



REPUBLIC OF KENYA



**Bux t/a Kukuzingo Chicken and Chips v Mutsoli (Appeal
E040 of 2025) [2026] KEELRC 884 (KLR) (23 March 2026) (Judgment)**

Neutral citation: [2026] KEELRC 884 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E040 OF 2025
K OCHARO, J
MARCH 23, 2026**

**BETWEEN
ROZMIN BUX T/A KUKUZINGO CHICKEN AND CHIPS APPELLANT
AND
NELSON WESEBEBE MUTSOLI RESPONDENT**

*(Being an Appeal from the Judgment of Honourable SRM R.N Akee at Mombasa
delivered on the 26th February, 2025, in CMELRC NO. E509 OF 2023)*

JUDGMENT

Introduction

1. Contending that at all material times, he was an employee of the Appellant, whose employment they terminated unfairly, the Respondent sued the Appellant in the above-stated suit seeking both declaratory and compensatory reliefs. Thus;
 - a. A declaration that the Claimant's termination was unlawful.
 - b. Payment of his terminal and contractual dues amounting to Kshs. 293,000/=.
 - c. Costs and Interests of this suit.
 - d. Certificate of Service.
2. The Appellant opposed the Respondent's claim through their Reply to the Memorandum of Claim dated 25th September 2023. They argued that they fairly terminated the Respondent's employment, and therefore, he was not entitled to the remedies he was seeking. Respondent's case in the lower court.
3. After hearing the parties on their respective cases and considering their evidence, the learned trial Magistrate found for the Respondent. The judgment aggrieved the Appellant. They challenge the entirety of the same through the instant appeal.



The Respondent's Case before the Lower Court.

4. The Respondent's case was that he was employed by the Appellant as a Chef on 1st July 2022, working at the Appellant's restaurant in Nyali, Mombasa, with a monthly salary of KShs. 18,000. He contends that he served the Appellant continuously and diligently until 7th July 2023, when his employment was terminated.
5. According to the Respondent, on 7th June 2023, he reported to work as usual only to be issued with a one-month notice of termination premised on allegations which he maintained were false, vague, and unsubstantiated. Upon expiry of the notice period, on 7th July 2023, the Appellant informed him that his employment had come to an end. When he sought clarification on the reasons for his termination, the Appellant allegedly declined to engage with him and ordered him to leave the workplace immediately.
6. The Respondent asserted that throughout his employment, he performed his duties faithfully and was never subjected to any disciplinary process.
7. He claimed that the termination was not preceded by a notice to show cause, any fair hearing, or compliance with the mandatory procedural safeguards outlined under sections 41, 43, and 45 of the *Employment Act*. Furthermore, the allegations made against him, including claims of untidiness, lateness, misuse of a mobile phone, and poor handling of food items, were baseless and never substantiated through any disciplinary inquiry.
8. The Respondent further stated that the Appellant failed to pay him house allowance throughout the period of employment, contrary to section 31 of the *Employment Act*, and upon termination failed to settle his terminal dues, including notice pay, accrued leave, service pay, and compensation for unfair termination. He also complained that he was not issued a certificate of service as required by law.
9. It was his position that the termination of his employment amounted to an unfair and unlawful labour practice, having been carried out without a valid reason, without due process, and in violation of the rules of natural justice and the protections afforded to employees under the *Employment Act*.

Appellant's case in the lower court

10. The Appellant admitted that the Respondent was employed on 1st July 2022 as a Cook at its restaurant in Mombasa, earning a monthly salary of KShs. 18,000. The employment relationship was governed by a written contract of employment, which explicitly set out the terms and conditions of service, including disciplinary procedures and termination clauses.
11. During his employment, the Respondent negligently and carelessly failed to perform his duties as per the agreed terms. The Appellant claimed that the Respondent repeatedly left his workstation untidy, failed to properly refrigerate perishable food items, disobeyed lawful instructions regarding food preparation, and generally provided substandard services, leading to customer complaints and negative impacts on the business.
12. The Appellant stated that despite several warnings and reminders, the Respondent's conduct did not improve. Consequently, and pursuant to term 9(c) of the employment contract, they issued him with a one-month notice of termination in June 2023, lawfully communicating the intention to terminate the contract. Upon expiry of the notice period, the employment relationship came to an end.



13. The Appellant argued that the termination was lawful, contractual, and compliant with the *Employment Act* 2007, and therefore did not constitute unfair termination. In the circumstances of the matter, the reliefs sought would not be justifiably granted to the Respondent.
14. The Appellant further stated that the Respondent was not entitled to a housing allowance, as the agreed salary was consolidated and inclusive of the allowance, and that the Respondent had already used his leave days earned, with any unutilised ones properly paid for.
15. The Appellant contended that the Respondent was duly registered with NSSF and that all statutory deductions, including NSSF and NHIF, were consistently and promptly remitted to his account throughout the employment period.

Judgement

16. The trial court identified two issues for determination: whether the Respondent's termination was lawful, and whether he was entitled to the reliefs sought. After unaliasing the material before it, the trial Court found that the termination of the Respondent's employment was unfair. In its final disposition, the Court granted the Respondent one month's salary in lieu of notice, compensation for earned but untaken leave days, compensation for unfair termination of employment, and a directive that he be issued with a certificate of service.

The Appeal

17. Dissatisfied with the Judgment of the lower Court, the Appellant filed the instant appeal, setting forth the following grounds;
 - a. That the Learned Trial Magistrate erred in law and in fact in allowing the Respondent's claim as prayed in the Memorandum of Claim as against the Appellant without due and/or proper consideration and/ or appreciation of the totality of the pleadings filed, the evidence on record and the Appellant's Written Submissions, thereby arriving at a wrong decision.
 - b. That the Learned Trial Magistrate erred in law and fact in holding that the Respondent had discharged the burden of proving that he was unfairly, illegally or unlawfully dismissed when Appellant followed due procedure as set out in section 35, 41, 43 of the *Employment Act*, CAP 226 in terminating the Respondent's employment and the Respondent was not entitled to any award.
 - c. That the Learned Trial Magistrate erred in law and fact by awarding the Respondent one-month salary in lieu of notice when the Claimant had issued the Respondent with one-month notice and paid the same.
 - d. That the Learned Trial Magistrate erred in law and in fact by awarding the Respondent one month's salary in lieu of notice as evidenced by the Respondent's Termination Notice dated 7th June, 2023 and which was produced as Respondent's Exhibit No. 2.
 - e. That the Learned Trial Magistrate erred and misdirected herself in law by awarding compensatory damages of KShs. 293,000/= without any basis, and when the Respondent was fairly, lawfully, and legally terminated from employment.
 - f. That the Learned Trial Magistrate erred in law and in fact by awarding unpaid leave days when the Respondent was compensated for the outstanding annual leave days and the Appellant produced evidence in support of the same.



- g. That the Learned Trial Magistrate erred in law and in fact by awarding House allowance and service pay without due and proper consideration and appreciation of the Exhibits No. 7 and 8, which were produced by the Appellant.
- h. That the Learned Trial Magistrate erred in law and fact in arriving at a decision that did not contain the requisite ingredients of a fair and just judgment, thereby occasioning a gross miscarriage of justice against the Appellant.

Appellant's Submissions

- 18. The Appellant challenged the entirety of the judgment rendered by the trial court, asserting that the Learned Trial Magistrate committed errors in both law and fact in determining that the Respondent was unfairly, unlawfully, and illegally terminated from employment. It was contended that the Respondent's termination was executed strictly in accordance with the provisions of the Employment Contract and Sections 35, 41, 43, and 45 of the *Employment Act*. The Appellant further argued that the Respondent was issued a written notice of termination dated 7th June 2023, which explicitly outlined the grounds for termination. Additionally, upon receipt of said notice, the Respondent signed it without objection, thereby acknowledging and accepting the reasons stated therein.
- 19. The Appellant further submitted that valid and fair reasons existed to justify termination, namely the Respondent's negligent and improper conduct at the workplace, including leaving the workstation untidy, failure to refrigerate perishable products, disobedience of lawful instructions, and poor performance that attracted customer complaints. It was argued that despite repeated warnings, the Respondent failed to improve, and that these actions constituted misconduct sufficient to warrant termination under section 45 of the *Employment Act*. The Appellant maintained that the Respondent was accorded a fair hearing as required under section 41, having been notified of the allegations and given an opportunity to respond.
- 20. Regarding compensation for unfair dismissal, the Appellant argued that the award of KShs. 293,000, which represents the maximum of twelve months' salary, was excessive, lacked support from evidence, and was unjustified.
- 21. It was argued that the Respondent had only worked for about a year and had secured alternative employment in less than two months after dismissal. Therefore, the Appellant contended that the trial court failed to correctly apply section 49 of the *Employment Act* and erred in awarding the maximum compensation in a case where the termination was lawful and where mitigation of loss was evident.
- 22. Regarding notice pay, the Appellant submitted that the award of one month's salary in lieu of notice was erroneous, as the Respondent had been duly issued with a termination notice in writing in compliance with section 35 of the *Employment Act* and clause 9(c) of the Employment Contract. The Appellant argued that payment in lieu of notice under section 36 was therefore inapplicable.
- 23. The Appellant also faulted the trial court for awarding unpaid leave days, submitting that evidence demonstrated the Respondent had utilised most of his annual leave entitlement and had been paid for the remaining four days upon termination. Reliance was placed on documentary evidence and on the Respondent's acknowledgement confirming receipt of payment for accrued leave.
- 24. On house allowance, the Appellant submitted that the Respondent earned a consolidated salary of Kshs. 18,000, comprising basic pay and a 15% house allowance, as reflected in the pay slip produced in evidence. It was argued that the trial court ignored this evidence and misapplied section 31 of the *Employment Act* by awarding a separate house allowance.



25. Similarly, the Appellant contended that the award of service pay was erroneous, as the Respondent was a member of the NSSF and statutory deductions were duly remitted throughout the period of employment. On this basis, service pay under section 35 of the Employment Act was not available to the Respondent.
26. In conclusion, the Appellant submitted that the trial court failed to properly evaluate the evidence and applicable law, resulting in an unjust decision. The Appellant therefore urged this Court to set aside the impugned judgment in its entirety and substitute it with an order dismissing the Respondent's claim with costs both at trial and on appeal.

Analysis and determination

27. Having carefully considered the record, the grounds of appeal, and submissions, and having concluded that the determination of the issues hereunder would fairly resolve the instant appeal. Thus:
 - a. Whether the Learned Trial Magistrate Erred in Finding that the Respondent's Termination Was Unfair, Unlawful, and Illegal
 - b. Whether the learned trial Magistrate erred in awarding the Respondent, she did.

Whether the Learned Trial Magistrate Erred in Finding that the Respondent's Termination Was Unfair, Unlawful, and Illegal

28. Before proceeding further with this matter, I find it essential to highlight that the termination of an employee's employment may be initiated by either the employer or the employee. This does not imply that it cannot also occur through mutual agreement. When an employee alleges that their employment was terminated unfairly at the employer's initiative, they must be clear in their pleadings about how it occurred. Undoubtedly, the factors to consider when determining whether a termination was fair may differ depending on the type of termination. For example, the factors to be considered when constructive dismissal is alleged are different from those for unfair summary dismissal or redundancy-related unfair termination.
29. By reason of the foregoing premise [para.28], it becomes clear that a trial court must inform its decision on the type of termination expressly pleaded, and cannot afford to appear to mix one or two in the same judgment, including those not pleaded, as did the trial Court in this matter. This Court notes that at page 2 of her judgment, the learned trial Magistrate purported to deal with constructive dismissal, a matter that was not pleaded and evidence led on, and even cited the case of *Coca Cola East Africa & Central Africa Limited v Macharia Kagia Ligaga* [2015] eKLR, the leading decision on constructive dismissal from the Court of Appeal.
30. This highlights the lack of a thorough examination of the facts and evidence by the trial court, something that must be avoided at all costs if judgments are to be fair. However, having noted this, it is important to point out that ultimately, her judgment was not based on the doctrine of constructive dismissal.
31. In *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] KECA 225 (KLR). The Court held that,

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair



(section 45); prove that the grounds are justified (section 47(5), amongst other provisions. A mandatory and elaborate process is then set up under section 41, requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed, thus obviating reliance on the *Evidence Act* and the *Civil Procedure Act*/Rules. Finally, the remedies for breach set out under section 49 are also fairly onerous and generous to the employee. But all that accords with the main object of the Act as appears in the preamble.

"..to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees.."

32. Walter Ogal Anuro v Teachers Service Commission [2013] KEELRC 386 (KLR), the Court stated: -

"In light of the foregoing, I find that Respondent had a genuine reason for terminating the Claimant's employment as required under Section 43 of the *Employment Act*. However, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness."

33. It is trite law, and as can be discerned from the above-cited judicial precedents, that under the *Employment Act*, 2007, termination of employment can be considered fair only where it is demonstrated that it encompassed both substantive and procedural fairness. In fact, this is what Section 45(1) & (2) of the Act commands.

34. Section 41 of the *Employment Act* provides for a mandatory procedure that must be followed by any employer considering terminating an employee's employment. The components of the procedure are: the notification [the employer must inform the employee of their intention and the grounds]; the hearing [the employer must give the employee sufficient opportunity to prepare and make a representation on the grounds, accompanied by a colleague of their choice or a trade union representative, if they are a member]; and lastly, the consideration [the employer must review the employee's representation before making a final decision].

35. Where any of the ingredients or all are missing in the process leading to the decision to terminate an employee's employment, the termination shall be considered unfair by dint of the provisions of Section 45 of the Act. I have carefully considered the material that was placed before the trial Court, and conclude that though the Respondent was served with the termination notice, embodying the reason for termination, the Respondent was not given an opportunity to be heard, and his representations were not taken into account before the decision to terminate his employment was reached. Consequently, I hold that the learned trial Magistrate did not err in finding that the termination was procedurally unfair.

36. Section 43 of the *Employment Act* imposes a legal burden on the employer, in disputes concerning the termination of an employee's employment, to prove the reason. The Act places a further obligation on the employer to demonstrate that the reason was valid and fair related to conduct, capacity, or compatibility.

37. Section 43[2] of the Act outlines what constitutes a valid reason for terminating an employee's employment, specifically one that the employer genuinely believed to exist and that led to the termination. I have carefully examined the reasons given by the Appellant for the termination, as reflected in the termination letter, the Respondent's evidence during trial, and the role the Respondent was serving in. Applying the reasonable employer test, see *British Leyland UK Ltd v Swift* [1981] IRLR 1, I conclude that any reasonable employer would, in the circumstances, have dismissed the Respondent.



38. In the upshot, the learned trial Magistrate erred in law in holding that the termination was substantively unfair.

Whether the Respondent was entitled to the reliefs granted

One month's salary in lieu of notice

39. Undisputedly, a one-month termination notice was issued. It was embodied in the termination letter, which Respondent admitted having received. As such, it is challenging to fathom what informed his claim for notice pay and the trial Court's award thereof. Consequently, the award is hereby set aside.

Compensation for unfair termination

40. The compensatory award under the provisions of Section 49[1][c] of the *Employment Act*, by the learned trial Magistrate, was based on the fact that the termination was both procedurally and substantively unfair. Having found that the termination was only procedurally unfair, and considering therefore that liability against the Appellant would only attach on that sole reason, and further, considering the length of service of the Respondent, and the fact that he contributed to the termination, I am inclined to set aside the trial Court's award under the provision, and substitute the same with two months' gross salary.
41. The Appellant asserted that the Respondent had only four outstanding leave days. Compensation for the same was made. I note that, through their letter dated 7th June 2023, the Appellant computed the amount due and owing to the Respondent for earned but unutilised leave days. This document and the impression it gave were not challenged in any manner during the trial. I have no reason to believe that the Appellant's version on this aspect was correct. Consequently, I set aside the awarded amount.
42. Clause 2 of the letter of offer of employment dated 1st July, 2022, reads;
- “Your net salary will be KShs. 18,000 [KShs. Eighteen thousand only]. The salary will be payable at the end of the month.
- Your salary consists of 85% basic salary and 15% housing allowance.”
43. With this express term of the contract of employment, one would wonder what informed the Respondent's claim for house allowance. I agree with the Appellant's assertion that the Respondent's salary was consolidated and, as such, included a house allowance. The trial Court held in making an award under the head.
44. Service pay, by operation of the law, section 35 of the *Employment Act*, is a benefit that cannot be claimed by an employee who is a member of the National Social Security Fund. There is no doubt, from the documents that were presented before the trial Court, that the Respondent was such a member. In my view, therefore, he was not entitled to it under the claim before the trial court.
45. In the premises, the Appellant's appeal substantively succeeds. Thus;
- a. The learned trial Court's finding that the termination of the Respondent's employment was both substantively and procedurally unfair is hereby set aside. In place thereof, this Court's finding that the termination was substantively justified, but procedurally unfair, is made.
 - b. The awards under the heads, house allowance, notice pay, and compensation for earned but unutilised leave days, are set aside.



- c. The compensatory award for unfair termination, pursuant to the provisions of Section 49[1] [c] of the *Employment Act*, is hereby reviewed to two months' gross salary, KShs. 36,000.
- d. Interest on the awarded sum in [c]above shall be at court rates from the date of the judgment of the lower Court till full payment.
- e. The Respondent shall bear 75% of the costs of this appeal.

READ SIGNED AND DELIVERED THIS 23RD DAY OF MARCH 2026.

OCHARO KEBIRA

JUDGE

