. Taking all this into consideration, we think that the respondent was not entitled to twelve months gross pay as compensation for wrongful dismissal. In our view, since the contract of employment was terminable by one month’s notice, we believe that an award of one month’s salary in lieu of notice would have been reasonable compensation. The trial court awarded that, albeit at a higher rate of US\$9000 instead of US\$5,075 plus twelve months salary amounting to US\$108,000. We hereby set aside the award of US\$9000 as one month’s pay in lieu of notice and substitute therefor US \$5075. The award of US\$108,000 is set aside in its entirety. 12. The Appellant further relies on Kenya Airways Limited v. Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR, where the court emphasized that compensation should be restorative, not punitive. The absence of justification for the maximum award, as noted in the Respondent’s submissions warrants intervention by this Honourable Court. A nominal award, if any, would have been appropriate given the Respondents’ misconduct. Failure to Appreciate the Respondents’ Right to Be Heard 12. The Learned Magistrate erred in failing to appreciate that the Respondents were afforded a right to be heard. As established in Alex Wainaina Mbugua v. Kenya Airways Limited [2017] eKLR, the right to be heard is satisfied when an employee is informed of the allegations and given an opportunity to respond. The Appellant submits that the disciplinary proceedings provided such an opportunity, and the Magistrate’s finding to the contrary was a misdirection

Respondent’s submissions

25. The Appellant from the Memorandum of Appeal expressed dissatisfaction with the award of 12 months as compensation for unfair termination. There was no objection to the award of Notice pay, Minimum wage balance, Un paid leave and House Allowance. 15. Once the trial court made the adverse finding that the Respondents were unlawfully terminated, then it had to award the Respondents compensation pursuant to section 49 (1) (c) of the *Employment Act*, 2007. Under that section, the trial court had discretion to award compensation up to a maximum of 12 months. 16. The Court of Appeal in the case of Kimathi v Ericsson Kenya Limited (Civil Appeal 601 of 2019) [2023] KECA 106 (KLR) stated that: "We are being called upon to interfere with the exercise of judicial discretion. We are guided by the principles enunciated in numerous case law from this Court. For example, Coffee Board of Kenya v Thika Coffee MU/s Limited 8: 2 Others [2014] eKLR, it was stated that the court ought not to interfere with the exercise of such discretion unless it is satisfied that the judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice." 17. In light of the above, the award of 12 months' salary as compensation was well within the discretion of the trial court under Section 49(1)(c) of the *Employment Act*. The Appellant has not demonstrated any misdirection in law, misapprehension of fact, or any improper exercise of discretion to warrant



interference by this Honourable Court. As such, the appeal on the issue of compensation is without merit and should be dismissed.

Decision

26. The grounds of appeal were as follows-
- a. The Honourable Magistrate erred in law and fact in awarding the Respondents twelve (12) months gross salary as compensation for unfair termination which award was excessive in the circumstances.
 - b. The Honourable Magistrate erred in law and fact by in failing to appreciate that the Respondents were afforded a right to be heard on the allegations against them.
 - c. The Honourable Magistrate erred in law and fact by holding that the Respondents proved their claim to the required standard of probabilities.
 - d. The Honourable Magistrate erred in law and fact in otherwise failing to exercise his discretion in the proper manner resulting in injustice to the Appellant.
27. The court agreed with the respondent that the only relief subject to appeal was the compensation. The trial court awarded 12 months' compensation to each of the 2 respondents. The trial court relied on the decision of *KenFreight (EA) Limited v Benson Nguti (2019)e KLR*, where the court addressed the application of section 49 of the *Employment Act* on matters of relief. The jurisprudence on remedies under section 49 of the *Employment Act* is settled by the superior courts. The Court of Appeal in *Kenya Broadcasting Corporation v Geoffrey Wakio* stated, "This Court has established the rule that an award of the maximum 12 months' pay must be based on sound judicial principles. In *Ol Pejeta Ranching Limited vs. David Wanjau Muhoro [2017] eKLR* this Court categorically stated that the trial Judge must justify or explain why a claimant is entitled to the maximum award; that the exercise of discretion must not be capricious or whimsical." The supreme court in *Ken freight (E.A) Limited v Benson K. Nguti SC Pet. No. 37 of 2018 [2019] eKLR* this Court explained the applicability of the provisions of Section 49 as hereunder;
- ".....What then should be the correct award on damages be based on? Having keenly perused the provisions of Section 49 of the *Employment Act*, we have no doubt that once a trial court finds that a termination of employment as wrongful or unfair, it is only left with one question to determine, namely, what is the appropriate remedy? The Act does provide for a number of remedies for unlawful or wrongful termination under Section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder. To us, it does not matter how the termination was done, provided the same was challenged in a Court of law, and where a Court found the same to be unfair or wrongful, Section 49 applies...." The exercise of the discretion of the court is not capricious or whimsical and the court should justify the award (*Olpejeta Ranching Limited v David Wanjau Muhoro (2017)e KLR*.
28. The factors to consider are as stated in section 49(4) of the *Employment Act* to wit- '(4)A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—
- (a) the wishes of the employee;
 - (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and



- (c) the practicability of recommending reinstatement or re-engagement;
- (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
- (e) the employee's length of service with the employer;
- (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
- (g) the opportunities available to the employee for securing comparable or suitable employment with another employer;
- (h) the value of any severance payable by law;
- (i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
- (j) any expenses reasonable incurred by the employee as a consequence of the termination;
- (k) any conduct of the employee which to any extent caused or contributed to the termination;
- (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
- (m) any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee.”

17. Before the trial court, the 1st respondent disclosed he had worked for 1 year and 1 month. The 1st respondent was awarded the maximum compensation plus notice pay. The court finds that this was an excessive and undeserved award, taking into account the period of service and the claimant's contribution to the termination, having been suspected of stealing, though not charged. The court considered the decisions cited by the parties. The Court is guided by the binding decision of the Supreme Court in *Kenya Ports Authority v Munyao & 4 others* (Petition E008 of 2023) [2023] KESC 112 (KLR) (28 December 2023) (Judgment) where the court held -

‘ If the court determined that the issues raised by the complainant were partially caused or contributed to by their own actions, it would reduce the compensatory award by a proportion deemed just and equitable based on that finding. Intentional conduct was considered essential for reducing compensation. Thus, any adjustment to the compensation amount largely hinged on the degree of contributory factors, though it did not prevent recovery altogether.’ Similar jurisprudence is found in *CMC Aviation Limited v. Mohammed Noor* [2015] eKLR, where the court held that compensation under Section 49 must be proportionate to factors such as the employee's length of service, the nature of the breach, and the employee's contribution to the termination. The court found that the reasons for the termination were not proved to have existed, as the respondents were not heard by the employer or charged in court, and hence the respondents were entitled to more than notice pay. The court finds that for the foregoing reasons of short period of service and contribution to the termination, the maximum compensation to the 1st respondent was unjustified. The same is set aside and substituted with 1 month's salary (minimum wage as pleaded and allowed by the trial court) as compensation for the unfairness. The notice pay of 1 month is upheld.



18. The 2nd, the Respondent had worked for 1 year and 8 months. The court, applying the foregoing analysis of facts and jurisprudence, finds that the maximum compensation was unjustified and reduces it to 2 months' compensation. The award of 1-month notice pay is upheld.

Conclusion

19. The appeal is allowed. The Judgment and Decree of the Hon. D. Kuto (M) delivered on 31st July 2024 in Mavoko CMEL Cause No. 055 of 2019 is set aside and substituted as follows-

1st Claimant

- A. 1 Month's compensation for unfair termination Kshs.13,573/-
- B. Notice of pay Kshs. 13573
- C. Minimum Wage balance 22,187
- D. Un paid leave Kshs 14930/=
- E. House allowance Kshs. 26,875

2ND claimant

- a. Compensation 2 months Kshs. 27146
- b. Notice of pay Kshs. 13573
- c. Minimum Wage balance 37,547
- d. Un paid leave 24431
- e. House allowance 37, 547

20. The claimants are awarded costs and Interest on the sums awarded and on the costs from the date of the Judgment.
21. The appellant is awarded costs of the appeal.
22. It is so Ordered

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

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Appellant – absent

Respondent – Ms. Kariuki

