

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

(Before Hon. Lady Justice Monica Mbarũ)

APPEAL NO. E197 OF 2025

ALLTECH INDUSTRIES LIMITED.....APPELLANT

VERSUS

PATRICK MWEDWA MAKASI.....RESPONDENT

**[Being an appeal from the judgment of Hon. Lucy Sindani delivered on 4th
September 2025 in Mombasa CMELRC No. E175 of 2021]**

JUDGMENT

The appeal arises from the judgment delivered on 4th September 2025 in Mombasa CMELRC E175 of 2021. The Appellant challenges the judgment on the ground that the Learned Magistrate erred in finding that the Appellant had not filed a response to the claimant and proceeded to award claims for overtime at Ksh. 2,316,931.80 without proof. The award of Ksh. 150,000, being 5 months' compensation for the alleged unfair termination of employment, is not justified.

The grounds of appeal are that there was no unfair termination of employment, and notice pay of Ksh. 30,000 should be set aside. The public holiday pay of Ksh. 2,000 is without merit. The alleged overtime for 6 days and an award of

Ksh. 486,000 was without proof. By awarding costs and interests, the Learned Magistrate failed to appreciate that the claims made had not been proved.

The judgment should be set aside since the Appellant had failed to respond to the claim.

The background to the appeal is a claim filed by the Respondent before the trial court. His case was that on 1st January 2012, he was employed by the Appellant as a machine operator earning a wage of Ksh. 30,000 per month. He worked for 7 days per week without compensation or a rest day. His work hours were 6 am to 6 pm without overtime pay. His claim was that he submitted an application for payment of his holiday allowances on 10th February 2021. The sum of Ksh. 2,000 for 25th and 26th December 2020 had not been paid. He asked the accountant why his allowances had not been paid, while others had. Instead of payments, the manager, Muktasu, told him that he had taken 3 sick days and hence did not deserve to be paid for the public holidays. The manager directed the guard to remove him from the premises and later denied access. This resulted in unfair termination of employment without payment of terminal dues. He claimed the following:

- a) Notice pay Ksh. 30,000
- b) House allowances for 108 months Ksh. 486,000.
- c) Unpaid holidays for 25 and 26 December 2020, Ksh. 2,000.
- d) Over time, for 4 hours, for 108 months, Ksh. 2,616,931.80

e) 12 months' compensation Ksh. 360,000.

f) Costs of the suit.

In reply, the Appellant admitted that the Respondent was employed as a machine attendant on an annual contract at a consolidated wage of Ksh. 30,000 per month, inclusive of the house allowance and overtime. The last contract is dated 1 January 2019, with pay slips to confirm work from 2020 to 2021. Each employment contract issued was distinct and independent of the previous one, with separate terms. Work days and hours were as agreed under the contract. On 24th to 31st December 2020, the Respondent went on sick leave. I submitted a medical note dated 24th and 29th December 2020. He was expected to resume work on 2nd January 2021. However, on 4th January 2021, the Respondent reported back to work, accompanied by another medical note from Mainland Health Centre granting 3 more sick leave days. Upon enquiring why the Respondent was absent from work on 2nd January 2021, he became hostile and threatened the manager. He was directed to leave the company premises and to report to work after the sick leave days. However, the Respondent refused to report to work on 7th January 2021 as instructed. He continued to be absent from work without permission. On 11th February 2021, the Appellant contacted the Respondent through his mobile phone number 0702 - - - 021 and invited him to a meeting. He attended and asked to present another employee of his choice: Julius Muthami, Kelius Mugo, Kazungu Kahindi, Daniel Mumo, and Judy.

During the meeting, the Respondent admitted to this gross misconduct, to being absent from work on 2nd and 3rd January 2021, and further admitted that he threatened the manager. He was asked to write his apology letter and to resume work with immediate effect, but he refused. He abandoned work. Efforts to reach him were unsuccessful. The Appellant discovered that the Respondent had destroyed work records, including daily attendance sheets. Some pages are mutilated. He also forged the official rubber stamp, which he used to stamp documents annexed to his pleadings. This was a breach of the employment contract and amounted to gross misconduct. Notice pay or compensation is not due. The house allowance was paid with the monthly wage. The claimed public holidays fell during the Respondent's sick leave, and there was no overtime.

The Learned Magistrate heard the parties and held that the Appellant had not filed any response to the Respondent's claim. Based on the evidence, the Learned Magistrate held that there was an unlawful and unfair termination of employment contrary to section 45 of the Employment Act (the Act). The Appellant was thus awarded the following:

- a) 5 months' salary in compensation Ksh. 150,000.
- b) Public holidays Ksh. 2,000.
- c) Overtime Ksh. 2,616,931.80.
- d) House allowance Ksh. 486,000.
- e) Costs and interests from the date of judgment.

The Respondent submitted that the Appellant failed to produce documents to show that the Respondent was accorded a fair hearing before the wrongful and unfair termination of employment. No minutes were produced. There was no due process.

Under section 41 of the Act, the employer has a duty to issue notice and invite the employee to the disciplinary hearing. This is to allow the employee a chance to make their representations. In **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR**, the court held that the employer has the legal duty to ensure the employee is accorded the rights under the Act. Notice must be issued and a hearing conducted before termination of employment.

In this case, the trial court addressed the claim well and made the awards, which should be confirmed with costs.

Determination

As this is a first appeal, the court may review the record, reassess the trial court's findings, and reach its own conclusions. However, remember that the trial court had the chance to see and hear the witnesses.

The man's issue in the appeal is that the trial court held that no response was filed to challenge the claim. However, this record is part of the Appeal Record. The Respondent has not challenged this fact.

Indeed, the Appellant replied to the claim and attached various work records.

This is corroborated by the Respondent's Reply to the Response dated 26th April 2021. This was an acknowledgement that a response had been filed and served.

The Respondent based his case on facts that he was employed by the Appellant from 1st January 2012 to 10th February 2021. That he was employed continuously without a break. The Appellant produced a term contract dated 1st January 2019. Clause 13 thereof allowed for the term of 12 months, 1st January to 31st December 2019.

The Respondent accepted the contract and signed it.

The period after the contract ends, from 1st January 2020, is a time when no contract is filed. The application submitted payment slips up to January 2021.

Without a defining document on the nature of employment, the evidence of monthly payments was apparent, and the Appellant became protected under section 37 of the Act. The duty to file work records indeed lies with the employer.

In this case, the Respondent had rights and benefits under the Act protected under section 37 thereof.

However, under section 10(3) of the Act, each employment term is distinct and different from the other.

The employment contract ending on 31st December 2020 had separate rights and benefits, distinct from those protected under section 37 of the Act.

Under section 89 of the Act, the Appellant cannot go back to the period before the term contract of 1st January 2019.

The Respondent's case is that he reported to work on 11th February 2021, and the manager sent him away. He had asked for his holiday allowances for 25th and 26th December 2020, but instead, the Appellant and its officers sent him away and unfairly terminated his employment.

The Appellant's case is that from 24th to 31st December 2020, the Respondent was away on sick leave. He was required to resume work on 2nd January 2021. He reported on 4th January 2021 with a sick leave note. He was to resume work on 7th January 2021, but only returned on 11th February 2021 and admitted he had been absent from work and had used threatening language against a supervisor. He then absconded from duty, and efforts to reach him through his phone number were unsuccessful.

Whatever acts of misconduct or gross misconduct the Respondent had committed as at 11th February 2021, the Appellant, as the employer, had a duty to terminate the employment relationship. The assertion that the Respondent absented himself and that there were efforts to trace him is insufficient. That process must be completed with a formal notice of termination of employment,

as held in **Mehta Electricals Limited v Rumbika [2025] KEELRC 1239 (KLR)**. An employee who deserts duty does not terminate his employment. The employer must be proactive and issue notice. See **Foremost Limited v Mwakulomba [2023] KEELRC 1916 (KLR)**.

Further, where the employer cannot trace the employee to effect service, notice must be given to the Labour Officer. Such notice then secures the employer from any claim of alleged unfair termination of employment as held in **Ayub Kombe Ziro v Umoja Rubber Products Limited [2022] KEELRC 141 (KLR)**.

In this case, the Learned Magistrate, although for different reasons, properly established that the termination of employment was unlawful and unfair.

Upon these findings, there is discretion to award compensation. This is not challenged in any material way.

The award of notice pay at Ksh. 30,000 and compensation at 5 months' wages at Ksh. 150,000, respectively, is hereby affirmed.

On the other hand, for a house allowance, the Appellant's case is that the wage paid was all-inclusive. The Respondent was employed as a machine attendant. His wage was KSh. 30,000.

Under the Wage Orders, the wage paid to the Respondent in 2021 exceeded the minimum wage. A claim for house allowance is not justified.

Further, the claim for such allowance for all the years worked is contrary to section 89 of the Act. Any alleged non-payment of a house allowance is a continuing injury. It must be addressed within 12 months from the date of cessation. See **Mistry V. Naran Mulji & Co v Ali [2026] KECA 497 (KLR)** and **Kiige v National Hospital Insurance Fund [2026] KECA 309 (KLR)**.

On the claim for house allowance for 2 days, there is a record of the Respondent taking sick leave from 24th to 31st December 2020. He was not physically at work to justify such a claim. If other employees were paid the allowance, the Respondent was away on sick leave.

For the 108-month overtime claim, the basis is the worksheets produced by the Respondent. Indeed, as submitted by the Appellant, these records should remain in the employer's custody. The employee, the Respondent, possessed these records, indicating he acquired them unlawfully. He cannot benefit from them.

The overtime claim is also a continuing injury, as addressed above. Where due, it should be addressed within 12 months from the date of cessation.

Where overtime is due, it should not be exaggerated. It is humanly impossible for the Respondent to have worked for 108 months each day of the week from 6

am to 6 pm as alleged. This is corroborated by the payment statements filed by the Appellant.

In January 2020, the Respondent was at work for 24 days.

In February 2020, he worked for 23 days.

In May 2020, he worked for 24 days.

In July 2020, he worked for 20 days.

In October 2020, he worked for 25 days.

In December 2020, he worked for 9 days.

In January 2021, he worked for 22 days.

The claim for overtime work is not justified.

Regarding costs and interest, this is discretionary under section 12(4) of the Employment and Labour Relations Court Act. The court must, however, give a justification for the award of costs. This is lacking. However, the claim for unlawful and unfair termination of employment is found on a good foundation; the Respondent is entitled to 50% of his costs. For the appeal, each party is to bear its costs.

Accordingly, judgment in Mombasa CMELRC E175 of 2021 is hereby reviewed in the following terms:

- a) There was an unlawful and unfair termination of employment.**
- b) Compensation Ksh. 150,000.**
- c) Notice pay Ksh. 30,000.**

d) Costs of the trial court at 50%.

e) For the appeal, each party to bear its costs.

Delivered in open court at Nairobi, this 23rd day of April 2026

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Catherine and Omar

..... and

.....