



REPUBLIC OF KENYA



**Mbithi v Khataw (Employment and Labour Relations Appeal  
E012 of 2025) [2026] KEELRC 831 (KLR) (23 March 2026) (Judgment)**

Neutral citation: [2026] KEELRC 831 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E012 OF 2025**

**K OCHARO, J  
MARCH 23, 2026**

**BETWEEN**

**PAUL MUTHAMI MBITHI ..... APPELLANT**

**AND**

**KUNAL KHATAW ..... RESPONDENT**

*(Being an Appeal against the judgment of Gathogo Sogomo (PM),  
delivered on 14th February 2025 in Mombasa CMELRC/E101/2023)*

**JUDGMENT**

**Background**

1. By the Memorandum of Claim dated 24th February, 2023, filed in the above-stated matter, the Appellant sued the Respondent and sought the following reliefs against him;
  - a. Payment of his terminal and contractual dues amounting to Kshs. 4,047,000/=.
  - b. Costs and Interest.
  - c. Certificate of Service.
  - d. Any other relief that the Court may deem fit to grant.
2. The Claimant particularised the cumulative sum mentioned above as follows;
  - a. One-month salary in lieu of notice, KShs. 15,000.00.
  - b. Unpaid leave days 500 x 21 x 343 years Kshs.3,601,500.00
  - c. Unpaid public holidays worked 500 x 4 days x 29 years Kshs. 58,000.00
  - d. Compensation for unlawful termination 15,000 x 12 Kshs. 180,000.00



- e. Unremitted NHIF 500 X 115 months Kshs. 57,500.00
  - f. Service pay from 1992 to 2010 /15,000/2 x18 years Kshs. 135,000.00
3. The Respondent contested the Appellant's claim in his Memorandum of Reply dated 14th April, 2023. The Respondent argued that the Appellant's employment was lawfully terminated for a justifiable reason. They denied his entitlement to the reliefs he had sought.
  4. After hearing the parties and reviewing their respective evidence, the learned trial Magistrate concluded that the dismissal of the Appellant from employment was unfair. However, he only granted the remedies of notice pay (one month's salary in lieu of notice) and the issuance of a certificate of costs in favour of the Appellant. The present appeal primarily contests his failure to award the other reliefs.

### **Appellant's case in the lower court**

5. The Appellant asserted that he was employed by the Respondent as a chef on 4 June 1992, responsible for preparing food and performing related domestic duties for the Respondent and his family at their residence in Nyali, Mombasa. His monthly salary was Kshs. 15,000. Initially, he was jointly employed by the Respondent and Narottam Mulji Khataw until the latter's death in 2009, after which the Respondent became his sole employer.
6. The Appellant asserted that on 3 December 2021, after reporting for work and executing his customary responsibilities, he was directed by the Respondent to visit the premises of Benzar Auto Parts & Agricultural Supplies Ltd, where the Respondent maintained an office. During this visit, he was unexpectedly given a termination letter dated the same day. He contended that he was not furnished with reasons for the termination, nor was he provided with any notice or afforded an opportunity to be heard. Additionally, he was instructed to leave immediately and refrain from returning.
7. The Appellant denied allegations of absconding from duty and stated that throughout his employment, he served diligently and faithfully. He further claimed that he was not granted annual leave, was not paid a house allowance, and was denied terminal dues and a certificate of service upon dismissal.
8. He argued that the termination was unfair, wrongful, and procedurally flawed, as it was conducted without a valid reason, notice, or a fair hearing, and in breach of his employment rights. He also claimed that attempts to resolve the dispute through the labour office failed because the Respondent did not attend meetings.

### **The Respondent's case before the trial court**

9. The Respondent stated that the Appellant was first employed by his grandfather as a domestic worker from 1992 until 2021, earning a final salary of Kshs. 15,000. The Respondent later became the sole employer following the grandfather's death. While recognising the Appellant's initial diligence, the Respondent contends that the Appellant's conduct declined over time.
10. The Appellant habitually reported to work late, appeared intoxicated, and was absent from duty on several occasions. Over the years, the Appellant received multiple verbal and written warnings, and authored apology letters acknowledging misconduct and accepting the possibility of disciplinary action if such behavior continued.
11. The Respondent further asserted that the Appellant absconded from duty shortly before termination, despite communication from the Respondent. The matter was reported to the Labour Office prior to dismissal.



12. The Respondent argued that at all relevant times, the Appellant was granted leave and occasionally requested leave encashment, which was permitted. It was also stated that the Appellant had previously received payment of KShs. 40,800 as a full and final settlement of outstanding dues, and that his terminal benefits had been paid and his leave days exhausted.
13. Additionally, the Respondent disputed claims for house allowance, unpaid leave, NHIF arrears, and service pay, asserting that some were time-barred under section 90 of the *Employment Act*. He also contended that the benefit of the service pay was not available to the Appellant, as he was a member of NSSF.
14. The Respondent asserted that the dismissal was justified and not unfair, and that the Appellant's claim was unfounded and brought in bad faith. Consequently, he sought the dismissal of the claim with costs.

### **Judgment of the Lower Court**

15. After hearing the parties and considering their evidence, the trial Court allowed the Appellant's claim only to the extent mentioned hereinabove [para 4].

### **The Appeal**

16. Dissatisfied with the Judgment of the lower Court, the Appellant filed the instant appeal, setting out the following grounds.
  - a. That the learned Magistrate erred in law and fact in failing to award the Appellant compensation for unlawful termination despite the Court finding that the Appellant was unlawfully dismissed from work.
  - b. That the learned magistrate erred in law and in fact in finding that the Appellant was guilty of being drunk at work and was often absconding from work without considering that the Appellant was never heard on merit.
  - c. That the learned magistrate erred in law and fact in failing to award the Appellant unpaid leave days despite the Respondent's overwhelming evidence in Court, which proves that the Appellant only took his leave days for two years.
  - d. That the learned trial Magistrate erred in law and in fact in failing to award the Appellant costs of the suit.

### **Appellant submissions**

17. The Appellant submits that the trial magistrate erred in law and fact by failing to award adequate remedies despite finding the termination of employment unlawful, and basing rejection on unproven matters like the alleged drunkenness, absenteeism and drunkenness. The trial Court did not consider the 29 years he worked for the Respondent, nor did it consider that the termination violated the requirements of procedural fairness.
18. Considering the manner in which his employment was terminated, without compliance with procedural fairness, and taking into account his extensive service of approximately twenty-nine years, the trial court should have awarded him the maximum compensation allowed by law, which is twelve months' gross salary.
19. Concerning leave, the Appellant contends that he was denied annual leave for the majority of his employment period, and that the Respondent failed to produce leave records to refute this assertion.



It is therefore asserted that the trial court erred in dismissing the claim for unpaid leave, despite the employer's obligation to maintain relevant employment records.

20. The Appellant also contests the trial court's refusal to award costs, arguing that although costs are discretionary, the court failed to give reasons for denying them. The Appellant maintains that, having succeeded on liability for unlawful termination, he was entitled to the costs of the suit, as well as costs and interest on appeal. He therefore urges the appellate court to review the trial court's exercise of discretion, award compensation for unfair termination, grant unpaid leave, and allow the appeal with costs.

### **Respondent's Submissions**

21. The Respondent contends that the trial Court's decision was appropriate, well-reasoned, and supported by evidence. It is argued that the Appellant was employed as a chef but engaged in persistent misconduct, including intoxication at work and repeated unauthorised absence. The Respondent states that several warning letters dated 5 January 2021, 6 September 2021, and 5 October 2021 were issued, and that, following the Appellant's admission of misconduct, the Respondent lawfully summarily dismissed him under section 44 of the [Employment Act](#).
22. Regarding the fairness of the termination, the Respondent contends that absenteeism without lawful cause constitutes gross misconduct and warrants summary dismissal. The Respondent asserts that the warning letters were part of a disciplinary process culminating in dismissal, as outlined in a letter dated 3 December 2021, and that the termination was based on valid and lawful grounds. Reliance is placed on *Komu v Sana Industries Limited (Appeal E107 of 2023) (2025) KEELRC 75 (KLR) (23 January 2025) (Judgment)* and *Owundu v Digital Sanitation Services Limited (2024) eKLR*.
23. Regarding compensation, the Respondent asserts that although the trial Court found the dismissal to be procedurally unfair, the Appellant's gross misconduct disentitled him to the compensatory relief contemplated under Section 49[1][c] of the [Employment Act](#). It is argued that compensation under section 49 of the [Employment Act](#) is discretionary and may be declined where it is found that an employee significantly contributed to the termination. To support this point, reliance has been placed on *Kamundia v National Cement Company Limited (Cause E070 of 2021) [2025] KEELRC 1927 (KLR) (30 June 2025) (Judgment)*.
24. On the Appellant's claim for unpaid leave, the Respondent contends that the documentary evidence presented demonstrated that the Appellant had utilised his leave days and signed relevant records. As such, the Respondent sufficiently discharged his duty as the employment records custodian. The trial Court rightly declined the claim.

### **Analysis and determination**

25. In *Selle & Another v Associated Motor Boat Co Ltd & Others*, the Court of Appeal held that a first appellate court is obliged to reconsider and re-evaluate the evidence on record and draw its own conclusions, bearing in mind that it did not see or hear witnesses.
26. Having carefully reconsidered the parties pleadings and evidence before the lower Court, its judgment, the grounds of appeal, and respective submissions by Counsel for the parties in this appeal, this appeal essentially revolves around one principal issue, whether learned trial Magistrate erred in law and fact in failing to fully grant the remedies that the Appellant had sought, despite finding that the summary dismissal against the Appellant was unfair.



27. One of the reliefs sought by the Appellant, but which was declined, was the compensatory relief under Section 49[1][c] of the *Employment Act*. Undoubtedly, the provision grants the courts the authority to award a compensatory remedy to an employee who has successfully challenged their employer's unfair termination. However, it is important to reiterate that this authority is discretionary and exercised on a case-by-case basis. Therefore, it is legally possible for a court to find that the termination was unfair, but still make an order for no compensation.
28. As the decision to grant or deny the compensatory award under the aforementioned provision is discretionary, successfully challenging such a decision on appeal would require the Appellant to demonstrate that, in making the decision, the trial Court either considered irrelevant matters, failed to consider relevant matters, or applied an incorrect principle of law, resulting in an erroneous decision.
29. Under section 49 of the *Employment Act*, one of the factors a Court may consider when exercising its discretion regarding the compensatory award is the extent of the employee's contribution to the termination of his employment. There is no dispute that the Appellant was accused of absenteeism, and that this was not a one-time occurrence. Furthermore, he apologised for it. His letter dated 7th October 2021 reflects this. The learned trial Court considered this factor and declined to award the compensatory relief.
30. Noting that the conduct of an employee, or the extent to which the employee contributed to the termination, is a factor that could legally diminish an employee's entitlement to the compensatory award under Section 49[1][c], I am not persuaded that he considered an irrelevant matter or that he applied an incorrect principle of law. I decline to disturb his finding.
31. Section 90 of the *Employment Act* requires employment claims to be filed within three years, unless it is a continuing injury, which must be filed within twelve months of cessation of the injury.
32. In *G4S Security Services (K) Limited v Joseph Kamau & 468 others* [2018] KECA 827 (KLR), the Court of Appeal affirmed that continuing injury must be brought within twelve months of cessation.

“Regarding ‘a continuing injury’, the proviso to Section 90 of the *Employment Act* requires that the claim be made within 12 months next after the cessation thereof. The learned Judge did not determine when the continuing injury ceased, for purposes of computing the twelve-month period. In the absence of a defined period, the learned Judge erred in concluding that the claims had no limitation of time. Further, upon the claimant's dismissal, any claim based on a continuing injury ought to have been filed within one year, failing which it was time-barred.”
33. Applying the foregoing, the Appellant's employment ended on 3 December 2021, and the suit was filed on 28 February 2023. Claims for unfair termination fall within the three-year limitation period and were therefore properly considered by the trial court. However, claims concerning historical leave, public holidays, and statutory dues spanning many years constitute a continuing injury that ceased upon termination in December 2021. The filing in February 2023, therefore, exceeded the 12-month period, and such claims were time-barred.
34. Furthermore, evidence demonstrated that previous dues had been cleared through the payment of Kshs 40,800, and that the Appellant took leave in 2019 and 2020.
35. Regarding the fairness of the termination and compensation, the trial court correctly found that the Respondent failed to comply with section 41 of the *Employment Act*, thereby rendering the termination procedurally unfair. Nonetheless, compensation under section 49 is discretionary and



guided by the factors set out in section 49(4), including the employee's conduct that contributed to the termination.

36. Regarding service pay and NSSF, section 35(6) of the *Employment Act* bars service pay where an employee is a member of NSSF. The trial court found that the Appellant was a member of NSSF, thereby disentitling him to service pay. The trial Court's decision to decline the relief was founded; therefore.
37. Regarding NHIF and statutory remittances, the Appellant failed to tender sufficient evidence of non-remittance or specific arrears.
38. In the upshot, I find the Appellant's appeal lacking in merit. It is hereby dismissed.

**READ, SIGNED AND DELIVERED THIS 23<sup>RD</sup> DAY OF MARCH 2026.**

**OCHARO KEBIRA**

**JUDGE**

