

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT  
MOMBASA

APPEAL NO. E110 OF 2025

THE REGISTERED TRUSTEES-SAMPLING TRUST FOUNDATION ..... APPELLANT  
VERSUS

SANDRA KHAIGA ..... RESPONDENT

[Being an appeal from the judgment of Hon. J. B. Kalo delivered on 19 May 2025 in  
Mombasa MCELRC No. E134 of 2024]

JUDGEMNT

The appeal arises from the judgment delivered on 19 May 2025 in Mombasa MCELRC E134 of 2024. The appellant seeks that the judgment be set aside and replaced with an order dismissing the respondent's claims.

The appeal is that the learned trial magistrate erred in law and fact in finding that the respondent was employed on 7 June 2021 and that the employment was terminated unfairly. The award of notice pay and 12 months' compensation is not justified. The salary award for the period from September 2023 to 29 January 2024 was not warranted and was issued in error. The trial court erred in awarding house allowance, costs and interests that were not due.

The background to the appeal is a claim filed by the respondent against the appellant. The claim was that on 7 June 2021, the appellant employed the respondent as an occupational therapist earning KSh. 24,000 per month. She worked until 3 February 2023, when she was promoted, and wages were paid in KSh. 42,000 per month. On 12 August 2024, the respondent was involved in a road accident along the Mombasa-Kilifi road. She suffered fractures and was unable to walk for 4 months despite seeking medical assistance from different hospitals. She informed the appellant. However, the appellant stopped paying the salary without notice or giving any assistance. She requested to resume her duties in January 2024, but there was no communication until 29 January 2024, when the trustee, Winnie Gitiha, informed her by phone of the decision to terminate her employment. The claim was that the respondent was treated differently from how an injured employee should be treated, resulting in discriminatory treatment contrary to Article 27 of the Constitution and sections 5 and 47 of the Employment Act. There was no notice before termination of employment or payment of terminal dues. The respondent sought the following orders:

- a) Notice pay Ksh. 42,000.
- b) Damages for discriminatory treatment to be assessed by the court.
- c) 12 months' compensation for unfair termination of employment, Ksh. 504,000.
- d) Unpaid salary for September 2023 to January 2024 Ksh. 210,000.
- e) Unpaid house allowances from June 2021 to January 2024 for 31 months Ksh. 195,300.

- f) Severance/service pay for 3 years Ksh. 63,000.
- g) Certificate of service,
- h) Costs of the suit.

In response, the appellant challenged the claim on the grounds that it lacked the capacity to be sued in its name and that the trustees' names had to be listed in the suit. The appellant admitted that the respondent was employed on 13 February 2023, not on 7 June 2021, as alleged. Before such employment, she was engaged as a consultant on an agreed intermittent part-time basis. The respondent informed the application that she was involved in an accident, but not that she was unable to attend work. No Certificate of Incapacity was issued or signed as required under section 30(1) of the Employment Act (the Act). There is no proof of the hospitals attended as alleged. Despite this, the appellant granted the respondent 7 days' sick leave with full pay and another 7 days' sick leave on half pay pursuant to section 30(1) of the Act. The respondent did not resume work or produce any certificate of incapacity as required. Before the accident, the respondent had been on probation for 6 months and was entitled to only 7 days of sick leave. The accident occurred while the respondent was on holiday and not at work; hence, the appellant had no legal obligations. The respondent opted to be absent from duty for over a month, until 3 January 2024. The appellant, being a non-governmental organisation, provides supervised therapy and education tailored to children with special needs, and the respondent was employed for this purpose. Failure to attend work compromised the employment, and the allegations of unfair termination are not justified; the claims made should be dismissed.

The learned magistrate heard the parties and held that there was employment from 7 July 2021, and that, following an accident, she reported the matter to the appellant, who then terminated her employment without due process, resulting in the unfair termination of her employment. The court awarded the following:

- a) Notice pay Kh. 42,000.
- b) 12 months' compensation Ksh. 420,000.
- c) Salary for September 2023 to January 2024 Ksh. 210,000.
- d) House allowance Ksh. 195,300.
- e) Costs of the suit.

The appellant submitted that there was no evidence of employment from 7 June 2021, but on 13 February 2023. Previously, the respondent was engaged on a consultative and part-time basis. The bank payments confirm this fact. Employment was terminated following desertion of duty after the respondent reported being involved in an accident. However, she did not file a certificate of incapacity as required under section 30(1) of the Act. The respondent engaged the appellant verbally without regularising her absence from duty.

Desertion of duty cannot be reverted to verbal termination of employment as alleged. The findings by the trial court should be set aside and the appeal allowed.

The respondent submitted that there was no desertion of duty as alleged. The respondent reported an accident that incapacitated her. An employer cannot be allowed to cite desertion of duty without any action, as held in **Godfrey Anjere v Unique Suppliers Limited [2015]**

**eKLR. And Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School [2015] eKLR** that where an employee is away from work due to illness, this is an issue beyond her control, and this should be communicated to the employer in good time. The respondent made a report to the appellant, which is admitted.

The trial court's findings are justified and should be affirmed by this court, and the appeal should be dismissed.

#### Determination

As this is a first appeal, the court may review the record, reassess the findings, and reach a conclusion. However, acknowledge that the trial court had the chance to see and hear the witnesses.

The appellant has challenged the trial court's findings regarding the alleged employment of the respondent on 7 June 2021 and the unfair termination of that employment in January 2024. The award of notice pay and 12 months' compensation is challenged, together with payments for the period from September 2023 to 29 January 2024, during which the respondent was away due to an accident. The other challenge is the award of allowance, costs and interest.

On the first issue of the period of employment, the custodian of work records is the employer. In this case, the appellant, as the employer, confirmed that the respondent was a consultant and that she was paid for work performed until 3 February 2023, when she was employed as an occupational therapist at a wage of Ksh. 42,000. The respondent did not produce any records to support the assertions that employment commenced on any date other than 3 February 2023.

Employment on a consultancy or piece-rate basis is allowed. However, the employment claim commenced on 3 February 2023.

It is not contested that the respondent was involved in an accident on 12 August 2023. She sought medical attention from various facilities. She informed the appellant about the accident. In return, the appellant paid the respondent her full pay for 7 days, then half pay for 7 days, and then stopped, on the basis that, if injured and unable to attend work, she did not submit a certificate of incapacity.

One area protected under the law is an employee's illness. Such matters are excluded from cases under section 44 of the Act, which permits summary dismissal if committed by the employee.

Being ill or sick is addressed under sections 30 and 34 of the Act. An employee who suffers an injury and is forced to be absent from work is allowed time off to recuperate. However, the employee or a third party may inform the employer of such illness or sickness, or, in this case, injury, within a reasonable time as held in Dorothy Njoki Ndung'u v Machakos University College & Deputy Principal (Administration Planning and Finance) Machakos University College [2016] KEELRC 17 (KLR).

The employee's responsibility is to submit a sick leave sheet, allowing her to be absent from work for the stated period. The certificate of incapacity, illness, or sickness must be submitted to the employer by the employee or a third party.

In Banking, Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd [2014] KEELRC 1145 (KLR), the court held that an employee may become ill while at work. However, there is a duty under section 34 to inform the employer and then submit a certificate of illness from a medical facility recognized by the employer or a government facility. This is to insulate the employee from being absent due to illness and to secure the employer who should treat absence from the workplace as desertion of duty. See James Mulinge v Freight Wings Limited [2016] KEELRC 1561 (KLR)

In this case, the fact of an accident was reported by the respondent to the appellant. However, no sick-off sheet was produced or filed with the Memorandum of Claim. Equally, no medical certificate has been filed or produced to the employer to confirm that such an accident indeed occurred.

The respondent cannot seek the protection of being injured and hence absent from work as required under section 34 of the Act. Her case is not supported by any material record required by law. Absence from work over alleged injury, illness or sickness is left bare.

The respondent thus frustrated her employment. There is no justification in claiming unfair or unlawful termination of employment.

The award of notice pay and compensation is not justified.

In this regard, for time away from work in September 2023 to January 2024, without justification under section 34 of the Act, the respondent cannot claim payment for failing to attend to her duties without justification. The verbal report of the accident should have been secured through a sick off sheet and a certificate of illness from a recognized medical officer or facility:

*34. (1) Subject to subsection (2), an employer shall ensure the provision sufficient and of proper medicine for his employees during illness and if possible, medical attendance during serious illness.*

*(2) An employer shall take all reasonable steps to ensure that he is notified of the illness of an employee as soon as reasonably practicable after the first occurrence of the illness.*

*(3) It shall be a defence to a prosecution for an offence under subsection (1) if the employer shows that he did not know that the employee was ill and that he took all reasonable steps to ensure that the illness was brought to his notice or that it would have been unreasonable, in all the circumstances of the case, to have required him to know that the employee was ill*

The claim for pay while absent from work is not justified.

Regarding the awards of house allowance, costs, and interest, the respondent was employed as an occupational therapist. The wage was Ksh. 42,000. This is not basic wage. Under section 31 of the Act, the employer may pay a consolidated wage. The basis here is that the paid wage was above the legal minimum.

The respondent also claimed that there was discriminatory treatment when the appellant failed to pay her wages while she was away from work due to injury. The findings above addressed, the respondent was unwilling to leave her workplace. She cannot use such absence to claim discriminatory treatment. In any event, a claim based on discrimination must meet the threshold set out in **Law Society of Kenya v The Attorney General and COTU Petition No. 4 of 2019**, that a claim of discriminatory treatment must give the basis of the following:

*...a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available members of society . . .*

Further, in the case of **Barclays Bank of Kenya LTD & Another vs Gladys Muthoni & 20 Others [2018] eKLR**, the court held that:

*...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions... whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.*

A claim of discriminatory treatment must include the given particulars. The party seeking under such a provision must demonstrate how they were treated for discriminatory treatment to accrue.

In this case, the respondent remained absent from work due to an alleged injury without fulfilling her responsibilities as permitted under sections 30 and 34 of the Act. She cannot blame the appellant for the loss of her employment.

**The appeal is with merit and is hereby allowed. The judgment in Mombasa CMELRC No. E134 of 2024 is set aside in its entirety. Costs to the appellant.**

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

M. MBARŪ

JUDGE

