

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT  
MOMBASA

APPEAL NO. E068 OF 2024

PROFESSIONAL CLEAN CARE ..... APPELLANT

VERSUS

PETRONILAR KONDE FONDO ..... RESPONDENT

[Being an appeal from the judgment of Hon. R. N. Akee delivered on 6 December 2023 in  
Mombasa CMELRC No. E514 of 2021]

JUDGMENT

The appeal arises from the judgment delivered on 6 December 2023 in Mombasa CMELRC  
No. E514 of 2021. The appellant is seeking that the judgment be set aside and the claim  
dismissed with costs.

The grounds of appeal are that:

1. The learned magistrate erred in law and fact in awarding the respondent general damages when the same had not been pleaded and prayed for.
2. The learned magistrate erred in law and fact in awarding general damages, which are not awardable in wrongful termination cases.
3. The learned magistrate erred in law and fact in awarding the respondent general damages at KSh. 350,000, which was an award that was unjustified and or excessive in the circumstances.
4. The learned magistrate erred in law and fact in waiving the respondent's one-month notice, yet the respondent was paid the same.
5. The learned magistrate erred in law and fact in finding that the respondent's termination was done unfairly and unjustly.
6. The learned magistrate erred in law and fact in deciding against the weight of the evidence before the court.
7. The learned magistrate erred in law and fact by ignoring and failing to consider the binding authorities cited and provided by the appellant in their written submissions.
8. The learned magistrate erred in law and fact in the construction of evidence tendered before the court, which led to an erroneous finding and decision.

The background of the appeal is a claim filed by the respondent against the appellant on the basis that the first employment with the appellant was in 2013 as a cleaner earning Ksh. 6,000 per month. It was agreed that, before termination of employment, notice would be issued or payment in lieu thereof would be made. The wage was increased over time to Ksh. 15,609 per month. The claim was that the respondent worked for the appellant for 7 years, but her employment was unfairly terminated in June 2020 without notice, justification or payment of terminal dues. During her employment, she did not

take annual leave, and her wages were underpaid. The respondent made the following claims:

- a) Underpayments from 2013 to 2018 plus the house allowance Ksh. 301,982.10
- b) Unpaid annual leave from 2013 to 2020 for 6 months Ksh. 98,816.30
- c) Notice pay Ksh. 15,609.
- d) 12 months compensation Ksh.187, 308.
- e) Certificate of service.
- f) Costs of the suit.

In reply, the appellant admitted that the respondent was an employee of NIC Bank Limited, Nyalı branch, from 2 January 2012 as a stewardess. She was later transferred to NIC, Nkurumar Road branch, following the merger of NIC Bank and CBA Bank and then attached to NCBA Harbour House. It was a term of the contract that as long as the appellant retained a contract with NCBA Bank, employment could be terminated by giving one month's notice or payment in lieu thereof. The appellant was thus served with a notice dated 9 June 2020 stating that the contract with NCBA had been affected by the merger of NIC Bank and NCBA Bank. The notice issued would end on 31 July 2020. In return, the appellant issued the respondent with a notice dated 10 June 2020 terminating her employment with effect from 31 July 2020, on the grounds that the NCBA had terminated its contract with the appellant. Terminal dues were paid together with a Certificate of Service. Despite the notice issued, the respondent was paid for the notice period. She had taken her leave days. The wage paid was consolidated and inclusive of house allowance at Ksh. 15,609. The claims, dating back to 2013, are time-barred, made contrary to section 90 of the Employment Act, and should be dismissed with costs. Termination of employment was procedural, and the allegations made are *res judicata*, having been determined in **Jared Mangera & 11 others v Professional Cleaning Care Limited [20`8] eKLR**.

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

- a) General damages for unfair termination of employment Ksh. 350,000.
- b) One month's notice pay Ksh. 14,609.
- c) Certificate of service.
- d) Costs of the suit.

On appeal, the appellant submitted that, in the termination of employment, due process was observed, notice was issued, and the respondent was paid her terminal dues. Based on the pleadings, the respondent did not plead for general damages and the award of Ksh. 350,000 in general damages is not due and has no legal or factual basis. This is not awardable under section 49 of the Employment Act (the Act).

In the case of **Mary Mutanu Mwendwa v Ayuda Ninos De Africa-Kenya (Anidan K) [2013] eKLR**, the court held that whereas damages could be awarded for unfair termination of employment, they cannot exceed the cap set out in section 49 of the Act. The total award in this case exceeded the wages paid. The court lacks the discretion to exceed the award of 12 months as held in **OI Pejeta Ranching Limited v Muhoro Civil Appeal No. 42 of 2015**.

The appellant submitted that, following the client's termination of its contract, it issued the respondent with a notice stating the reasons for the termination of her employment. In addition to the notice, there was a payment; hence, the award of notice pay was not justified. In the cases of **Jared Mangera & 11 others v Professional Clean Care Limited [2008] eKLR** and **Eric Odhiambo Owade & 2 others v Professional Cleaning Care Limited [2018] eKLR**, the court held that termination of employment was not unfair where there were contingent reasons for the termination. A notice of termination was issued, and there was justification for the termination in this case. The claims made are not justified and are contrary to section 90 of the Act for being time-barred.

The respondent submitted that the trial court found the appellant liable to pay general damages for the unfair termination of employment, which was correct and should be affirmed by this court. The appellant justified its action on the basis that the offer of employment dated 2 January 2012 was tied to a third-party contract between the appellant and NIC Bank Nyali Branch. That upon the termination of the contract by the third party, the employment of the respondent would automatically terminate. Those terms were not binding upon the respondent. She was not privy to the third-party contract or its details.

The application reassigned all employees working at NIC Bank Nyali except the representative. No reason is given to justify such different treatment.

In this case, there was an unfair redundancy as defined under section 2 of the Act. Where employment is terminated due to operational reasons, section 40 of the Act applies. The employer has a legal duty under sections 43 and 45 of the Act, and under section 40, to pay redundancy dues, as held in **Thomas De L Rue (K) Ltd v David Opondo Omutelema [2013] eKLR**.

The respondent submitted that before a redundancy is declared, the employer should invoke Article 13 of the ILO Recommendation No. 166 of Convention No. 158. In this case, the appellant did not consult the respondent, believing she was bound by the third-party agreement.

In **Kenya Airways Limited v Aviation & Allied Workers Union of Kenya**, the court held that where the employer fails to consult with employees affected by operational reasons, this constitutes unfair termination in contravention of sections 43 and 45 of the Act.

In this case, the award of notice pay, underpayments, house allowances, and compensation for unfair termination of employment are justified. For years worked, severance pay should be awarded with costs.

Determination

This being a first appeal, the court is required to review and reassess the record. Evaluate the findings and make a conclusion. However, take into account that the trial took place and that you had the opportunity to see and hear the witnesses give evidence in court.

The appellant admitted that it employed the respondent from 2012 to 31 July 2020. The employment was terminated following the third party terminating its contract with the

appellant following a merger with another party. As a result, the appellant issued the respondent with notice dated 10 June 2020 terminating her employment with effect from 31 July 2020. The reasons for termination of employment were stated in the notice.

The respondent, on her part, asserts that she was issued the notice terminating her employment dated 10 June 2020 on 26 June 2020. No reason was given to justify the termination of employment. She was not paid a house allowance, and hence her claim.

As a general rule, the employee bears the burden of proof that employment was terminated unfairly. Under Section 47(5) of the Act, the employee bears the initial burden of proof in claims of unfair termination. Only when a *prima facie* case is established does the employer need to justify the termination of employment. See **Rupra Construction Company Limited v Makomere [2025] KEELRC 1376 (KLR)** and **Gitonga v Karanja Njenga Advocates (Employment and Labour Relations Cause E625 of 2021) [2025] KEELRC**.

In this case, to assert that there was no payment of a house allowance, the respondent did not discharge the burden under section 47(5) of the Act, setting out the unfavourability in the termination of her employment. The respondent admitted receipt of the notice dated 10 June 2020 on 26 June 2020, which sets out the reasons for termination of employment with effect from 31 July 2020.

*(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.*

Without the respondent discharging the burden of proof, having failed the threshold under section 47(5) of the Act, the appellant had no reason to justify the grounds for termination of employment beyond what was stated in the notice dated 10 June 2020. See **Josephine M. Ndungu & Others v. Plan International Inc (2019) eKLR** and **Ayuma v Omunga [2025] KEELRC 673 (KLR)**.

It is not sufficient to plead unfair and unjust termination of employment. The employee must discharge her burden under section 47(5) of the Act. Without discharging this burden, the appellant was justified in terminating the employment following notice, and the stated reasons for the contract were terminated by the third party, which affected the employment of the respondent.

On the reliefs granted by the trial court, indeed, general damages were not pleaded. In any event, general damages are only payable on a claim premised under the provisions of section 12 of the Employment and Labour Relations Act and not under section 49 of the Act, as held in **Kenya Ports Authority v Munyao & 4 others [2023] KESC 112 (KLR)**;

*From the above analysis and the wording of section 49, it is clear to us that section 49 applies to only instances as have been set out under the Act; section 49 only applies where an employee is terminated; in any other instance the court is expected to exercise its discretion as granted by the [Constitution](#), the [Employment and Labour Relations Act](#) and any other statutory provisions. In exercising such judicial discretion, a judge or*

*magistrate bears the burden of accounting for their decision, and in order to discharge this burden, the judge or magistrate ought to explain the basis of their decision.*

Hence, without the respondent pleading for damages, any constitutional rights violations, or any matter under the Employment and Labour Relations Court Act, the learned magistrate awarded damages in this case at KSh. 350,000 was in error.

On the award of notice pay, the respondent admitted in evidence that notice was issued and served on 26 June 2020, taking effect on 31 July 2020, which is over a month. She was also paid for the period. The award in notice pay was not justified.

Regarding the claims for house allowances dating back to 2013, these are continuing injuries regulated under section 90 of the Act. It cannot go beyond the 12-month limitation period.

Where due, the employee must assert the right within the time allowed under the Act.

The respondent admitted that the last wage paid was KSh. 15,609 per month. The appellant asserted that the wage paid included the house allowance as provided under section 31 of the Act.

In June 2020, the basic wage for a cleaner was KSh. 13,572.90. 15% of the house allowance is Ksh. 2,035.80, and the gross wage is Ksh. 15,607.

There was no underpayment of wages.

The appellant submitted evidence that the respondent had taken the due annual leave. This was not challenged.

A Certificate of Service has since been issued.

**The appeal analysed above has merit. The award by the trial court in Mombasa CMELRC No. E514 of 2021 is set aside in its entirety. Each party to bear its costs.**

Delivered in open court at Mombasa, this 29<sup>th</sup> day of January 2026.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Shamsi and Japhet

..... and .....

