

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

ELRC APPEAL NO. E038 OF 2025

JUSTIN MWILO MBEKE.....APPELLANT

VERSUS

HAKIKA TRANSPORT SERVICES LIMITED.....RESPONDENT

*(Being an Appeal against the entire judgment of Hon. Sogomo-PM, Principal Magistrate,
delivered on the 21st February 2025 in Mombasa MCELRC/E669/2023)*

Background

1. Contending that at all material times he was an employee of the Respondent, whose employment the latter unfairly terminated, the Appellant sued it, seeking the following reliefs;
 - a. Payment of his terminal and contractual dues amounting to Ksh.926,600/=
 - b. Certificate of service
 - c. Costs and Interests of this suit.

d. Any other relief that the Court may deem fit to grant.

2. He particularised the above-stated sum as hereunder;

a. One month's pay in lieu of notice, Kshs. 28,000/=

b. Unpaid leave days 2017 to date, Kshs. 117,600/=

c. Compensation for unlawful termination,

Kshs. 28,000 x 12months 336,000/=

d. Service pay, Kshs. 448,000

TOTAL Kshs. 926,600/=

3. The Appellant challenged the Respondent's claim through a Response to Claim dated 6th November 2023. The Respondent admitted that the Appellant was its employee, stating that he was employed as a tractor driver on 25th January 2017. The Respondent's position was that following the Appellant's arrest on 30th August 2023, his port pass was blocked, thereby preventing him from performing his port-based duties. The Respondent further asserted that the Appellant subsequently failed to resume duty or apply for leave. It did not terminate his employment. He willfully absented himself from duty.

The Appellant's case before the trial court

4. In the witness statement dated 25th October 2023, the Appellant, Justin Mwilo Mbeke, stated that he was employed by the Respondent in 2007 as a driver of heavy commercial motor vehicles and served until the end of August 2023, when he last received his salary.
5. He stated that in August 2023, while on duty within the Kenya Ports Authority's precincts, a turn boy placed six twist locks in the vehicle, which the authorities suspected were stolen, leading to allegations of conveying suspected stolen property against him. As a result of the accusation, his port pass was confiscated.
6. The Appellant stated that he cooperated with the investigators and that the Office of the Director of Public Prosecutions decided not to pursue prosecution after a Diversion Agreement dated 31st August 2023, which settled the matter.
7. He argued that, despite this, the Respondent refused to assign him duties in August and September 2023 without providing any explanation. He claimed that his work was not confined to port operations, as he would

also drive across the wider coastal region, and that some drivers carried out duties without entering the port.

8. The Appellant further testified that he was not subjected to any disciplinary process or hearing, and that despite repeatedly reporting to the Respondent's offices, he was verbally informed that there was no work. His salary for September 2023 was stopped without notice.
9. He maintained that the Respondent unfairly condemned him despite the discontinuation of criminal proceedings, denied him due process, and claimed entitlement to notice pay, service pay, gratuity, and other terminal benefits arising from what he considered an unfair termination.

Respondent's case

10. In the witness statement dated 23rd February 2024, the Respondent's witness, Rajab Yeri Kombe, stated that he is the Human Resource Manager and was familiar with the Appellant, who was employed as a tractor driver on 25th January 2017, earning a basic salary of Kshs. 14,200 and a house allowance of Kshs. 2,150, with additional pay of Kshs. 150 per extra trip.

11. He stated that on 30th August 2023, the Appellant was arrested at the port and detained at the Port Police Station after being found in possession of six container twist locks, suspected of having been stolen and concealed in the cabin of the tractor assigned to him.
12. The witness further stated that following the incident, the Appellant's port pass was immediately blocked, thereby preventing him from performing his contractual duties, which required access to the Port for transporting containers.
13. He further testified that the police investigations resulted in the Appellant accepting the charges and signing a Diversion Agreement dated 31st August 2023.
14. The witness maintained that following the arrest, the Appellant failed to resume duty or apply for leave, prompting the Respondent to notify the Labour Office of his absence. The witness further asserted that the Appellant was not dismissed but willfully absented himself from duty.

Judgment of the Lower Court

15. Upon considering the pleadings, evidence, and submissions, the trial court identified the key issues for determination as whether the Appellant

was employed by the Respondent, the nature and salary of his employment, whether his termination was unlawful, and whether he was entitled to the remedies sought. The court found that employment was admitted and established by documentary evidence. On salary, the court held in light of the Appellant's August 2023 payslip, that his monthly salary was Kshs. 19,700.

16. The trial Court found that the termination of the Appellant's employment was both procedurally and substantively unfair, thereby rejecting the Respondent's defence of desertion.
17. The trial court awarded the Appellant one month's salary in lieu of notice in the sum of Kshs. 19,700. However, it rejected the claims for unpaid leave, service pay, and compensation for unfair termination. It did not award compensation for unfair termination, on the grounds that the Appellant had admitted to criminal misconduct and that the loss of the port pass contributed to the termination of employment.
18. The court also declined to grant a certificate of service and costs, noting that the Appellant had not demonstrated clearance with the employer and had contributed to the circumstances leading to the loss of employment.

19. In conclusion, the court partially allowed the claim and entered judgment in favour of the Appellant only to the extent of Kshs. 19,700 as notice pay, with all other claims dismissed.

The Appeal

20. Dissatisfied with the Judgment of the lower Court, the Appellant filed the instant appeal, setting forth the following grounds;

- 1) THAT the learned magistrate erred in law and in fact in denying the Appellant compensation for unlawful and unfair termination on account of an erroneous whimsical conclusion that the Appellant had admitted to the crime he had been charged with ignoring the overwhelming evidence that the diversionary agreement adduced at the trial court shall not be used to the detriment of the Appellant in a court of law.
- 2) THAT the learned trial magistrate erred in law and in fact by whimsically concluding that the Appellant's core duties were conducted at the port grounds, ignoring the overwhelming evidence to the contrary.

- 3) THAT the learned trial magistrate erred in law and fact by concluding that the Appellant had contributed to his loss of employment while at the same time making a finding that the Appellant's employment was unlawful and unfair.
- 4) THAT the learned trial magistrate made an erroneous determination that the Appellant's employment was terminated unfairly, but proceeded to deny the Appellant compensation for unlawful termination.

Appellant's submissions

21. In the submissions dated 24th August, 2025, the Appellant raised the following issues for determination;
 - i. Whether the trial court erred in fact and in law by failing to award the appellant compensation for unfair termination.
 - ii. Whether the diversion agreement entered into between the appellant and the Office of the Director of Public Prosecutions (ODPP) served to negate, mitigate, or otherwise affect the

appellant's entitlement to fair labour practices, due process, and remedies under the Employment Act.

- iii. Whether the trial court misapprehended the facts by finding that the appellant was “based at the port.”
- iv. Whether the appellant is entitled to the reliefs sought, including compensation for unfair termination, unpaid leave dues, issuance of a certificate of service, costs, and any other relief this honourable court deems just and fit to grant.

22. The Appellant challenged the entire judgment of the trial court, contending that the learned magistrate misapplied the law and failed to properly evaluate the evidence, thereby reaching an erroneous decision. The Appellant maintained that although the trial court found the dismissal procedurally unfair, it erred by awarding only notice pay and declining to grant other remedies arising from the unfair termination.

23. The Appellant submitted that the summary dismissal was effected without notice, a disciplinary hearing, or valid reasons, contrary to **Sections 41, 43, and 45 of the Employment Act**. Reliance was placed on the case of **Kenfreight (EA) Ltd v Benson K. Nguti**.

24. The Appellant contended that the trial court failed to consider the statutory factors under section 49(4), including length of service and lack of prior misconduct.
25. The Appellant further submitted that the trial court wrongly relied on the diversion agreement arising from the criminal allegations involving twist locks to deny compensation, arguing that diversion does not constitute a conviction or admission of guilt and cannot substitute an employer's disciplinary process. It was asserted that the Respondent remained bound to conduct internal disciplinary proceedings and prove reasons for termination.
26. On factual findings, the Appellant argued that the trial court misapprehended evidence by concluding that he was permanently based at the port and that loss of port access rendered continued employment impossible. Reliance was placed on the case of **Kenya Airways Limited v Alex Wainaina Mbugua**.
27. Regarding remedies, the Appellant contended that having found procedural unfairness, the trial court was obligated to award compensation, unpaid leave, and a certificate of service. The Appellant

relied on the case of **Walter Ogal Anuro v Teachers Service Commission**.

28. In conclusion, the Appellant urged the appellate court to set aside the judgment of the trial court and substitute it with an award of twelve months' salary as compensation for unfair termination, unpaid leave dues, issuance of a certificate of service, costs, and interest, together with any other appropriate relief.

Respondent's submissions

29. In the submissions dated 28th July, 2025, the Respondent raised the following issues for determination.
- i. Whether the Trial Court was wrong in concluding Appellant had admitted to theft.
 - ii. Whether the Trial Court erred in finding Appellant's core duties were centred at the port.
 - iii. Whether the Trial Court was wrong in concluding Appellant contributed to the loss of employment.
 - iv. Whether the Trial Court was wrong in exercising its discretion not to award costs.

30. The Respondent opposed the appeal and urged the court to affirm the judgment delivered on 21st February 2025, submitting that the learned magistrate properly evaluated the evidence and exercised discretion judiciously. The Respondent maintained that the trial court correctly found that the Appellant admitted to the offence of theft, relying on the Diversionary Agreement dated 31st August 2023, in which the Appellant confessed to conveying stolen twist locks recovered from the tractor assigned to him.
31. The Respondent further argued that the trial court correctly determined that the Appellant's primary duties were centred at the Port of Mombasa, as his contract as a tractor driver required constant access to port premises for container transportation. It was contended that the confiscation and cancellation of the Appellant's port pass following the security incident prevented him from fulfilling his contractual obligations.
32. On contribution to termination, the Respondent contended that the Appellant's own conduct led to the revocation of his port pass and consequently to the loss of employment, a finding the trial court was

correct to make based on documentary evidence and communication from the Kenya Ports Authority.

33. Regarding remedies, the Respondent submitted that the trial court properly exercised its discretion in declining compensation after considering the Appellant's conduct and the circumstances of separation, in line with the principles set out in the case of **Ol Pejeta Ranching Limited v David Wanjau Muhoro (2017) KECA**.
34. In conclusion, the Respondent maintained that the learned magistrate correctly addressed all issues and applied settled law properly and therefore urged this court to dismiss the appeal with costs in its favour.

Analysis and determination

35. In the case of **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123**, the Court held that;
- “...this court is not bound necessarily to accept the findings of fact by the court below... an appeal... is by way of retrial and the court must reconsider the evidence, evaluate it itself and draw its own conclusions...”*

This Court will consider the instant appeal using the above-mentioned lens.

36. This Court observes that the trial Court found that the Appellant's employment was both procedurally and substantively unfair. The Respondent, who could normally challenge such a finding on appeal, did not do so. It is not difficult to see and conclude that the gravamen of the instant appeal is whether the learned trial Magistrate erred in not awarding the Appellant the reliefs he had sought.

37. The Appellant argued that, having found his employment termination to be unfair, the trial court lacked any legal basis to refuse him compensation for unfair dismissal, reasoning that the Appellant's admitted criminal conduct and loss of his port pass contributed to the termination. The Respondent, on the other hand, contended that the compensatory relief was declined on a sound and legal basis.

38. Section 49[1][c] of the Employment Act, 2007, confers authority upon the Courts to award compensatory relief to an employee who has successfully contested their employer's decision to terminate their employment through litigation. However, it is pertinent to note that the

exercise of this power is discretionary and is contingent upon the specific circumstances of each case.

39. It is at this point that it must be stated that, therefore, any challenge against a decision made regarding the compensatory award contemplated under section 49 [1][c] of the Employment Act can only succeed if the Appellant sufficiently demonstrates the existence of those factors recognised by law as valid grounds for setting aside a discretionary decision. See **Mbogo & Another vs Shah [1968] EA 93**.

40. In my view, an employee's conduct is a relevant factor to consider while exercising the discretionary authority under section 49[1][c] of the Employment Act. The Court of Appeal in **OI Pejeta Ranching Limited v David Wanjau Muhoro [2017] KECA 329 (KLR)** held;

“Remedies for wrongful dismissal and unfair termination are provided for in section 49 of the Act. They include and which the learned Judge invoked, payment equivalent of a number of months’ wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employees at the time of dismissal. In deciding whether to adopt some of the remedies, the court has to take into account a raft of considerations such as the wishes of the

employee, circumstances in which the termination took place and the extent of the employee's contribution, practicability of reinstatement, employee's length of service, opportunity available to the employee, severance payable, right to press other claims or unpaid wages, expenses reasonably incurred by the employees as a consequence of termination, conduct of the employee which to any extent caused or contributed to the termination, failure by the employee to reasonably mitigate the losses and any other compensation in respect of termination of employment paid by the employer and received by the employee.”

41. However, the statutory framework does not provide that an employee's contribution automatically extinguishes entitlement to compensation under the above-stated factor, as the learned trial Magistrate's Judgment tend to suggest. It is here that I conclude that the learned trial Magistrate misdirected himself on a principle of law.

42. I have carefully considered the length of the period the Appellant served the Respondent, the fact that the Respondent inexplicably failed to adhere to the statutory cannons of procedural fairness, and the fact that his

admitted infraction which in my view, would amount to a criminal offence, and conclude that he is entitled to a nominal award under section 49[1][c] of the Employment Act, one month's gross salary.

43. Under Section 51 of the Employment Act, a certificate of service is a statutory entitlement. The manner in which the employee leaves his employment is not considered a factor that should override this entitlement. The relief was wrongly denied by the trial court.
44. In the upshot, the Appellant's appeal succeeds in the following terms;
 - a) He is hereby awarded compensation under section 49[1][c] of the Employment Act, one month's gross salary, KShs. 19,700.
 - b) The Respondent is to issue him a certificate of service within 30 days of this Judgment.
 - c) Costs of this appeal shall be in his favour, and are hereby assessed at KShs. 15,000.

Read Signed and Delivered this 12th Day of March 2026.

OCHARO KEBIRA

JUDGE