



REPUBLIC OF KENYA



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Kirata v Mwagi t/a Hunters Lodge & Butchery and Jamka Lodge (Employment and Labour Relations Appeal E017 of 2023) [2026] KEELRC 742 (KLR) (3 March 2026) (Judgment)

Neutral citation: [2026] KEELRC 742 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E017 OF 2023**

AN MWAURE, J

MARCH 3, 2026

BETWEEN

PETER WAINAINA KIRATA APPELLANT

AND

**JAMES K MWAGI T/A HUNTERS LODGE & BUTCHERY AND JAMKA
LODGE RESPONDENT**

(Being an Appeal from the Judgment and Decree of the Honourable Emmanuel S. Soita, Senior Resident Magistrate, delivered on 23rd May 2023 in Nakuru CM ELRC No. 78 of 2020)

JUDGMENT

1. The Appellant, being dissatisfied with the Judgment and Decree of the Honourable Emmanuel S. Soita, Senior Resident Magistrate, filed this appeal vide a Memorandum of Appeal dated 19th June 2023, on the following grounds that: -
 1. The learned magistrate erred in law by not awarding compensation for unfair termination as per section 49(c) of the [Employment Act](#) after confirming that the termination was unfair.
 2. The learned magistrate erred in law and facts by not awarding or giving decision under prayers unpaid leave and underpayment of the Appellant claims on memorandum of claim.
 3. The learned magistrate erred in facts by failing to take into account and to consider the evidence adduced on behalf of the Appellant.
2. The Appellant prays that:
 - I. The Appeal be allowed.
 - II. The Judgment be set aside and reviewed.



- III. The Appellant be awarded cost of this appeal
3. The appeal was disposed of by way of written submissions.

Appellant's submissions

4. The Appellant submitted that the trial magistrate erred by awarding inordinately low damages in an employment termination case. The Appellant relied on the case of *Butt v Khan* (1981) KLR 349, where the court emphasized that appellate courts may only interfere with damages if they are based on wrong principles or misapprehension of evidence. The Appellant had given proper notice to resign, but the Respondent dismissed him immediately without cause. Under section 43 of the *Employment Act*, 2007, the employer must prove valid reasons for termination, failing which the dismissal is deemed unfair. Section 49(1) further empowers compensation for unjustified termination, including notice pay, wages due, and up to twelve months' salary. The Appellant submitted that the trial magistrate should have awarded reasonable compensation, given the unlawful dismissal.
5. The Appellant submitted that one of the guiding principles for remedies under section 49 of the *Employment Act* is that they are awarded to compensate the Claimant, not as punishment to the employer. The Appellant relied on the case of *Mary Njoki V John Kinyanjui Muthuru* [1985] eKLR, stated as follows:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight of bearing of circumstances admitted or proved, or has plainly gone wrong the appellate court will not hesitate to decide.”

6. The Appellant submitted that the trial magistrate erred in awarding only one month's compensation to him, who had worked for the respondent for over ten years. The Appellant emphasized that the award was unjustifiably low and lacked any reasoning from the magistrate.
7. On this basis, the Appellant urged the court to allow the appeal as prayed and award the costs in his favour.

Respondent's submissions

8. The Respondent submitted that the first appellate court will only interfere with a trial court's findings of fact if it is shown that the trial court acted without evidence, misunderstood the evidence, or misapplied legal principles. The Respondent relied on the case of *Peters v Sunday Post Ltd* [1958] EA 424, where the court held that appellate interference is not warranted merely because the appellate court would have arrived at a different conclusion.
9. Ultimately, the Respondent submitted that the burden lies on the Appellant to demonstrate such errors, as mere dissatisfaction with the outcome is not a valid ground of appeal.
10. The Respondent submitted that the claim for unpaid leave was dismissed because it was neither pleaded with specificity nor supported by evidence. The Appellant failed to indicate the period of leave allegedly denied, did not testify on it, produced no documents, and made no submissions on the issue. As a result, the claim was deemed a bare assertion. The Respondent relied on the case of *Independent Electoral and Boundaries Commission & another v Mule & 3 others* [2014] KECA 890 (KLR), where the Court of Appeal held that parties are bound by their pleadings, and reliefs must be proved. Further, sections 107 to 108 of the *Evidence Act* provide that the burden of proof lies with the Appellant. Since



the Appellant failed to discharge this burden, the trial magistrate was correct in rejecting the claim, and no error of law or fact was found.

11. The Respondent submitted that the Appellant blames the trial court for failing to examine a claim that he himself abandoned at trial. The Respondent relied on the case of *Galaxy Paints Company Ltd v Falcon Guards Ltd* [2000] KECA 215 (KLR), where the Court of Appeal held that a court may only pronounce judgment on issues arising from the pleadings. The Respondent argued that the Appellant cannot be allowed to benefit from his own failure to adduce evidence.
12. The Respondent submitted that the Appellant's challenge on underpayment was dismissed because the evidence showed his pay included commission, and the Respondent provided records explaining this payment method. The Appellant failed to counter with pay slips, wage orders, or computations, making his claim unsubstantiated. Courts have held that mere allegations of underpayment are insufficient without proof, as seen in the case of *CMC Aviation Limited v Mohammed Noor* [2015] KECA 775 (KLR).
13. Additionally, the Respondent submitted that the Appellant attempted to introduce new arguments on appeal, which is impermissible because appeals are not intended to fill evidentiary gaps or reframe cases after judgment. This principle was reinforced in *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212, which underscored that such conduct would prejudice the Respondent and undermine the trial process.
14. The Respondent concluded, stating that the Appellant had not shown any misdirection, misapprehension of evidence or error of law on the part of the learned Magistrate. The Appellant's main contention was simply compensation awarded was too low and unfair. The Respondent maintained that the judgment was well-reasoned, properly supported by evidence, and legally sound.
15. The Respondent urged the court to dismiss the appeal in its entirety with costs.

Analysis and determination

16. Being the appellate court, it is the court's responsibility to re-evaluate and analyze the evidence tendered before the trial court and subject it to an independent analysis so as to arrive at its own conclusion as to whether or not to uphold the decision of the trial court as set out in *Selle Associates V Associated Motor Boat Company Ltd* (1968) E.A. 123.
17. Having considered the records of appeal, the memorandum of appeal, and the submission by both parties.

1. The issue for determination is whether the Claimant is entitled to remedies prayed.

18. Looking at the record of appeal, there is no dispute that the Appellant was employed as a meat cutter at the Respondent's lodge, earning Kshs.3,500/= per month, which was increased to Kshs.8,500/=. The Appellant had worked from October 2010 upto 2017 for the Respondent and he is seeking compensation for salary in lieu of notice, 12 months' compensation for unfair termination in accordance with section 49(1)(c) of the *Employment Act*, unpaid leave and underpayment. The trial learned magistrate, in his judgment, stated that the Respondent did not state its reasons for the Appellant's termination and found that his termination was unlawful.
19. In *Ombengi V Lavington Security Limited* [2023] KECA 1147 (KLR), the Court of Appeal held that compensation under section 49(1)(c) of the *Employment Act* is merely one of several remedies available to a trial court, and its application depends on the specific circumstances of each case. For an appellant to successfully challenge a trial court's discretionary decision, they must demonstrate



that the discretion was exercised improperly, whether injudiciously, prejudicially, or in a capricious or whimsical manner. This principle was affirmed by the Supreme Court in *Kibira v Independent Electoral & Boundaries Commission & 2 others* [2019] KESC 62 (KLR), which emphasized that judicial discretion must be exercised judiciously and without prejudice.

20. In *Premier Bag & Cordage Limited V Peter Wakaba Wachie* [2017] KECA 196 (KLR), the Court of Appeal held as follows:

“However, there is evidence from the respondent’s witnesses, Ibrahim Abdalla and John Busisa, pointing to the fact that Wakaba contributed to the termination by failing or refusing to report back on duty in July, 2012. This evidence was significant, and the lower court ought to have taken it into account when determining whether or not to award compensation for unfair termination, and if so, how much to award. In view of the fact that the employment may have continued save for the refusal to return to work, and also appreciating the length of the employment, we would award six months’ compensation.”

21. The court finds the trial magistrate was right in finding that the Appellant was unfairly terminated by the Respondent as per the evidence tendered. The Appellant gave one month notice to leave employment and the Respondent instead of giving feedback on the resignation letter he ordered the Appellant to leave work immediately. That evidence is not challenged by the Respondent.
22. As for award of unfair termination he was given equivalent of one month salary compensation. That is excessively too low despite having exercised his discretion. The trial magistrate ought to have considered the length of service that the Appellant worked for the Respondent. Section 49(1)(c) of the *Employment Act* provides that consideration of the equivalent of a number of months’ wages or salary not exceeding twelve months, based on the gross monthly wage or salary of the employee at the time of dismissal and years served. The evidence depicts Appellant worked for the Respondent close to six (6) years.
23. Considering the above, the court finds it is reasonable that 6 months will be appropriate compensation and will be awarded the same calculated as follows:
- Kshs.8,500 X 6= 51,000/=
24. For the claims for unpaid leave and underpayment, the court relies on sections 107, 108 and 109 of the *Evidence Act*, as whoever alleges must prove, and the Appellant failed to prove on the claim for unpaid leave and underpayment with supporting evidence; thus, the court will uphold the decision of the trial magistrate. There is no evidence the Appellant applied for leave and was denied. There are no calculations to support underpayment. The court does not find there is reason to support the two prayers of unpaid leave and underpayment and so upholds the trial court’s in rejecting those prayers.
25. Flowing from the foregoing, the appeal succeeds partially by setting aside the compensation for 1 month for unfair termination and substituting it with 6 months, amounting to Kshs.51,000/= as compensation. Total award will be Kshs.8,500/= for salary in lieu of notice awarded by the trial magistrate and for unlawful termination totaling Kshs.59,500/=. Plus, interest at 14% per annum from date of this judgment till full payment.
26. The Appellant will have the costs of the Appeal together with the lower court costs awarded therein.
- Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 3RD DAY OF
March, 2026.**



ANNA NGIBUINI MWAURE

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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

