

REPUBLIC OF KENYA

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

APPEAL NO. E233 OF 2025

KENYA SAFARI LODGES & HOTELS LIMITED APPELLANT

VERSUS

ATHUMAN SAID ATHUMAN RESPONDENT

**[Being an appeal from the judgment of Hon. R. Ombata delivered on 6 November 2025
in Mombasa MCELRC E296 of 2024]**

JUDGMENT

The appeal arises from the judgment delivered on 6 November 2025 in Mombasa MCELRC E296 of 2024. The appellant is seeking that the judgment be set aside and the claims dismissed with costs.

The background of the appeal is a claim filed by the respondent against the appellant. The respondent was employed by the appellant as a cleaner in 2002 and was promoted to a steward, earning Ksh. 27,000 per month. He worked until 20 December 2023 on the grounds that he had forged his academic documents for his 1987 Standard 8 KCPE certificate. He was a member of the union, KUDHEIHA, regulated under a CBA. His claims are that the appellant refused to pay his terminal dues as required under the CBA upon termination of employment. He claimed the following dues:

- a) 4 months' salary in notice pay Ksh. 108,000.
- b) Service pay for 22 years Ksh. 297,000.
- c) Damages for unfair termination of employment Ksh. 324,000.
- d) Payment for safety boots for 6 years, Ksh. 43,200.
- e) Clothes for 6 years Ksh. 86,600.

In reply, the appellant's case was that the respondent's employment was terminated through summary dismissal due to submitting academic certificates that were not authentic. The appellant was subject to internal disciplinary procedures, issued a notice to show cause, and was then subjected to a disciplinary hearing. The subject academic documents were verified by the Kenya National Examination Council, which confirmed they were not authentic. The appellant was required, by a circular from the Public Service Commission and the Ethics and Anti-Corruption Commission, to address any employment obtained through forged documents. The respondent thus had a reasonable basis to issue a notice to show cause and invite him to a disciplinary hearing that could lead to termination of employment.

The learned magistrate heard the parties and, in the judgment, held that the appellant failed to discharge its burden of proof, resulting in unfair termination of employment contrary to sections 43 and 45 of the Employment Act (the Act), and hence awarded the claims as follows:

- a) 4 months' salary in lieu of notice, Ksh. 108,000.
- b) 12 months' compensation Ksh. 324,000.
- c) Costs.
- d) Interests in the awards.

Aggrieved, the appellant filed the appeal on the grounds that the learned magistrate erred in law and fact in finding that there was no substantive justification under section 43 of the Act, and that there was no proof of forged academic documents to justify the termination of employment. This was despite unchallenged evidence from KNEC that the KCSE Certificate was forged and used to seek employment. The learned magistrate failed to appreciate that the appellant had issued a notice to show cause and afforded due process through a disciplinary hearing, and that the employee who fails to attend cannot benefit from such conduct. The finding that there was a need for data protection was unnecessary, as this was neither pleaded nor required under sections 35, 41 and 44 of the Act.

Other grounds of appeal are that the learned magistrate erred in awarding notice pay and compensation as terminal dues, despite the respondent having used forged academic certificates to secure employment. The termination of employment was justified, and the appeal should be allowed with costs.

On appeal, the appellant submitted that, following directions by the PSC and EACC in a letter dated 19 October 2022 to undertake an audit of all employees' academic certificates used to seek employment, they contacted the KNEC and established that the respondent had used a forged KCSE Certificate for 1987. He was issued a notice to show cause why his employment should not be terminated for using such forged documents. He was invited to the disciplinary hearing but failed to attend, citing that he had not been provided with the necessary documents. However, he did not state which documents were required. He did not challenge the fact that the KCSE certificate was forged.

The appellant contends that the trial court erred, both in law and fact, in finding that the respondent's termination was unfair. The learned magistrate failed to properly assess the documentary and oral evidence presented, including the verification report from the Kenya National Examinations Council (KNEC) and the respondent's staff records, which demonstrated valid grounds for summary dismissal under sections 43 and 44 of the Act.

The appellant argues that the respondent was dismissed after it was discovered that the KCPE certificate he relied upon at the time of employment had been altered. Following a directive issued by the PSC in a letter dated 19 October 2022 requiring verification of employees' academic credentials, the appellant submitted the respondent's KCPE certificate for authentication by KNEC.

The verification report dated 19 October 2023 confirmed that the respondent had indeed sat the 1987 KCPE examination at Freretown Primary School under index number 16033/117, but that the grades on the certificate had been modified in four subjects. The report specifically indicated that the grade for English was changed from E to B; Science and Agriculture from D- to D+; Geography, History and Religious Education from E to B+; and

Art and Craft, Home Science and Music from E to B. The appellant maintains that this confirmation by the examining authority served as sufficient evidence that the certificate was not genuine and justified disciplinary action against the respondent.

The appellant further contends that the learned magistrate erred in concluding that the appellant had failed to prove that the respondent submitted a forged certificate. The KNEC verification report, the respondent's personnel file, and the testimony of the human resource officers demonstrated that the certificate had been presented during the respondent's recruitment and retained in his staff records. The appellant submits that the trial court misapplied the legal test on substantive justification and imposed a higher evidentiary threshold than that required under sections 43(1), 44(3), and 47(5) of the Act. The appellant relies on **Kenya Ports Authority v Fadhil Juma Kisuwa (Civil Appeal No. 76 of 2016) [2017] KECA 652 (KLR)**, where the Court of Appeal reiterated the doctrine of *ex turpi causa non oritur actio*, holding that no legal remedy or benefit can arise from an illegal act and that courts will not aid a claimant whose cause of action is founded on illegality.

On procedural fairness, the appellant argues that the respondent was granted due process in line with section 41 of the Act. Notice to Show Cause dated 31 October 2023 was issued, informing him that disciplinary action was being considered for falsifying a KCPE certificate. The notice required the respondent to explain the discrepancies and invited him to attend a disciplinary hearing. Evidence showed that the respondent attended disciplinary hearings on 15 and 17 November 2023, appearing with a shop steward of his choice, Maurice Bwire. The attendance sheet and minutes of the disciplinary proceedings were produced in evidence and confirmed the respondent's participation. The trial court erred in finding procedural unfairness despite clear evidence that the respondent was informed of the allegations, allowed representation, and allowed to respond to the charges.

Regarding the remedies awarded by the trial court, the appellant contends that the court erred in granting the respondent four months' salary in lieu of notice despite recognising that the dismissal was summary in nature. The appellant argues that sections 35, 36, and 44 of the Act permit an employer to summarily dismiss an employee without notice if gross misconduct is proven. The appellant maintains that once the court accepted that the respondent had been summarily dismissed, awarding notice pay was legally inconsistent with the statutory framework.

The appellant also challenges the award of the maximum compensation equivalent to 12 months' salary under section 49(1)(c) of the Act. The trial court failed to justify the respondent's entitlement to the maximum award and did not consider the statutory factors set out in section 49(4) of the Act. In support of this argument, the appellant relies on **OI Pejeta Ranching Limited v David Wanjau Muhoro [2017] KECA 329 (KLR)**, where the Court of Appeal held that an award of the maximum twelve months' compensation under section 49 of the Employment Act must be justified by sound judicial reasoning and consideration of the statutory factors, and reduced the award where the trial court failed to provide such justification.

The appellant further argues that the respondent was not entitled to notice pay because the dismissal was substantively justified. In **Pheoby Aloo Inyanga v Stockwell One Homes Management Limited & Another [2022] KEELRC 590 (KLR)**, the court held that where an employee's conduct justifies summary dismissal under section 44 of the Employment Act, the employee is not entitled to payment in lieu of notice, even though compensation may still be awarded if the dismissal was procedurally unfair.

The appellant therefore argues that the trial court misdirected itself on the evidence, misapplied the law relating to substantive and procedural fairness, and made wrongful awards not supported by the record. The appellant accordingly urges this Honourable Court to allow the appeal, set aside the trial court's judgment, substitute it with an order dismissing the respondent's claim, and award the costs of the appeal and the proceedings in the lower court to the appellant, in line with the principle that costs follow the event.

The respondent submitted that he was employed by the appellant in 2002 as a kitchen cleaner, a role that did not require academic qualifications, and served the appellant for over 22 years with an exemplary record. He argues that his summary dismissal was malicious and orchestrated by the appellant's acting general manager, John Musyoki Mbithi, to deny him his retirement benefits. According to the respondent, the alleged KCPE certificate irregularities arose after the appellant altered the grades appearing on his certificate and forwarded the altered document to the KNEC without his knowledge or consent. The respondent contends that this action violated his constitutional right to privacy under Article 31(c) and (d) of the Constitution and contravened the principles of lawfulness, transparency, and fairness under the Kenya Data Protection Act No. 24 of 2019.

The respondent further contends that the appellant improperly relied on issues not pleaded before the trial court, particularly regarding compensation and notice pay. The respondent asserts that the appellant did not dispute the existence of the relevant Collective Bargaining Agreement (CBA) with the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA), nor did it challenge the respondent's payslips demonstrating union deductions. The respondent maintains that the parties are bound by their pleadings and cannot introduce new issues on appeal. In **Tolksdorf v Mwangi & 3 Others (Environment and Land Case No. 5 of 2022) [2025] KEELC 848 (KLR)**, the court clarified that parties are bound by their pleadings and cannot deviate from them, and **Yaa & 3 Others v Kithi & Another [2025] KEELC 7835 (KLR)**, confirms that an appellate court is generally restricted to issues raised before the trial court, but may examine issues reflected in the trial record that the lower court did not fully address.

On the burden of proof, the respondent submitted that the law places the responsibility on the employer to justify the termination once the employee establishes a prima facie case of unfair dismissal. The respondent argues that under section 47(5) of the Act, the employee needs only to show that termination occurred and that it appears unlawful, after which the burden shifts to the employer to justify the decision.

In **Josephine M. Ndungu & Others v Plan International Inc [2019] eKLR**, the court held that an employee discharges their burden by establishing a prima facie case that the termination fell outside the legal threshold under section 45 of the Act. In **Muthaiga Country Club v Kudheihia Workers [2017] eKLR**, the Court of Appeal held that once employees deny the reasons for dismissal, the burden shifts to the employer to prove and justify the grounds for termination. Additionally, in **Kenya Revenue Authority v Reuvel Waitthaka Gitahi & 2 Others [2019] eKLR**, the Court of Appeal stated that an employer must demonstrate the reasons it genuinely believed to exist when deciding to terminate employment.

The respondent submitted that the appellant failed to produce his original personal file from his employment in 2002, despite a request from the Ethics and Anti-Corruption Commission dated 20 December 2023, which required the appellant to submit certified personnel records, recruitment documents, and correspondence relating to the verification of academic certificates. The respondent argues that the appellant instead produced incomplete staff records dating back to 2010, which undermined the credibility of the evidence relied upon in the dismissal. The respondent relies on **Nanyuki Water & Sewage Company Limited v Benson Mwiti Niritu & 4 Others [2018] KECA 196 (KLR)**, Court of Appeal held that where an employer fails to produce employment records that it is legally obliged to maintain, the court is entitled to draw adverse inferences. The Court found that the respondents' casual contracts had converted to term contracts by operation of law under section 37 of the Act, 2007, and that their termination was therefore unlawful.

Regarding the disciplinary process, the respondent argues that the termination procedure was fundamentally flawed and contrary to the requirements of section 41 of the Act and the principles of fair administrative action. The respondent states that the Notice to Show Cause dated 31 October 2023 did not specify the date or venue of the disciplinary hearing and that no invitation letter for the hearing was produced before the court. The alleged disciplinary hearing was irregular because there was no attendance list for the meeting, said to have been held on 17 November 2023. The key witness was not listed as present at the hearing on 15 November 2023, and his witness statement was filed two days after the hearing. The disciplinary minutes were undated and signed months after the alleged meeting, raising serious doubts about the authenticity of the process. According to the respondent, these irregularities demonstrate that the disciplinary proceedings were conducted unfairly and without due process.

The respondent submitted that he was denied access to crucial documentary evidence needed for his defence, including his original personal file and the witness statements relied upon by the appellant. He claims that this breach violated his constitutional right to access information under Article 35(1)(b) of the Constitution and compromised his right to a fair hearing. To support this, the respondent relies on **Katiba Institute v President's Delivery Unit & 3 Others [2017] eKLR**, in which the court held that access to information is a constitutional right essential to safeguarding fundamental freedoms. In **Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR**, the court

determined that employees subject to disciplinary proceedings must be provided with clear charges, adequate time to prepare their defence, and access to necessary documents for that defence.

The disciplinary hearing did not adhere to the principles of fair administrative action under the Fair Administrative Action Act, which mandates that a person affected by administrative action be given prior notice of the allegations, an opportunity to be heard, and access to the evidence relied upon. In **Nebert Mandala Ombajo v Institute of Certified Public Accountants of Kenya (Court of Appeal Civil Appeal No. 62 of 2018) [2022] eKLR**, the Court of Appeal held that disciplinary proceedings conducted on extremely short notice violate procedural fairness, noting that serving an employee with a hearing notice in the afternoon for a hearing the next morning was “oppressive, unfair and unjust” and reduced the hearing to a mere formality.

In **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] KEELRC 905 (KLR)**, the court held that section 41 of the Act is mandatory and that failure by an employer to follow the prescribed disciplinary procedure renders a termination unfair.

On remedies, the respondent argues that the trial court correctly granted compensation for unfair dismissal. He maintains that under clause 9(c) of the CBA with KUDHEIHA, an employee with over ten years of continuous service is entitled to either four months’ notice or four months’ pay in lieu of notice. The respondent also contends that the award of maximum compensation, equivalent to 12 months’ salary, was justified in light of his 22 years of service, his exemplary employment record, and the manner of his dismissal. In **Alfred Muthomi & 2 Others v National Bank of Kenya Limited [2018] eKLR**, the court held that long service may justify the award of the maximum twelve months’ compensation for unfair termination, noting that the claimants had served the employer for between seven and thirty-three years.

The appellant failed to justify the dismissal either substantively or procedurally, to show that the disciplinary process violated statutory and constitutional protections, or to show that the trial court correctly found the termination was unfair. The respondent accordingly urges the court to dismiss the appeal and uphold the judgment of the trial court awarding Kshs. 432,000, along with interest and costs.

Determination

As this is a first appeal, the court may review the record, reassess the findings, and render its conclusions. However, consider that the trial court had the chance to see and hear the witnesses.

The basis of the respondent’s case is that his employment was unfairly terminated. He was not accorded a hearing, and his terminal dues were not paid.

The claims are premised on a CBA negotiated between the appellant and KUDHEIHA.

The respondent submitted various documents, including payment statements, to support his case. The statements show that he was a member of KUDHEIHA and that the union sent a demand letter for payment of terminal dues. Union dues deductions are remitted to KUDHEIHA and COTU.

A claim premised on a CBA and involving a unionised employee is a labour relations dispute as defined under the Labour Relations Act. Such a claim is reserved for the court and not the trial court, which is specifically denied jurisdiction under Gazette Notice No. 6024 of 2018.

The trial court had no jurisdiction to hear a labour relations dispute. It should have downed its tools.

The resulting judgment delivered on 6 November 2025 is of no legal effect. A court issued it without jurisdiction.

On the substantive issue, the appellant, through a notice dated 20 December 2023, terminated the respondent's employment by summary dismissal for using forged academic certificates to secure employment. This followed a directive by the PAS and EACC requiring the appellant to authenticate all academic certificates held by its employees.

The appellant, in accordance with the PSC and EACC directives, contacted KNEC, and it was established that the respondent indeed held a forged KCSE certificate for 1987. He has not challenged or presented an authentic certificate.

Under section 47(5) of the Act, the employee bears the burden of proving that the termination of employment was unfair. 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

Without discharging this duty, the employer is discharged from its legal burden of justifying the termination of employment under section 43 of the Act, as held in **Kayaga v Winguards Services Limited [2026] KEELRC 399 (KLR)** and **Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] KEELRC 323 (KLR)**.

In this case, the respondent's failure to show good cause for using a forged certificate to secure employment rendered the employment unlawful and invalid. He cannot justify his claims premised on an illegality and invalidly secured employment.

In **Abdullahi v Ministry of Interior and National Administration & 3 others [2026] KEELRC 367 (KLR)**, the court emphasized that:

The contract entered into through fraud and/or illegality is null and void, and a party cannot be allowed to benefit from such a fraudulently or illegally induced contract.

In this regard, the termination of employment was lawful and justified.

The judgment of the trial court was by a court without jurisdiction. No party addressed this aspect, which would have saved crucial judicial time.

Accordingly, the appeal is allowed to the extent that the judgment of the trial court is Mombasa CMELRC No. E296 of 2024 is hereby set aside in its entirety. Each party to bear its costs.

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

M. MBARŪ

JUDGE