

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT MOMBASA
APPEAL NO. E070 OF 2025

EVANS OBET OMBUYA APPELLANT

VERSUS

COOK N' LITE LIMITED RESPONDENT

[Being an appeal from the judgment by Hon. Lucy Sindani delivered on 3 April 2025 in Mombasa CMELRC No. E010 of 2023]

JUDGMENT

The appeal proceeded in the absence of the respondent. Despite the service, there was no attendance. On 9 December 2025, the appellant submitted that the respondent is under receivership and there is a moratorium against court proceedings. No records were submitted in this regard.

The appeal relates to the judgment delivered on 3 April 2025 in Mombasa CMELRC No. E010 of 2025. The appellant is aggrieved by the findings that there was unfair termination of employment and that there should be payment of compensation and terminal dues in accordance with section 49 of the Employment Act (the Act).

The appeal is on the grounds that the learned magistrate erred in law and fact in absolving the respondent from the burden of proving fair termination of employment contrary to sections 43 and 45 of the Act. The findings related to union involvement without proper evidence were in error, especially since no evidence was tendered to demonstrate that the appellant was aware of the return-to-work formula. His signature does not appear on the minutes or attendance records of union meetings, and he was not a participant. No pay slip or other evidence was presented by the respondent to show deductions for union dues, indicating the appellant was a member of the union.

Other grounds of appeal are that the learned magistrate erred in law by misapplying the principles of desertion of employment as held in **Boniface Nkubi Karagania v Protective Custody Limited [2019] eKLR** and **Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School [2015] eKLR**, and failing to properly apply the provisions of sections 47 and 43 of the Act regarding the procedure for termination of employment. The trial court erred in awarding a grossly inadequate sum of Ksh. 2,115 as the only relief and failing to award compensation under section 49 of the Act.

The underpayments, including unpaid leave days, were not assessed despite evidence of unpaid status. The court accepted the respondent's claim that the appellant was absent from work on 27 June 2022 without submission of the attendance registrar. The appeal should be allowed, and the claims assessed on the merits.

The background to the claim and the appeal is that the appellant was employed by the respondent in November 2007 as a machine operator at a daily wage of Ksh. 705. He attended work, but the respondent failed to pay him for 4 weeks. On 6 June 2022, the appellant reported for work and requested payment of his unpaid wages. The personnel office informed Taura that there was no money and that he should return home and wait for communication regarding when he could be paid and resume work. On 6 June 2022 and 7 July 2022, the applicant reported for work to conduct enquiries. On 27 July 2022, the respondent, through Taura, orally terminated his employment in response to a demand for payment of his employment dues. This amounted to unfair and unlawful termination of employment. This is despite the respondent being operational and occasionally hiring employees. He claimed that there was underpayment of wages contrary to the Wage Orders and thus claimed the following:

- a) Salary for 4 weeks Ksh. 16,920.
- b) Notice pay Ksh. 16,920.
- c) Underpayments from 1 May 2019 to June 2022 Ksh. 156,717.
- d) Leave pay for 15 years ksh. 177,660.
- e) 12 months' compensation Ksh. 233,496.
- f) Costs of the suit.

In reply, the respondent admitted that it engaged the appellant as a shearer within the category of general labourer in the steel and processing department on 3 May 2019 at a wage of Ksh. 705 and Ksh. 1,410 inclusive of house allowance per the Wage Orders. He was paid for the days worked in May 2022. However, the appellant, together with other employees, went on strike on 6 June 2022 and refused to return to work. He deserted his employment and engaged in an unprotected strike. The respondent reported the matter to the Labour office, and a consultative meeting was held in the presence of the employees and the union, resulting in a return-to-work formula requiring the employee to attend in-house causals to return to work by 15 June 2022. The respondent faced financial constraints that employees were aware of and lacked the capacity to meet its obligations, including the timely payment of wages. Efforts to reach the appellant on his phone 0721- - - -67 upon desertion of duty were not successful. Notice issued to the labour officer to this effect. Notice was served through email at googlecyber85@yahoo.com on 21 June 2022 and through registered mail at the last address on 24 June 2022. There was no response. Desertion of duty results in summary dismissal, and the claims made are without merit, including being time-barred contrary to section 90 of the Act.

The learned magistrate heard the parties and held that the claim of unfair termination of employment was without merit, save for payment of 3 days' wages at Ksh. 2,115.

On the appeal, the appellant filed written submissions reiterating his grounds of appeal.

Determination

As this is a first appeal, the court is under a duty to review the record, reassess the findings, and reach a conclusion. However, consider that the trial court had the opportunity to hear the witnesses.

The appellant asserts that his employment was terminated unfairly by the respondent on 27 July 2022, when Mr. Taura orally directed him to return home after Mr. Taura sought payment of his 4 weeks' wages, which remained unpaid. At the time, his wage was Ksh 705 per day, which was an underpayment. He thus sought various terminal dues, including notice pay, 4 weeks' wages, underpayments, leave pay and compensation.

The respondent, in reply, admitted that the appellant was an employee as a general labourer paid between Ksh. 705 and Ksh. 1,410 from 3 May 2019 until 6 June 2022, when he deserted duty. Prior to the desertion, the employees went on strike following the respondent's financial strain and inability to pay wages. However, there was a meeting with the union and the labour officer regarding a return-to-work formula. The appellant did not attend, and despite efforts to trace him, he could not be located.

Indeed, as held by the learned magistrate, the employee has the burden of proof under section 47(5) of the Act that there was unfair termination of employment. The employee must first establish a prima facie case that there was unfair termination of employment before the burden shifts to the employer to show a legitimate explanation for termination, as held in **GMV V Bank of Africa Kenya Limited [2013] eKLR**, that:

... once the employee has established a prima facie case, the burden shifts to the employer to show a legitimate explanation for termination. Where the employee has demonstrated a prima facie case, a presumption that the employer discriminated against the employer is raised.

In this case, the appellant asserts that on 27 July 2022, Taura orally sent him away. The respondent admitted that on 6 June 2022, the employees engaged in an unprotected strike. The matter was reported to the labour officer with an agreement to return to work by 15 June 2022.

In essence, production stopped on 6 June 2022. Work resumed by 15 June 2022. The appellant did not return to the shop floor. His assertion that on 27 July 2022, his employment was terminated through oral directions is discounted by the evidence of the respondent.

Further, the appellant does not respond to the facts that notices were issued to him through his personal phone number referenced under paragraph 12 of the response. There was no response to the email recalling him back to work referenced under paragraph 14 of the response.

An employee who deserts duty frustrates his employment.

An employee who fails to report to work is in breach of section 44(3) and (4) of the Act. Such allows summary dismissal. The employee cannot turn around and assert that his employment was unfairly terminated.

To protect itself, the respondent reported the desertion to the labour office. This is allowed under section 18 of the Act. Upon desertion, and after making reasonable efforts to trace the

employee, which are unsuccessful, the employer may deposit the notice with the labour officer.

The claim for notice pay and compensation is not due in this case.

In response to the claims for underpayment, the respondent filed work records for the casual labourers in the shearer department in which the appellant was employed. From May 2019 to 15 March 2023, the wages paid were 705 per day.

The week of 16 to 22 May 2022, the application was paid Ksh. 4,080, translating to Ksh. 582.85 per day for the week. The appellant was paid Ksh.705.

In the subsequent week, the applicant was paid Ksh. 4,230.

On 24 May 2022, he was paid Ksh. 705.

Under the Wage Orders published by the Minister in May 2022, a general labour daily wage was Ksh. 731.50 from the previous rate of Ksh. 653.10.

In this regard, the daily wage is paid in Ksh. 705 per day was less by Ksh.26.

As this is a continuous injury, under section 89 of the Act, the applicant may claim this benefit only within 12 months.

For every day worked, there was an underpayment of Ksh. 26, which translates to Ksh. 9,464 for the 12 months.

On the claim for accrued leave days, under sections 28 and 89 of the Act, an employee can only claim for such benefits for up to 18 months each year. This translates to Ksh. 23,265 in leave pay.

On costs, this is discretionary under section 12(4) of the Employment and Labour Relations Court ct. The appellant must demonstrate and give a good basis for the claim in costs. In this regard, no effort was made to justify why the costs are justified.

Accordingly, judgment in Mombasa CMELRC No. E010 of 2023 is reviewed with the award of underpayments at Ksh. 9,494 and leave pay for Ksh. 23,265. No orders on costs.

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

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Omar

..... and

