

REPUBLIC OF KENYA

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

APPEAL E215 OF 2025

ASUSA TRANSPORTERS LIMITED APEPLLANT

VERSUS

JARED OKUMU LUBONGOYO RESPONDENT

**[Being an appeal from the judgment of Hon. J. B. Kalo delivered on 19 September 2025
in Mombasa, CMELRC No. 1788 of 2018]**

JUDGMENT

The appeal arises from the judgment delivered on 19 September 2025 in Mombasa CMELRC No. 1788 of 2018.

The appeal is that the learned magistrate erred in law and fact by failing to analyse the evidence before it, and that the respondent proved his case, thereby warranting the unlawful and unfair termination of employment. The resignation letter dated 27 March 2018 was not considered, as the respondent had voluntarily resigned from his employment. The award of Ksh. 99,000 for alleged leave days; the salary for alleged days worked was unsupported by evidence. The appeal is that the trial court erred in failing to consider the counterclaim seeking to recover surcharges amounting to KSh. 241,998.58, and the ward of costs was unjustified despite the respondent's resignation.

The appellant is seeking that the appeal be allowed, the judgment set aside, and its counterclaim allowed with costs.

The respondent filed this claim on the basis that in February 2015, he was employed by the appellant as a heavy commerce driver at a wage of Ksh. 33,544 per month. He worked and followed instructions that each driver had to load their vehicle to avoid the appellant meeting extra costs. However, he was required to drive a vehicle he was unfamiliar with, contrary to the regulations. When he complained, the appellant took the opportunity to lay him off, citing redundancy. There was no notice or explanation for the termination of his employment, and he claimed it was unlawful and unfair. He claimed the following:

- a) Notice pay, Ksh.33, 000.
- b) Unpaid leave for 3 years, Ksh. 99,000.
- c) Days worked in March 2018 Kh. 25,300.
- d) 15 days' pay for each 3 years Ksh. 21,250.
- e) General damages for wrongful termination.
- f) Costs.

In response, the appellant admitted that the respondent was employed on 2 February 2015 to assist the driver in the appellant's vehicles. He was involved in several disciplinary cases. On

1 September 2015, he admitted to being a turn man for truck no. KBT 437T and that he lost 3 springs, 1 drum, 2 pieces of shoe lining, and 4 pieces of tyres. The fuel levels remained low, unaccounted for. He failed to report the losses to the police. The appointment gave him a chance to change and to be assigned driver duties in 2017. He was issued a contract dated 22 November 2016. On 13 September 2017, he undertook to work as directed by the appellant. However, he remained in breach of his contract. On 25 October 2017, the respondent was issued a show-cause notice for the loss of a motor vehicle part and general indiscipline. On 16 January 2018, he was issued a notice to show cause for carrying passengers in the appellant's vehicles without authority. On 2 February 2018, upon review of its operations, the appellant issued the respondent with a term of notice on the grounds of redundancy. He was to serve one month with effect from 2 March 2018. He was to be paid his terminal dues. He was paid on 2 March 2018.

The response was that on 15 March 2018, the respondent reapplied for employment and was assigned as a driver. On 23 March 2018, the respondent carelessly drove the allocated vehicle, caused an accident, was charged with careless driving, found guilty, and fined Ksh. 30,000. Due to breach of his employment contract, the respondent resigned on 27 March 2018. He terminated the employment relationship contrary to what is alleged. He resigned and deserted duty after owing the appellant Ksh. 171,748.58 in accumulated surcharges, which resulted from deliberately causing loss of cargo he was carrying, along with other employment breaches. Additionally, he owes Ksh. 30,000 paid for the traffic offence. He also owes a surcharge of Ksh. 25,750 for parts damaged on 11 November 2017, and Ksh. 14,500 for the aluminum bracket.

The appellant counterclaimed the sum of Ksh. 241,998.58 for the surcharges and losses incurred by the respondent in the course of his employment. It is also claimed costs.

The learned magistrate heard the parties and held that the respondent proved his case, and there was unfair termination of employment as the appellant had failed to demonstrate that due process in a redundancy was followed. The trial court awarded the following:

- a) Notice pay Ksh. 33,000
- b) Leave pay for 3 years Ksh. 99,000.
- c) 6 months' compensation Ksh. 198,000.
- d) Days worked Ksh.25, 300.
- e) Costs of the suit.

Regarding whether the respondent was terminated or voluntarily resigned, the appellant argues that the respondent failed to prove termination as required under section 47(5) of the Employment Act. The appellant states that the respondent was initially issued a redundancy notice effective 2nd March 2018, received his dues, and left employment. He subsequently re-applied for employment on 15th March 2018 and was re-engaged as a driver. While in employment, he was charged with careless driving on 23rd March 2018 under section 49(1) of the Traffic Act, pleaded guilty, and was fined Kshs. 30,000. The appellant contends that the respondent thereafter tendered a resignation letter dated 27th March 2018 to avoid

disciplinary action. The appellant maintains that the resignation letter was clear, voluntary, and unchallenged, and that the respondent did not plead duress or constructive dismissal.

To support the legal validity of resignation, the appellant cites **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] KECA 394 (KLR)**, where the Court of Appeal held that when an employee resigns but claims unfair dismissal, the claim can only succeed if the resignation amounts to constructive dismissal. The appellant also refers to **Thomas De La Rue (K) Ltd v Omutelema [2013] KECA 492 (KLR)**, where the Court of Appeal determined that if an employer complies with the requirements of section 40 of the Employment Act when declaring employees redundant, the redundancy will be lawful.

The appellant therefore argues that the respondent voluntarily resigned on 27th March 2018 and that the statutory enquiry into unfair dismissal does not arise.

In the alternative, and without conceding that termination took place, the appellant argues that there were valid and lawful reasons to justify dismissal under sections 43, 44, and 45 of the Employment Act. The appellant states that the respondent had a disciplinary record, including mishandling company vehicles, fuel shortages, failure to report incidents, and transporting passengers in violation of company policy. Moreover, the respondent admitted to careless driving while operating the appellant's vehicle. The appellant argues that such conduct eroded confidence in the respondent as a commercial driver and provided a legitimate ground for dismissal under section 44(4) of the Employment Act. As a result, the appellant contends that the trial court failed to consider the disciplinary context and erred in holding that the termination was unfair.

Regarding the award of Kshs. 99,000 for accrued leave, the appellant asserts that the claim was neither explicitly pleaded nor conclusively proved. It argues that the respondent failed to specify the leave years claimed, the number of outstanding leave days, or provide any calculations or supporting documents, such as leave forms or attendance records.

The appellant relies on **George Onyango Akuti v G4S Security Services Kenya Ltd [2013] KEELRC 727 (KLR)**, where the court held that termination might be unfair if an employer dismisses an employee without offering them an opportunity to be heard, even if the employee is in police custody. The court concluded that the dismissal did not meet the standards of justice and equity under section 45(4)(b) of the Employment Act and awarded the claimant notice pay, gratuity, and payment for accrued leave. The appellant argues that the trial court improperly shifted the burden of proof onto the employer and awarded Kshs. 99,000 without sufficient evidence or accurate calculation.

On the counterclaim, the appellant argues that the trial court erred by failing to determine its claim for surcharges amounting to Kshs. 241,998.58, which stemmed from the respondent's misconduct and operational losses. The appellant states that the counterclaim was properly pleaded, detailed, and backed by documentary evidence, including invoices and internal surcharge records. The alleged losses resulted from fuel shortages, improper vehicle handling, breach of the company's transport policy, and the respondent's traffic conviction while driving the appellant's vehicle. The appellant contends that the respondent failed to

provide evidence to counter the counterclaim, and that the trial court's failure to address it made the judgment incomplete and flawed.

The appellant thus submits that the respondent failed to prove its case for termination or unfair dismissal, that the monetary awards lacked supporting evidence, and that the counterclaim was improperly dismissed. The appellant accordingly requests that the appeal be allowed, the judgment of the trial court be reversed, and the counterclaim for Kshs. 241,998.58 be granted, and that the costs of the appeal and the proceedings in the lower court be awarded to the appellant.

The respondent states that he filed a statement of claim dated 19th August 2018, seeking a declaration that his termination was unfair, payment of terminal dues including accrued leave, compensation for unfair dismissal, and costs of the suit. He testified that he was employed by the appellant as a driver from 1st April 2010 until 27th March 2018, and that he performed his duties diligently. He contends that on 15th March 2018, he was informed that his employment had been terminated without a valid reason, without a termination letter, and without being given an opportunity to respond to any allegations. He denies ever voluntarily resigning and asserts that the alleged resignation letter dated 27th March 2018 was fabricated after the termination.

The respondent asserts that the appellant failed to demonstrate a valid reason for termination or to follow proper procedural fairness as required under sections 43 and 45 of the Employment Act. He references **G4S Kenya Ltd v Mutinda & another [2025] KEELRC 2047 (KLR)**, where the court emphasised that, under section 43 of the Employment Act, an employer must prove the reasons for termination, and those reasons must be the matters the employer genuinely believed to exist at the time of dismissal. Failure to establish such reasons renders the termination unfair.

The respondent also relies on **Walter Edwin Ogara Odhiambo v SGS Kenya Limited [2020] KEELRC 361 (KLR)**. The court held that an application seeking to restrain a redundancy process was premature, as the notice issued was only a draft intended to gather the employee's input and had not yet been formally implemented.

Regarding the awards made by the trial court, the respondent asserts that leave pay and related entitlements were properly awarded under the Employment Act. He relies on **Lintons Place Ltd v Kamau & 2 others [2025] KEELRC 2743 (KLR)**, where the appellate court upheld the trial court's awards of leave pay and compensation where the employer failed to produce complete employment records as required under section 74 of the Employment Act, confirming that such failure entitles employees to the corresponding benefits.

The respondent further contends that accrued leave is a statutory entitlement under sections 37(1) and 74(f) of the Employment Act and must be paid upon termination if the employer fails to produce leave records. He maintains that compensation for unfair dismissal was properly awarded under section 49(1)(c). He relied on **Andera v Aimsoft Limited [2025] KEELRC 60 (KLR)**, where the court held that compensation for unfair termination is discretionary but capped at 12 months' gross salary under section 49(1)(c).

Regarding the appellant's counterclaim for surcharges of Kshs. 241,998.58, the respondent contends that it was not supported by credible evidence. In **Patrick Njuguna Kamau & 26 others v Wilham (K) Limited [2017] KEELRC 982 (KLR)**, the court held that it will dismiss claims that are time-barred, unsupported by admissible evidence, or lacking legal entitlement, and only claims supported with consistent proof and within statutory or contractual rights will succeed.

The respondent therefore asserts that the trial court's judgment was supported by the evidence and relevant law, and that the appellant has not demonstrated any error justifying appellate intervention. He accordingly requests that the appeal be dismissed, the judgment dated 19th September 2025 be upheld, and the costs of the appeal be awarded to the respondent.

Determination

This being a first appeal, the court may review the record, reassess the findings, and reach a conclusion. However, consider that the trial court had the chance to see and hear the witnesses.

The respondent's claim was premised on his employment being terminated by the appellant by notice dated 2 February 2018.

The appellant admitted that, indeed, through its notice dated 2 February 2018, it issued a notice to the respondent terminating his employment due to operational reasons.

The appellant also admitted that the respondent reapplied for employment, was issued a contract dated 15 March 2018, but then resigned.

The respondent does not address this second part of his employment. He was keen to urge the case for redundancy and termination of his employment, effective 2 March 2018, by notice dated 2 February 2018.

Under section 40(1) of the Employment Act (the Act), an employer is allowed to terminate employment due to operational reasons. The procedures under the Act require that notice be issued or that payment be made in lieu thereof. The employee must be issued a personal notice stating the reasons for the termination of employment.

In the notice dated 2 February 2018, the appellant indicated that it had reviewed its operations and that its position as a driver had been phased out. He was to serve 30 days' notice.

This is a lawful and proper termination of employment as held in **Cargill Kenya Limited v Mwaka & 3 others (Civil Appeal 54 of 2019) [2021] KECA**, the Court of Appeal held that;

While the requirement of consultation was not expressly provided in section 40 of the Employment Act, that requirement was implied, as the main reason and rationale for giving the notices in section 40(1)(a) and (b) to the unions and employees of an impending redundancy. Section 40(1) of the Act did not expressly state the purpose of the notice. Although it also did not expressly provide for consultation between the employer

and the employees or their trade unions before the final decision on redundancy was made, the requirement for consultation was provided for in the Kenyan law and implicit in the Employment Act itself.

In **Keen Kleeners Limited v Kenya Plantation and Agricultural Workers' Union [2021] KECA 352 (KLR)**, it was held that upon a redundancy, the employer may opt to issue notice or make payment in lieu of notice under section 40(1) (f) of the Act.

In this case, the respondent was allowed to serve notice.

Under the termination notice, his remaining dues were processed and paid, including prorated leave and days worked.

The reasons for the termination of employment were lawful and fell within section 40 of the Act. There was a payment of terminal dues.

The claims for compensation and notice pay were not justified.

A claim for accrued leave days for 3 years was awarded contrary to the provisions of section 38 of the Act.

The only claim justified under termination premised on section 40 of the act is severance pay of 15 days for each year worked.

For the 3 full years worked, the award of Ksh. 41,250 is justified.

On the counterclaim, this was not addressed to the merit. At the end of employment, the employer may deduct and seek payment from the employee for costs incurred due to negligence of duty. This depends on whether there is a counterclaim. Under sections 17 and 19 of the Act, the employer is permitted to effect such deductions for losses caused by the employee's negligence.

The respondent did not contest that while employed as a driver by the appellant, he caused an accident and was charged under the Traffic Act and found guilty with a fine of Ksh. 30,000. He does not contest that he also incurred losses and damage, leading to a total surcharge of Ksh. 241,998.58.

The award and any payments to the respondent by the appellant should be paid less what he owes in damages and losses. The award of Ksh. KSh. 41,250 in severance pay shall be offset against what the respondent owes in counterclaim. 241,998.58.

On costs, the above analyses addressed, each party should pay its costs.

Accordingly, judgment in Mombasa CMELRC No. 1788 of 2018 is hereby set aside;

- a) The respondent is awarded Ksh. 41,250 severance pay.**
- b) The counterclaim is allowed in the sum of Ksh. 241,998.58.**
- c) The award to the respondent shall be offset from what he owes the appellant.**
- d) Each party to bear its costs.**

Delivered in open court at Mombasa on this 19th day of March 2026.

M. MBARŪ

JUDGE