

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

(Before Hon. Lady Justice Monica Mbarũ)

APPEAL NO. E189 OF 2025

MIO'S BAR & RESTAURANT..... APPELLANT

VERSUS

STANLEY JUMA..... RESPONDENT

[Being an appeal from the judgment delivered by Hon. J. B. Kalo delivered on 29th August 2025 in Mombasa MCELRC No. E483 of 2023]

JUDGMENT

The appeal arises from the judgment delivered on 29th August 2025 in Mombasa MCELRC No. E483 of 2023.

The grounds of appeal are:

- 1. The Learned Magistrate erred in law and fact in finding that the Respondent's employment was for a period of 3 years, hence warranting leave amount for 3 years, once.*
- 2. The Learned Magistrate erred in law and fact in finding that the Respondent had proved his case of the following unpaid leave and house allowance, hence awarding the sum of Ksh. 91,800.*

3. *The Learned Magistrate misdirected himself on the applicable principles of law in failing to take into consideration and appreciate the evidence by the Appellant.*
4. *The Learned Magistrate wrongfully gave an order that interests apply from the date of filing suit in awarding costs to the Respondent.*

The Appellant is thus seeking to have the judgment of the trial court set aside with costs.

The Respondent filed his claim before the trial court on the basis that he was employed as a counter attendant by the Appellant from 2021 to 2022. From 2017 to 1st January 2023, he was a waiter before promotion to counter attendant. His wage was Ksh. 9,000 per month in 2017. 12,000 in 2018 and Ksh. 17,000 from 2021 to 2022. His claim was that he was subjected to difficult working conditions when the director withheld monthly wages, became abusive and subjected him to bodily injuries, resulting in him breaking his foot while at work. His wages were suspended due to the work injury. To cover up the matter, the Appellant filed a police report of theft at Bamburi Police Station, which the police found to have no evidence. The Respondent continued working without a break, underpayment and overtime. His employment was terminated without due process or payment of terminal dues. He claimed the following:

- a) Underpayments Ksh. 650,000.
- b) 12 months' compensation Ksh. 204,000.

- c) Notice pay Ksh. 17,000.
- d) Service pay Ksh. 105,875.
- e) Unpaid leave Ksh. 303,219.
- f) Public holidays ksh. 73,330.
- g) Overtime Ksh. 110,529.
- h) House allowance Ksh. 255,410.
- i) Compensation for work injury Ksh. 4 million.
- j) Certificate of service.
- k) Costs of the suit.

In reply, the Appellant's case was that from 2017 to 2018, there was no employment between the parties. From 5th January 2019 to 15th November 2019, there was no employment. There was employment from 1st December 2019 to 29th February 2020 as a casual waiter working for 4 hours per week. From March 2020 to 1st October 2020, the bar and restaurant were closed due to the COVID-19 pandemic. During the business closure, there was employment on a casual basis for 3 days per week. From 1st October 2020 to 2nd November 2020, he was employed at KSH 4 days per week. 500 per day. On 12th September 2021, the Respondent was employed for a day. There was employment from 13th September 2021 to 31st December 2021. On 1st January 2022, there was employment for Ksh. 17,000 per month. The employment was for 45 hours per week, spread over 6 days. During this period, the Appellant noted stock

shortages of Ksh. 72,750, and a warning was issued. On 31st December 2022, the Respondent failed to account for a crate of beer. A report was made at Bamburi police station, and investigations were suspended to allow the Respondent to confirm the losses. Through a notice dated 3rd January 2023, the Appellant suspended the Respondent from duty and notified him of a disciplinary hearing on 6th January 2023, at which he admitted committing acts of gross misconduct. There was a summary dismissal on 10th January 2023. The termination of employment was procedural and justified. Upon acceptance of gross misconduct, the Appellant sanctioned him with summary dismissal, and the claims are without merit.

The Learned Magistrate heard the parties and, in judgment, held that the Respondent was subjected to a disciplinary hearing and that employment was terminated procedurally. On the claims, these were analysed, and the following were awarded:

- a) Leave pay for 3 years Ksh. 51,000.
- b) House allowance for 3 years Ksh. 91,800.
- c) Costs of the suit plus interests.

In the appeal, the Appellant submitted that the award of leave and house allowance for 3 years was unjustified, as there was no continuous employment. The evidence submitted and admitted by the Respondent was that he was working in 2017 and 2018. Later, he was employed as a casual waiter; due to

the COVID-19 pandemic, his work hours and days changed, and he worked intermittently.

The award of a house allowance is not justified, as there was a wage increase to 17,000 per month from January to December 2022. There are records to confirm these payments. This evidence was not challenged.

The Respondent did not file written submissions.

Determination

This being a first appeal, the court is required to review the record, reassess the findings and make a conclusion. However, consider that the trial court had the opportunity to hear, see, and appreciate the oral evidence. Hence, make these provisions as held in **Selle v Associated Motor Boat Co. Ltd (1968) EA 123.**

In response to the claim, the Appellant gave a chronology of the employment relationship with the Respondent. The Respondent had asserted that he was employed from 2017 to 1st January 2023 as a counter attendant. The Appellant admitted the employment to the extent that the Respondent was employed as a bartender from January to December 2022 at a wage of Ksh. 17,000 per month. Previously, there were employment records for 5th January 2017 to 31st December 2017. In between, and particularly during the COVID-19 pandemic period 2020 to 2021, there were different employment schedules.

What is clear is that before the employment was terminated, the Respondent was afforded due process, issued a notice to show cause, and given a disciplinary hearing. Under section 43 of the Employment Act, if the employer genuinely believes there is reasonable cause to terminate employment and the employee has been taken through the internal disciplinary process, termination is justified. See **Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR**.

Indeed, under Section 47(5) of the Employment Act, an employee who claims that their employment has been unfairly terminated bears the burden of providing evidence indicating that a termination took place and that it either lacks substantive justification or is procedurally defective, as held in **Kisero v Wabwire [2025] KEELRC 176 (KLR)**. The findings by the Learned Magistrate were correct in this regard.

On the assessment of the claims for house allowance and leave pay, the admission that there was employment from January to December 2022, these being continuing injuries, the accruing benefit can only go back to 12 months.

A bartender's wage is not defined under the Wage Orders. However, a general worker in Mombasa from January to December 2022 had a basic wage of Ksh. 15,201.65 plus a house allowance at 15% at Ksh. 2,280.20 with gross wage being Ksh. 17,481.90.

The wage paid was Ksh. 17,000, hence less by Ksh. 481.90.

For the 12 months, the underpayment, inclusive of house allowance, is Ksh. 5,782.77. This is due.

For annual leave, section 28(4) of the Employment Act allows up to 18 months of leave, amounting to 33 days based on the basic wage.

In this case, for Ksh. 33 days, the Respondent is entitled to Ksh. 15,201.65. 16,721.82 in leave pay.

The assessment of the house allowance and leave pay for 3 years was in error.

On costs, this is discretionary, but the justification must be given pursuant to section 12(4) of the Employment and Labour Relations Court Act. None was given in this case.

The appeal thus assessed; each party shall bear its costs.

Accordingly, judgment in Mombasa CMELRC No. E483 of 2023 is hereby reviewed with the following awards:

- a) Leave pay Ksh. 16,721.82.
- b) House allowance Ksh. 5,782.77.
- 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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