

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT KISUMU

APPEAL NO. E071 OF 2025

(Before Hon. Justice Dr. Jacob Gakeri)

THE GREAT LAKES
HOTEL.....APPELLANT
VERSUS
IAN OCHIENG
TALO.....RESPONDENT

JUDGMENT

Aggrieved by the Judgment of Hon. F. Rashid PM delivered on 30th July 2025 in Kisumu MCELRC NO. E252 of 2024 **Ian Ochieng Talo V The Great Lakes Hotel Ltd**, the appellant filed this appeal on 27th August 2025 vide a Memorandum of Appeal of even date faulting the learned trial magistrate on seven (7) grounds.

The brief facts of the case before the trial court were that the claimant was employed by the respondent, initially as an intern from 4th May 2022 to 5th May 2023 and as a Acting Front Office Supervisor effective 8th May 2023 at Kshs.12,000.00 to 22nd August 2024 when the respondent

terminated his employment vide letter dated 23rd August 2024.

The claimant availed copies of the national identity card, appointment letter dated 8th May 2023 and termination letter dated 23rd August 2023. He also availed a copy of his bank statement from Bank of Africa dated 22/02/2025 which showed a credit of Kshs.10,500.00 from the respondent on 11th September 2023.

The respondent denied the claimant's allegations and sought the dismissal of the case with costs. However, over and above the letters filed by the claimant the respondent filed two (2) letters of apology written by the claimant, a final warning letter dated 6th May 2024 and an undated recommendation letter on internship, which the claimant did not contest.

The respondent attested to his industry discipline and meeting of standards.

The claimant prayed for salary in *lieu* of notice, underpayment, accrued leave, unpaid public holidays, unpaid NHIF, NSSF and PAYE, Certificate of Service, costs

of the claim and any other relief the court deemed just to grant.

After consideration the respective cases, evidence and submissions by counsel, the trial court found that termination of the claimant's employment was unfair and awarded pay in *lieu* of notice, underpayment, declaration that termination was unfair, gratuity and compensation, total Kshs.374,600.00, certificate of service, costs and interest.

This is the judgment appealed against.

The appellant faulted the trial court on the grounds that:

- 1. It misunderstood the evidence in court and wrongly analysed it and reached a wrong conclusion of fact and law.*
- 2. It awarded Kshs.30,627.00 as salary in lieu of notice, Kshs.91,882 as compensation, Kshs.298,032 for underpayment, Kshs.15,314 as gratuity and*
- 3. It misunderstood and wrongly evaluated the evidence before it.*

The appellant prayed that the appeal be allowed with costs.

Appellant's submissions

On termination of the respondent's employment, reliance was placed on the provisions of Section 47(5) of the Employment Act to urge that the respondent bore the burden to prove that his services were terminated by the appellant unlawfully.

Counsel submitted that the respondent was a student from 2022 until May 2023 when he was employed as Front Office Supervisor in an acting capacity and the appellant complied with the provisions of Section 41 of the Employment Act, having issued warning letters and the respondent was accorded an opportunity to respond in writing. Reliance was placed on the decision in **Abel Muema V Kenya Ports Authority** [2018] to urge that a warning letter was corrective not punitive and the respondent was not entitled to the declaration sought as he had been subjected to progressive disciplinary process.

Counsel urged the court to allow the appeal.

Respondent's submissions

As to whether the respondent was an employee of the appellant, regard was had to the provisions of Section 8 and 10 of the Employment Act to submit that the respondent was an employee of the appellant from 2022.

As to whether termination of employment was unlawful, counsel submitted that the appellant did not comply with the provisions of Section 41 of the Employment Act and cited the sentiments of the court in **Anthony Mkala Chitavi V Malindi Water and Sewerage Co. Ltd** [2013] eKLR on the ingredients of procedural fairness.

Counsel, further submitted that the respondent's employment was terminated unprocedurally in contravention of the rules of natural justice as he was never issued with a warning letter and those on record had no letterhead and were not served.

That he was not issued with a notice to show cause or invited for a disciplinary hearing.

Reliance was placed on the sentiments of the court in **Mary Chemweno Kiptui V Kenya Pipeline Co. Ltd** [2014] eKLR on the essence compliance with Section 41

of the Employment Act and the appellant bore the burden of proof under Section 45 of the Employment Act.

On reliefs, counsel submitted that the respondent was entitled to salary in *lieu* of notice, compensation for unfair termination of employment, underpayment, certificate of service, gratuity, costs and interest.

Analysis and determination

As discernible from this judgment, the appellant's challenge against the judgment of the trial court is premised on two related grounds namely; misapprehension and misapplication of the evidence on record and the awards made. The two are related because one is generally the effect of the other.

Before delving into these grounds, it is apt to capture the role of the first appellate court as articulated by the Court of Appeal in **Gitobu Imanyara & Others V Attorney General [2016] KECA (KLR)**, thus:

"This being the first appeal, it is trite law this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial..."

is by way of a 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 though it should always bear in mind that it has never seen nor heard the witnesses and should make due allowances in this respect”.

See also **Selle and Another V Associated Motor Boat Co. Ltd & others** [1968] EA 123, **William Diamond V Brown** [1970] EAI and **Peters V Sunday Post Ltd** [1958] EACA 424.

Concerning the evidence other than the documents availed by the parties, the learned trial magistrate captured the oral testimony adduced by the witnesses.

On his part the respondent confirmed that he worked as Acting Front Office Supervisor from 23rd May 2023 and adduced no evidence of having worked in 2021 or worked overtime or on public holidays and denied having been a student or having received a warning letter.

Needless to emphasis, even in circumstances in which the respondent does not provide controverting evidence,

the claimant is still bound to prove his/her case to the required standard under Section 47(5) of the Employment Act the claimant must establish a *prima facie* case of unfair termination for the respondent to controvert. See **Karugi & another V Kabiya & 3 others** [1983] KECA 38 (KLR).

From the evidence on record, the trial court framed two (2) issues namely; whether termination of the respondent's employment was unfair or unlawful and whether the respondent was entitled to the reliefs prayed for.

On the 1st issue the trial court relied on three (3) relevant judicial authorities and the provisions of the Employment Act and arrived at the conclusion that the termination of the respondent employment was unfair for want of a reason, as the letter of termination of employment had none and procedural fairness which **RWI** confirmed non-compliance with.

In the court's view, the trial court neither misunderstood the evidence nor wrongly evaluated or analysed it. The facts of the case were largely agreed upon that the respondent initially joined as an intern as his Letter of

Recommendation stated, bearing in mind the respondent had no evidence of having been at the appellant's premises before 2023 and did not contest the contents of the Recommendation letter and later joined as the Acting Front Office Supervisor.

Strangely, the respondent did not provide evidence of his qualifications, which in the court's view was material.

On termination of the respondent's employment by the appellant, the law is settled that the relevant provisions of the Employment Act must be complied with, that there must have been a valid and fair reason for the termination of employment and the procedure must have been fair. (Section 43, 44, 47(5) and 45(2)(a) and (b) on reason(s) and Sections 41 and 45(2)(c) of the Employment Act) on procedure.

Put in alternative terms, the employer must have had a substantive justification for the termination of the employee's employment and the process must have been procedurally fair as aptly captured by Ndolo J in **Walter Ogal Anuro V Teachers Service Commission** [2013] eKLR cited by the trial court.

The Court of Appeal expressed similar sentiments in **Naima Khamis V Oxford University Press (EA) Ltd** [2017] eKLR

Using the foregoing test, it is deducible that termination of employment may be substantively and procedurally unfair or either substantively or procedurally unfair and in either case, the termination triggers the provision of Section 49(1) of the Employment Act.

Concerning the reason or reasons for termination of the respondent's employment, it is clear that the appellant's letter of termination of the respondent's employment dated 23rd August 2023 had no specific reason for the summary dismissal, even assuming that he had a previous warning, which he denied having received, a fact not denied in the witness statement.

Equally, the respondent neither denied nor contested the contents of the apology letters on record one of which was undated.

Although the respondent's last warning was in early May 2023, dismissal from employment took place more than three (3) months later, which would suggest that there

was another infraction or malpractice which culminated in the dismissal and because the appellant did not disclose it, the court is in agreement with the findings of the trial court that the appellant failed to provide a reason (s) for terminating the respondent's employment contrary to the provisions of Section 43, 44, 45(2)(a) and (b) and 47(5) of the Employment Act.

Section 43 of the Act provides:

- (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.**

Although subsection (2) of the provision has been construed to be partly subjective (See **Kenya Revenue**

Authority V Reuwel Waithaka Gitahi & others [2018] eKLR, it cannot avail the appellant for the simple reason that the letter of termination of the respondent's employment did not allege any wrongdoing on the part of the respondent.

On procedural fairness it is common ground that neither the provisions of Section 41 of the Employment Act nor Section 45(2)(c) were complied with.

It is trite law that the elaborate procedural requirements under Section 41 of the Employment Act are compulsory as held in **Pius Machafu Isindu V Lavington Security Guards Ltd** [2017] eKLR.

Similarly, the appellant availed no evidence to demonstrate that the elements of procedural fairness were complied with.

See **Postal Corporation of Kenya V Adrew K. Tanui** [2019] eKLR and **Antony Mkala Chitavi V Malindi Water & Sewerage Co. Ltd** (supra) eKLR among others.

From the evidence adduced before the court, it is clear that the appellant failed to prove that termination of the respondent's employment on 22nd August 2024 was conducted in accordance with a fair procedure.

Consequently, the termination of the respondent's employment lacked procedural propriety and was thus unfair for purposes of Section 45 of the Employment Act.

In the court's view, the learned trial magistrate cannot be faulted for having misapprehended or misapplied the evidence on record on the issue of termination of the respondent's employment.

As to whether the respondent was entitled to the reliefs sought, the learned trial magistrate was faulted for making all the monetary awards.

The trial court reasoned that pay in *lieu* of notice was merited but no justification was provided.

Under the provisions of Section 35 of the Employment Act, except where separation is by way of summary dismissal, the requisite notice ought to be given to the employee. In this case a one (1) month's notice was

necessary and none was provided hence salary in *lieu* of notice was payable pursuant to the provisions of section 36 of the Employment Act.

The claim for salary in *lieu* of notice was merited, Kshs.26,925.53.

On accrued leave pay, the respondent adduced no shred of evidence to prove that he did not proceed on leave and how many days were outstanding. The claim lacked supportive evidence and was for dismissal as was the claim for unpaid public holidays worked. The respondent no evidence of the public holidays on which he on duty and rendered services.

As regards gratuity, the trial court awarded Kshs.15,314 on the premise that the employer tendered no evidence of having paid NSSF deductions.

It is trite law that service pay and gratuity are not synonymous and refer to different entitlements.

While services pay is statutory, and awardable to employees whose employment is terminated and are not members of any pension scheme or provident fund under

Section 35(6) of the Employment Act grants gratuity on the other hand is a contractual entitlement either incorporated in the contract of employment, typically in fixed term contracts or the Collective Bargaining Agreement (CBA), if any. It is not a statutory entitlement and cannot be a substitute where the employee's NSSF deductions were not made or were not remitted to the National Social Security Fund Board.

An employer may, however offer a gratuity as opposed to a pension scheme.

(See the rendition of the Court of Appeal in **Bamburi Portland Cement Co. Ltd V William Kilonzi** [2016] KECA 546 (KLR) on gratuity).

Since the respondent's written contract of employment dated 8th May 2023 had no provision on gratuity, the award was unproven, was unmerited and ought not to have been awarded.

The claim for unpaid PAYE, NHIF and NSSF was unmerited on account that these payments are statutorily payable by the employer to the relevant government body for a

defined purpose and cannot be awarded to the individual employee.

Similarly, the statutes under which these mandatory deductions are made provide for the administration of the Acts by a Board of Directors for PAYE and NHIF (now SHIF) or Trustee in the case of the NSSF.

The prayer was unmerited and ought not to have been awarded.

On compensation for unfair termination of employment, the trial court awarded the equivalent of three (3) months salary Kshs.91,882.

The trial court considered the duration served of 3 years, no recorded warning letter and the fact that the respondent did not contribute to the termination of employment.

The court is however concerned as to how the respondents salary was determined to be Kshs.30,627.45.

The trial court relied on the Regulation of Wages (General) (Amendment) Order 2018 and identified the

respondent as a Salesman or cashier which he was not. He was the acting Front Office Supervisor and adduced no evidence of having been a Salesman or Cashier.

Under the Regulation of Wages (Amendment) Orders a Salesman or Cashier are highly rated positions equated to a driver of a heavy commercial vehicle.

The respondent was a receptionist as he admits in his undated letter of apology to the appellant.

A Receptionist is similar to a Shop Assistant but selling a service as opposed to goods and has no duties outside the place of work, and whose basic salary from May 2022 was Kshs.24,818.31+House allowance at 15% Ksh.3,722.75 Total Kshs.28,541.06 translated to Kshs.85,623.17.

In the court's view, the appellant has not made a case to justify interference with the award of equivalent of three (3) months salary as compensation awarded by the trial court.

On underpayment, the trial court found that the respondent provided no evidence to show how much he

was earning prior to 2023 and as thus could not prove underpayment.

Similarly, the letter of appointment dated 8th May 2023 had no salary. However, the letter of termination dated 23rd August 2024 had a figure of Kshs.12,000 as at the date of termination, a fact the respondents bank statement would appear to confirm.

The learned trial magistrate used 8th May as the date of employment, which in the court's view was reasonable.

It is trite law that payment of salary or wage below the prescribed minimum is unlawful as held by the Court of Appeal in **Ngang'a V Christ the King Parish & another** [2023] KECA 1100 (KLR). See also **Irungu Githae V Mutheka Farmers Co-operative Society Ltd** [2019] eKLR.

The salary of Kshs.12,000 paid to the respondent amounted to underpayment and the respondent was entitled to the difference for the duration served, a total of 15 1/2 months which translates to 1st May 2023 to 30th April 2024, $Kshs.26,925.53 - 12,000 = Kshs.179,106.36$

8th May 2024 to 23rd August 2024=Kshs.55,893.71,Total
Kshs.235,000.07.

In conclusion, the judgment of the trial court is interfered with to the extent that:

- (a) *The award for gratuity is set aside.*
- (b) *The award for underpayment is adjusted to*
Kshs.235,000.07
- (c) *The award for salary in lieu of notice is adjusted to*
Kshs.28,541.06 - Kshs.12,000.00 already paid,
Kshs.16,541.06
- (d) *The award of compensation is adjusted to*
Kshs.85,623.17

Other awards by the trial court are upheld save for the declaration which was not sought.

Owing to the partial success of the appeal parties shall bear own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT
KISUMU ON THIS 23RD DAY OF FEBRUARY 2026.**

DR. JACOB GAKERI
JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI
JUDGE

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