

REPUBLIC OF KENYA

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

APPEAL NO. E170 OF 2025

VINCENT NDORO MWASOKO
APPELLANT

VERSUS

CHANGAMWE SERVICE STATION LIMITED
RESPONDENT

[Being an appeal from the judgment of Hon. Gathogo Sogomo delivered on 1 August 2025 in Mombasa MCELRC No. E496 of 2023 – Vincent Mwasoko Mwangawari

Mombasa MCELRC No. E495 of 2023 – Polycarp Makamu Shikoti

Mombasa MCELRC No. E493 of 2023 – Nicholas M’Mwanda Mwandowe

Mombasa MCELRC No. E492 of 2023 - Stephen Matho Rimba]

JUDGMENT

The judgment here consolidates several appeals arising in **ELRCA E169 of 2025, ELRCA E168 of 2025, ELRCA E170 of 2025 and ELRCA E171 of 2025**. The appeal was analysed and applied in the series in **ELRCA E170 of 2025**. The findings therefrom shall apply to all the files which have similar facts and relate to the same respondent.

The appeal arises from the judgment delivered on 1 August 2025 in Mombasa MCELRC No. E496 of 2023.

The appellant is seeking that the trial court judgment be set aside and the claim allowed with costs on the grounds that:

1. The learned magistrate erred in law and fact in striking out the claim on the grounds that it was premature.
2. The learned magistrate erred in law and fact in finding that the criminal proceedings had been instituted against the appellant by the respondent, who was not under any obligation to institute internal disciplinary proceedings against the appellant.

3. The learned magistrate erred in law and fact in finding that the cause by the appellant was premature since the criminal proceedings barred any form of disciplinary proceedings, whether express or constructive.
4. The learned magistrate erred in law and fact in arriving at a conclusion that the appellant has failed to prove that his termination was wrongful, unlawful, and or unfair, while he held that the appellant, due to a criminal trial, was not entitled to a disciplinary process.
5. The learned magistrate erred in law and fact in failing to appreciate that due process when terminating an employee from employment is a statutory right which cannot be taken away by a pending criminal case against the employee.
6. The learned magistrate erred in law and fact in failing to acknowledge pertinent issues raised by the appellant by simply dismissing them as questions which would be superfluous to delve into.
7. The learned magistrate erred in law and fact by contradicting the entire evidence adduced by the appellant and laying emphasis on the respondent's evidence, and hence arrived at a wrong decision.
8. The learned magistrate erred in law and fact and failed to address the denial of the alleged signatures by the appellant on the muster roll of the documents produced by the respondent, while there is no pay slip to support the same.
9. The learned magistrate failed to appreciate that a criminal charge is not a bar to a fair process for dismissal from employment.

The background of the appeal is thus a claim filed by the appellant before the trial court. He alleged that he was employed by the respondent as a pump attendant in March 2010 at a wage of Ksh. 7,000 per month, which was increased to Ksh. 18,000 per month until the time his employment was terminated. His case was that on 28 August 2020, one Abdul Salaam Mohamed Assam Noorani, a director of the respondent, unilaterally dismissed him from his employment without due process. He verbally chased him from his employment on allegations of stealing by a servant. There was no notice, hearing, or payment of terminal dues. He only learned the reasons for his dismissal when he was charged in court with the offence of stealing by a servant.

The appellant's case was that during his employment by the respondent, he never went on annual leave for 10 years or was paid in lieu thereof. He was not provided with housing or paid a house allowance. Termination of employment was summary without notice or payment

in lieu thereof. He worked overtime from 7 am to 7 pm, Monday through Friday, and for the 4 overtime hours, he was not compensated. The appellant made the following claims:

- a) Notice pay Ksh. 18,000.
- b) Unpaid salary for August 2020, Ksh. 18,000.
- c) Unpaid house allowance for 10 years Ksh. 337,900.
- d) Unpaid overtime for 10 years Ksh. 125,000.
- e) 12 months' salary compensation Ksh. 216,000.
- f) Unpaid leave for 10 years Ksh. 126,000.
- g) Service pay for 10 years Ksh. 90,000.
- h) Costs of the suit.

In reply, the respondent admitted that the appellant was employed as a pump attendant on a contractual basis but denied the allegations made. There was no unfair termination of employment by dismissal or threats not to take annual leave as alleged. The appellant was paid a consolidated wage, inclusive of the house allowance, as a term of the contract. There was no overtime work, and there is no proof. Work hours were divided into shifts: 7 am to 4 pm, evening shift from 4 pm to 12 am, and night shift from 12 am to 8 am. The appellant worked for only one shift. There was payment for the days worked in August 2020. House allowances were always included in the monthly wages. The terminal dues claimed are not justified.

The learned magistrate heard the parties and, in the judgment, held that the claim by the appellant was premature because there were ongoing criminal proceedings which debarred any form of termination, be it express or constructive.

The employer had initiated and concluded disciplinary proceedings on account of misconduct, which is subject to criminal proceedings, for which the employee is exculpated or found innocent, will be entitled to set aside the employer's administrative punitive decision either by the employer or lawful authority and the employee is entitled to relevant legal remedies as may be found to apply and t be just.

The claim was thus found to be premature since the criminal proceedings were in progress. The claim was struck out with costs.

In the appeal, the appellant submitted that, under section 90 of the Employment Act (the Act), upon unfair termination of employment, the employee has the right to institute proceedings

within 3 years. He filed suit against the respondent following his oral termination of employment. Under section 41 of the Act, he was not afforded the due process of notice and hearing, nor were any reasons given to justify the summary action. He learned the reason for his termination of employment only when he was charged in criminal proceedings. The respondent alleged theft, thereby giving rise to the criminal proceedings.

The appellant submitted that, under Article 50 of the Constitution, there is a right to be heard by an independent tribunal, which right is addressed in section 41 of the Act. He was discharged from his employment without due process, and under section 47(5) of the Act, his employment was terminated unfairly.

The appellant submitted that the learned magistrate erred in failing to address his claim on merit and that it was premature on the basis that there were criminal proceedings. However, internal disciplinary proceedings are distinct from criminal proceedings, as held in **Ufansi Freighters (K) Limited v Wambua Nyamai and Jane Nyandiko v Kenya Commercial Bank Limited [2017] eKLR**. Criminal charges are not a bar to the rights under sections 41, 43, and 45 of the Act. The right to due process of law is a right of the employee, as held in **Oyombe v Eco Bank Limited [2022] eKLR**.

The appellant submitted that the trial court's judgment striking out his case with costs should be set aside, and that his claim should be assessed and allowed with costs.

The respondent submitted that the trial court assessed the claims and properly applied the law. In **Mathew Kipchumba Koskei v Baringo Teachers Sacco [2013] eKLR**, the court held that if the employer concludes administrative disciplinary proceedings in such matters and institutes criminal proceedings, the employer is generally bound by the outcome of the criminal proceedings. In this case, the appellant filed his claim prematurely since the respondent, as the employer, had already instituted criminal proceedings, as held in **Amir Lodges Ltd & another v Mohammed Omar Shariff & another [2022] eKLR**.

The respondent submitted that under section 107 of the Evidence Act, whoever desires the court to give judgment as a legal right must prove. In evidence, the appellant failed to produce evidence supporting his assertions that he was unfairly terminated by the respondent. The learned magistrate was correct in striking out the claim.

The appellant and other employees of the respondent were arrested on 28 August 2020 for the offence of theft by servant contrary to section 281 of the Penal Code. They were charged in

the Mombasa Chief Magistrate's Court, Criminal Case No. E1370 of 2020. The respondent produced the charge sheet from DCIO Changamwe dated 28 August 2020, and this was admitted in evidence. The respondent could not contact the appellant or other employees, as such contact would constitute witness interference.

Judgment in the criminal case was delivered on 22 May 2025. The appellant and others were convicted on all charges arising from the offence of stealing by a servant. This justified the summary dismissal.

The purpose of a disciplinary hearing is to enquire into an employee's conduct, as held in **Ismael Hassan Abdulahi v Kenya Ports Authority [2013] eKLR**.

The claims thus made by the appellant are unjustified, and the judgment of the trial court should be affirmed with costs.

Determination

This is a first appeal. The court is required to review the record, reassess the findings and make its conclusions. However, consider that the trial court had the opportunity to hear and see the witnesses testify.

Before the trial court, the appellant's case was that the respondent dismissed him from employment on 31 August 2020 without due process. Together with other workmates, he was arrested and only learnt of the reasons for dismissal when taking a plea in the Mombasa Chief Magistrate's Court, Criminal Case No. E1370 of 2020 on allegations of stealing by a servant. He was not paid his terminal dues and thus claimed notice pay, unpaid salaries, overtime, leave pay, and compensation.

The respondent admitted that the appellant, together with other employees, engaged in stealing by a servant. They were charged in court and have since been convicted. Their conduct justified summary dismissal, and the orders sought are without merit.

The learned magistrate dismissed the suit on the basis that it was premature. The ongoing criminal proceedings, which debarred any form of termination, be it express or constructive.

The respondent has heavily relied on the case of **Mathew Kipchumba Koskei v Baringo Teachers Sacco [2013] eKLR**. The court held that, if the employer concludes administrative disciplinary proceedings in such matters and institutes criminal proceedings, the employer is generally bound by the outcome of the criminal proceedings. However, this position was

reviewed by the Court of Appeal in subsequent decisions, which bind this court. In the case of **Attorney General V Andrew Maina Githinji [2016] eKLR**. Criminal proceedings carry a different threshold of proof, whereas internal disciplinary proceedings over alleged misconduct or gross misconduct should proceed on the premise of sections 35 and 41 or 44 of the Employment Act. This position is affirmed by the court in **James Mugeria Igati v Public Service Commission of Kenya [2014] eKLR** that there is nothing in the law to suggest that a disciplinary process is in any way tied to a criminal process that may arise from the same facts. This position is reiterated in **Nzau v Attorney General [2023] KEELRC 919 (KLR)** and **Wanyama v Mumias Sugar Company Limited ((Under Receivership)) [2025] KEELRC 293 (KLR)** that criminal proceedings are distinct from internal disciplinary processes and pendency of the criminal case was not a reason for the employer to refuse to take the employee(s) through the internal disciplinary procedures addressed under sections 41 and 44 of the Employment Act.

Thus, it is imperative to distinguish between internal disciplinary procedures applicable to employees suspected of misconduct or gross misconduct. Sections 41 and 44 of the Employment Act require notice to the employee to allow him to attend and address in the presence of another employee of his choice. The motions of sections 41 and 44 of the Employment Act are couched in mandatory terms as held in **Kamau v Track & Trace Company Limited [2024] KEELRC 2846 (KLR)**, **Masichi v Brookside Dairy Limited [2025] KEELRC 3509 (KLR)**, and **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR** that:

Section 41 of the Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative.

The basis that the respondent moved with criminal proceedings against the appellant without undertaking the internal disciplinary procedures, whether concurrently or consecutively, without legally bringing the employment relationship to a closure under the Employment Act, resulted in unlawful and unfair termination of employment contrary to section 45 of the Employment Act. This cannot be justified as premature in light of ongoing criminal proceedings. The employer has the duty to bring the employment relationship to a close through the due process under sections 41 and 44 of the Act.

The finding that the claim by the appellant was premature was in error.

For want of due process in terminating employment, notice pay and compensation are due to the appellant.

The appellant was earning Ksh. 18,000 per month. As a pump attendant, this wage was below the legal minimum wage, including the house allowance. Notice pay is due under section 35 of the Employment Act for Ksh. 20,195.15.

Compensation is due under sections 45 and 49 of the Employment Act where employment has terminated unlawfully and unfairly. The appellant worked from March 2010 to August 2020. Compensation at 1 month's pay is hereby found justified in the given circumstances leading to termination of his employment. This is Ksh. 20,195.15.

In support of the claim for payment for days worked, the respondent has not submitted any evidence of payment. Under section 18 of the Employment Act, the reasons leading to termination of employment notwithstanding, for work done, the appellant is entitled to his pay. The trial court erred in failing to address the same on merit. The appellant worked until 31 August 2020, and the full wage due is Ksh. 20,195.15.

On the claim for a house allowance, there is a written contract of service as required under section 10 of the Employment Act. A claim for house allowance is a continuing injury, and under Section 89 of the Employment Act, it ought to have been addressed within 12 months, as held in **Bakery Confectionery Food Manufacturing & Allied Workers Union (K) v Wrigley Company (East Africa) Limited & another [2025] KECA 2021 (KLR)**.

Employment was for a pump attendant. Under the Wage Orders applicable in 2020, the basic wage due was Ksh. 17,561 plus a house allowance of 15% at Ksh. 2,634.15. The gross wage should have been Ksh.20, 195.15, thus an underpayment of Ksh.2, 195.15 for the 12 months at Ksh. 26,341.80.

House allowances due: Ksh. 26,341. 80.

The claim for unpaid overtime was not assessed by the trial court. The appellant's case was that he worked for 4 extra hours from Monday to Friday and for 6 hours on Saturday. Saturday is a working day unless the parties to the employment relationship are covered by a collective agreement or by other private arrangements.

The fact that the appellant worked fewer hours on Saturday compensated him for his time, with Sunday as the day of rest. There is no basis for the overtime pay claimed.

On the claim for leave pay for the entire duration of employment, again, under section 89 of the Employment Act, as a continuing injury, these provisions read with section 28(4) of the Act, the appellant can only claim for unpaid leave for up to 18 months, amounting to 33 leave days. On the basic wage of Ksh. 17,561 for 33 days, he is entitled to Ksh. 19,317.10.

On the claim for service pay, the respondent submitted evidence of remittances to the NSSF with regard to the appellant. Service pay is not due.

On the claim for costs, the appellant's claim before the trial court was on a good foundation. His appeal is equally well-founded. His costs are due.

Accordingly, judgment of the trial court in Mombasa MCELRC No. E496 of 2023 and in Mombasa MCELRC No. E496 of 2023 – Vincent Mwasoko Mwangawari

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Mombasa MCELRC No. E492 of 2023 - Stephen Matho Rimba]

are set aside. The findings under Appeal ELRCA E170of 2025 shall apply to all the appeals.

Judgment is entered for the appellant in the following terms:

- a) Employment terminated unlawfully and unfairly.**
- b) Compensation Ksh. 20,195.15**
- c) Notice pay Ksh. 20,195.15**
- d) Pay for August 2020 Ksh. 20,195.15.**
- e) Underpayment and house allowance Ksh. 26, 341.80.**
- f) Leave pay Ksh. 19,317.10.**
- g) Costs for the trial court proceedings and for the appeal.**

And

The findings above shall apply to Mombasa ELRCA E171 of 2025, ELRCA E169 of 2025, ELRCA E168 of 2025, and ELRCA E170 of 2025.

Delivered in open court at Mombasa, this 19th day of February 2026.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Omar

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