

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

(Before Hon. Lady Justice Monica Mbarũ)

APPEAL NO. E174 OF 2025

MILTON MICHAEL JUMA..... APPELLANT

VERSUS

BERC MINING COMPANY LIMITED..... RESPONDENT

**[Being an appeal from the judgment of Hon. J. B. Kalo delivered on 30th
July 2025 in Mombasa CMELRC No. E009 of 2023]**

JUDGMENT

The appeal arises from the judgment delivered on 30th July 2025 in Mombasa CMELRC No. E009 of 2023. The Appellant is seeking that the judgment that dismissed his claims be set aside and there be an award:

- a) Severance pay Ksh. 94,500.
- b) Notice pay Ksh. 31,500.
- c) Ksh. 25,000 for unpaid IF dues.
- d) Ksh. 18,000 for unpaid NSSF dues.
- e) Salary arrears Ksh. 387,830.
- f) Underpayments Kh. 1,048,698
- g) Unpaid rest days Ksh. 642,200

- h) Accrued leave days Ksh. 133,000.
- i) House allowance Ksh. 195,000.

The background of the appeal is a claim filed by the Appellant against the Respondent. His case was that he was employed by the Respondent as a driver on 6th January 2016. He worked until 16th June 2022, when his employment was terminated. At the time, he was earning Ksh. 950 per day. The Respondent experienced financial challenges and stopped paying salaries for several months. NSSF and NHIF dues were not remitted. In June 2022, the Respondent purported to deploy him to Njuca Construction Company Limited in Thika, thereby terminating his employment unfairly. The Appellant claimed that during his employment, he was not allowed rest days or public holidays or paid a house allowance. There was an underpayment of wages, leading to the unfair termination of his employment. He claimed the following:

- a) 12 months' compensation Ksh. 346,750.
- b) House allowance Ksh. 195,000.
- c) Accrued leave days Ksh.133, 000.
- d) NHIF Ksh. 25,000.
- e) Rest days Ksh. 630,800.
- f) Salary arrears Ksh. 387,830.
- g) Notice pay Ksh. 31,500.
- h) Severance pay for 6 years Ksh. 94,500.

- i) NSSF Ksh. 18,500.
- j) Underpayments Ksh. 1,048,698.
- k) Costs of the suit.

In response, the Respondent denied the claims and stated that there was no termination of employment due to deployment, but rather due to the Appellant's unjustified absence from work on 27th June 2022. He did not give notice. The claims of wrongful termination of employment do not apply, since the Appellant frustrated his employment. He is not entitled to compensation or to the awards particularized in the Memorandum of Claim.

The response is that, through a Certificate of Agreement dated 29th September 2022 between the parties and the Kwale County Labour Officer, there was a payment of KSh. 369,348 all-inclusive as disclosed by the claimant in his filed documents. He is therefore estopped from claiming any further payments above what was agreed upon in settlement, and the claim should be dismissed with costs.

The learned magistrate heard the parties and held that the deployment of the Appellant to another company and entity resulted in constructive dismissal and hence unlawful and unfair. There was an award of 6 months' pay in compensation at KSh. 23,750.

On the terminal dues claimed, the learned magistrate held that they were paid under the Certificate of Agreement, which the Appellant executed for the sum of Ksh. 369,348.82.

Aggrieved by the judgment, the Appellant faulted the trial court on the basis that upholding the Certificate of Agreement and finding that it was binding was invalid since it was not obtained voluntarily, and it had no capacity to extinguish the Appellant's rights in employment. The claim for underpayment, house allowances, and pay for public holidays, rest days, and unpaid statutory deductions was not assessed. The claim for severance pay was not assessed following the redundancy, and the 6-month award was miscalculated. The appeal should be allowed, and the claim reassessed on merit.

On the appeal, the Appellant submitted that the trial court relied on the Certificate of Agreement without analyzing the evidence before it. This was an illegal contract obtained through coercion and is therefore invalid, as held in **Nganga v Christ the King Parish & another [2023] eKLR.**

The Appellant was earning Ksh. 950 per day, which is below the minimum wage. The application of such a wage to tabulate dues in the Certificate of Agreement was wrongful, and, on this basis, it should be set aside, as held in **Mapis Investment (K) Ltd v Kenya Railways Corporation [2005] eKLR.**

A settlement agreement did not bar the Appellant from seeking his lawful dues. Keeping an employee without payment of his wages for months is unlawful and places him in inhumane and degrading circumstances. Such should not be permitted, and the due wage arrears should be tabulated and paid as held in **Coastal Bottlers Limited v Kimathi Mithika [2018] eKLR, Jonathan Spangler v Centre for African Family Studies (CAFS) [2017] eKLR.**

The certificate of agreement was only a partial settlement of terminal dues. The wage arrears of Ksh. 574,978 were reduced to Ksh. 369,348.82. This amount did not address the terminal dues owing at the end of employment due to redundancy. The claims should be assessed accordingly.

The Respondent submitted that the parties entered into a valid certificate of agreement dated 29 September 2022, with payment of Ksh. 369,348.82. This was done in the presence of the Labour Officer, and the appeal has since been paid in full.

The Respondent submitted that the trial court also found that there was unfair termination of employment and awarded 6 months' compensation, with a cumulative award of KSh. 369,349, which was above what had been agreed by the parties. The certificate of agreement was held valid and included all terminal dues owed.

The Respondent submitted that the trial court committed an arithmetic error when tabulating the 6 months' salary in compensation. The daily rate of Kh. 950 x 30 = Ksh. 28,500 per months x 6 = Ksh. 171,000. This court can correct the error.

Determination

As this is a first appeal, the court may review the record, reassess the finding, and reach a conclusion. However, take into account that the learned magistrate had the chance to take evidence, see the parties and hence make this allowance.

The Appellant pleaded that he was employed by the Respondent as a driver at a daily wage of KSh. 950 and worked from 6 January 2016 to 16 June 2022. Due to financial challenges, he was transferred to Njuca Construction Co. Limited in Thika, resulting in the unfair termination of his employment. There was a settlement agreement where he was paid Ksh. 369,348.82 before the owing terminal dues.

The Respondent asserted that the parties mutually settled the matter through the certificate of agreement, and that the Appellant is estopped from renegeing on its terms, as the amount has been paid in full. The trial court also awarded him 6 months' compensation as an additional payment. This should settle his claim.

A settlement agreement is binding on the parties to it to the extent of the matters agreed therefrom. However, in employment disputes, an employee is protected under section 35(4) (a) of the Employment Act (the Act) and is allowed to challenge the lawfulness and fairness of the termination of employment:

(4) Nothing in this section affects the right—

(a) of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46; or

Therefore, an employee whose terminal dues are paid under a certificate of agreement is not estopped from making a claim under the law.

In this case, the Appellant asserts that, following a redundancy affecting the Respondent, he was deployed to a sister company. By letter dated 14th June 2022, the Respondent deployed the Appellant to a sister company in view of the operational challenges it faced in the Mombasa branch.

A redundancy and including operational challenges facing the employer is regulated under sections 2 and 40 of the Act. An employer who is unable to pay its employees is allowed to proceed and terminate employment and make the necessary payments under section 40(1) of the Act.

However, to avoid the loss of employment, the employer may mitigate such loss by redeploying affected employees to ensure continuity of employment. A deployment is thus a valid and legitimate mode of mitigating a redundancy.

In this case, the Appellant took the deployment to a sister company to mean termination of employment. He was not issued a notice terminating his employment, but a letter of deployment.

A deployment is essentially placing the employee in the same role while the principal remains the same. Placement at a sister company ensured no loss of employment or attendant benefits as held in **Wanjala v CS Health & another [2022] KEELRC 12722 (KLR)** and **Mtana v Sopa Lodges [2024] KEELRC 1125 (KLR)**. Indeed, the deployment of an employee is the employer's prerogative to ensure continuity of work, as held in **Kibusion v Board of Management, Kimng'orom Girls High School [2023] KEELRC 2586 (KLR)**.

The Appellant declined. He did not take the deployment.

The Appellant frustrated his employment.

The award of compensation is not due. An operational need that leads to deployment is lawful and permitted under section 40 of the Act. By declining to accept the deployment, the applicant cannot then turn around and claim an unfair termination of employment or payment of severance pay.

These did not accrue upon the deployment.

On the claims, these were addressed in the certificate of agreement.

The Appellant is seeking payment of a house allowance. The Appellant was employed as a driver earning a daily wage of Ksh. 950. His evidence was that he was a heavy commercial driver.

A driver working in Kwale in June 2022, was entitled to a daily wage of Ksh. 1,454.90 inclusive of the house allowance. On the paid wage of Ksh. 950 per day, there is an underpayment of Ksh. 504.90.

Underpayments are defined under section 89 of the Act as continuing injuries.

Where this arises, the employee should claim the same within 12 months.

In this case, the underpayment including house allowance is $\text{Ksh. } 504.90 \times 30 \times 12 + 181,764$.

The claim for leave is addressed in section 28 of the Act and can only accrue for 18 months, which amounts to 33 days. On the daily wage due at Ksh. 1,454.90 less the house allowance of 15%, the leave pay due is Ksh. 218.20 – Ksh. 1,454.90. The basic being $\text{Ksh. } 1,236.70 \times 33 = \text{Ksh. } 40,811.10$

On the claim for statutory dues, these are not to the employee but the statutory body.

Rest days are claimed without the Appellant giving particulars on how these arose based on the daily wage paid.

On the claim for salary arrears, although these are due at the end of employment, the particulars are not gone into. Placing a general claim without due regard to the provisions of section 89 of the Act cannot suffice.

On the claim for underpayments, this are addressed above including house allowance. As a continuing injury, the Appellant can justify a claim for alleged underpayments going back beyond 12 months.

On costs, the claims assessed above, each party should meet its costs.

The payment of Ksh. 369,348.82 is admitted and secured under the Certificate of Agreement dated 29th June 2022. The dues analyzed above shall be offset whichever is higher.

Accordingly, judgment in Mombasa CMELRC E009 of 2023 is hereby reviewed in the following terms:

a) Underpayments including house allowance Ksh. 181,764.

b) Leave pay Ksh. 40,811.10.

Less Ksh. 369,348.82 settled under the Certificate of Agreement.

c) 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

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