

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI**  
**ELRC APPEAL NO. E024 OF 2025**

**MAGMA HOLDINGS LIMITED.....**  
**APPELLANT**

**VERSUS**

**JULIUS MUEMA MUSEMBI.....RESPONDENT**

*(Being an Appeal from the Judgment of Hon. M. Kimani, Senior Resident Magistrate in Nanyuki MCELRC Cause No. E003 of 2024, delivered on 22<sup>nd</sup> May 2025)*

**JUDGMENT**

1. The Respondent commenced proceedings before the Magistrate’s Court at Nanyuki by filing a Statement of Claim in CMELRC No. E003 of 2024. He averred therein that he had been engaged by the Appellant as a motor vehicle mechanic in 2005 and had diligently discharged his duties in accordance with the terms of his contract, without ever attracting any complaint, warning, or disciplinary sanction during the tenure of his employment.

2. Before the trial Court, the Respondent contended that on 11<sup>th</sup> April 2023, the Appellant unilaterally reduced his salary from Kshs 80,000.00 to Kshs 40,000.00 without prior notice or consultation. He further stated that on the same date, while performing his duties, he was served with a letter terminating his employment with immediate effect. He added that following interventions with the Labour Office in Nanyuki, the Appellant issued him with a subsequent letter reinstating him and indicating that the earlier termination had been occasioned by extreme pressure.
3. The Respondent maintained that the Appellant acted in contravention of the Employment Act and constitutional safeguards on fair labour practices, asserting that the conduct amounted to constructive dismissal and compelled him to leave employment. On this basis, he sought maximum compensation for unfair termination, notice pay, gratuity, costs of the suit, and interest.
4. In response to the Claim, the Appellant filed a Statement of Response dated 6<sup>th</sup> February 2024, denying that the Respondent had performed his duties diligently and alleging that he had been involved in acts of dishonesty and misconduct during his employment.
5. The Appellant acknowledged that, by a letter dated 11<sup>th</sup> April 2023, it notified the Respondent and other employees of its intention to reduce his monthly

salary from Kshs 80,000.00 to Kshs 40,000.00, attributing this decision to the withdrawal of work by its principal client, M/S BAITUK, which adversely affected its cash flow. It maintained that it sought the Respondent's consent prior to the proposed reduction.

6. The Appellant further contended that on 11<sup>th</sup> April 2023, it came to its attention that the Respondent had absconded duty for a period of one week without leave or explanation. As such, the Appellant denied having terminated the Respondent's employment.
7. It was further averred by the Appellant that on 13<sup>th</sup> April 2023, upon receiving an explanation for his absence, the Appellant withdrew both the termination letter and the notice proposing salary reduction, informing the Respondent that his employment would continue on the existing terms.
8. The Appellant stated that, in reply to its letter of 13<sup>th</sup> April 2023, the Respondent, through correspondence dated 14<sup>th</sup> April 2023, indicated that he was no longer interested in continuing in employment and requested settlement of his dues to enable him move on. To this end, the Appellant maintained that the Respondent voluntarily disengaged from employment and urged the Court to dismiss the claim with costs.

9. Upon evaluating the evidence before her, the learned trial Magistrate entered judgment in favour of the Respondent, awarding him Kshs 800,000.00, being compensation equivalent to nine months' salary together with one (1) month's salary in lieu of notice, as well as costs of the suit and interest.
10. In its determination, the trial Court held that although there had been a variation of the Respondent's terms of employment, the same did not constitute constructive dismissal. Nevertheless, the Court found that the Respondent's employment had been terminated unfairly, having been effected without adherence to due process.

### **The Appeal**

11. The Appellant was dissatisfied with the Judgment of the trial Court, hence preferred the instant Appeal, setting out the following two (2) grounds in support thereof:

- 1) The Learned Magistrate erred and was wrong in the award of compensation to the Respondent of gross salary for nine (9) months under Section 49 (i) (c) of the Employment Act when there was evidence that the Appellant, a mechanic, could easily and readily find employment elsewhere and/or self-employment.**

**2) The Learned Magistrate erred and was wrong in making an award that was not commensurate with the Respondent's circumstances.**

12. To this end, the Appellant seeks the following orders from this Court:

- a) THAT the award made by the Learned Magistrate for nine (9) months' compensation for unfair termination in the sum of Kshs. 720,000/= be revised to an award of three (3) months in the sum of Kshs. 240,000/=.**
- b) THAT the costs of this Appeal be given to the Appellant.**

### **The Submissions**

13. The Appeal was canvassed by way of written submissions. The Appellant submitted that its grievance was limited to the award of damages, arguing that the Employment Act does not provide for damages in cases of unfair or unlawful termination. In support of this position, reliance was placed on the case of *Alphonse Maghangah Mwachanya v Operation 680 Ltd (2018) KLR*, with the Appellant asserting that the trial Court lacked a legal basis for granting such an award.

14. The Appellant further argued, that even if the award of damages was correct, the quantum awarded was excessive in the circumstances, as the trial Court failed to properly consider the factors prescribed under Section 49(4) of the Employment Act.
15. On the other hand, the Respondent submitted that the judgment of the trial Court was reasonable, justified and based on well-established legal provisions and precedent.
16. The Respondent further submitted that the trial Magistrate took into account his length of service of 18 years, as well as his status as a middle-aged employee with a reasonable expectation of continued employment for a further 20 years.
17. The Respondent further maintained that he bore no contributory fault in the termination of his employment. He further contended that prior to the termination, his working environment had become intolerable, rendering continued employment untenable. The Respondent submitted that although the Appellant later apologized for the allegations made against him and offered reinstatement, he had by then suffered harassment, stress and frustration to such an extent that he could no longer continue in the employment. On the basis of the foregoing, the Respondent argued that the award equivalent to nine months' salary was justified and not excessive.

18. In support of the Respondent's position, reliance was placed on the cases of *Nation Media Group Limited v Munene (2025) KECA 114 (KLR)*, *Alphonse Maghangah Mwachanya v Operation 680 Ltd (supra)*, *Alfred Muthomi & 2 others v National Bank of Kenya Limited (2018) eKLR*, and *Mbogo v Shah (1968) EA 93*.

### **Analysis and Determination**

19. As a first appellate Court, this Court is obligated to reconsider and re-evaluate the evidence adduced before the trial Court alongside the Judgment, and to arrive at its own independent conclusions, while bearing in mind that it did not have the advantage of seeing or hearing the witnesses testify. This position was affirmed in the case of *Selle v Associated Motor Boat Co. Ltd & Others [1968] EA 123*.

20. With that being said, the Court has reviewed the record, the rival submissions, and the applicable law, and isolated the following issues for determination: -

- a) Whether the trial Court erred in granting the Respondent compensatory damages for unfair termination;**
- b) Subject to (a), whether the quantum of compensation awarded to the Respondent by the trial Court was excessive.**

### **Award of compensatory damages**

21.The Appellant has faulted the trial court for awarding the Respondent compensatory damages for unfair termination. According to the Appellant, Section 49 of the Employment Act has no provision for damages.

22.Section 49(1) of the Employment Act provides as follows:

***[49](1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following***

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.....

***(c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.***

23.Flowing from the foregoing statutory provision, it is evident that the Court is vested with the authority to award compensation where it finds that the termination of an employment contract was unfair and unjustified.

24.In the instant case, the trial Court awarded the Respondent Kshs 720,000/-, being the equivalent of nine months' gross salary, as compensation for unfair

termination. Although the trial Court described the award as “compensatory damages,” it is clear that the same was granted pursuant to **Section 49(1)(c) of the Employment Act**. This is distinct from an award of damages contemplated under **Section 12(3)(vi) of the Employment and Labour Relations Court Act**.

25. Accordingly, the compensation awarded to the Respondent by the trial Court constituted a lawful remedy under **Section 49(1)(c) of the Employment Act**, and therefore cannot be said to have been made in error.

**Whether the compensation awarded by the trial Court was excessive**

26. The Appellant has further contended that the compensation awarded by the trial Court was excessive and that the Court failed to properly take into account the factors set out under **Section 49(1) of the Employment Act**.

27. In awarding the Respondent compensation equivalent to nine months’ gross salary, the trial Court observed that the Respondent had served the Appellant for a period of 18 years and had a legitimate expectation of continued employment but for the unfair termination. The Court also observed that the Respondent’s future employment prospects were adversely affected by the

sudden and unfair termination, and that in the absence of a disciplinary hearing, it was not possible to ascertain any contributory conduct on his part.

**28. Section 49(4) of the Employment Act** outlines the factors to be considered by the Court in determining the appropriate remedies for unfair termination, including, *inter alia*, whether the employee took reasonable steps to mitigate the losses arising from the unjustified termination.

29. The record reflects that, by a letter dated 13<sup>th</sup> April 2023, the Appellant addressed the Respondent as follows:

*“Firstly, we apologise for our letter of yesterday, which was written whilst under pressure to try and find a way forward for the workshop without the work of BATUK.*

*We have reached out to several customers who have been positive and willing to support us in bringing their vehicles to Magma in the future.*

*For that reason, we wish to continue your employment on your current salary.*

*We are willing to work with you to address any issues that have arisen and make a fresh start.”*

30. The Respondent rejected the Appellant’s offer to resume duty through his letter dated 14<sup>th</sup> April 2023, stating that the abrupt termination of his contract without

notice had disrupted his day-to-day livelihood. He also alluded to allegations that he had threatened security guards and incited his colleagues, which he maintained were unfounded and had influenced his decision not to return to work.

31. What is apparent is that the Appellant invited the Respondent to continue in employment on his previous salary terms, but the Respondent declined the offer.

32. In the circumstances, the Court finds that the Respondent was afforded an opportunity to mitigate his loss by resuming his employment, which he chose not to take. Consequently, he failed to take reasonable steps to mitigate his losses arising from the unfair termination of his employment contract.

33. It is notable that the trial Court did not take into account the Respondent's failure to mitigate his losses when assessing compensation for unfair termination. This ought to have been a central consideration, particularly in light of **Section 49(4)(l) of the Employment Act**, which imposes a duty on an employee to mitigate his or her loss.

34. On the question of mitigation of loss, the Court of Appeal in the case of *African Highland Produce Limited v. John Kisorio [2001] eKLR* held that:

*“The prime factor is that he(sic), plaintiff, has a duty to mitigate loss if it is within his means to do so. Herein the plaintiff had the means to do so but did not act prudently.... It is manifestly clear that the plaintiff did not take reasonable steps to mitigate the loss which he sustained consequent upon the accident.”*

35. In the circumstances of this case, the Respondent would have mitigated his loss by accepting the offer to resume duty, which he declined. Consequently, the consideration that he had a legitimate expectation of long-term employment would not have arisen. Similarly, the assertion that his future employment prospects were adversely affected by the termination would not hold had he taken reasonable steps to mitigate his loss.

36. Consequently, the Court finds that the compensatory award granted to the Respondent by the trial Court failed to adequately take into account the factors relevant to this case as prescribed under **Section 49(4) of the Employment Act.**

37. Having taken into account all relevant factors in the case herein, including the length of the employment relationship and the Respondent's failure to mitigate his losses, the Court finds that the award of compensation for unfair termination

equivalent to nine months' salary is excessive. In the premises, the award of compensation is hereby revised to the equivalent of five months' salary.

### **Orders**

38. In the final analysis, the Court allows the Appeal and makes the following orders:-

- (a) The declaratory order that the Respondent's termination was unfair and unlawful is sustained.**
- (b) The award of one (1) month's salary in lieu of notice is sustained.**
- (c) The award of compensation is upheld, but the quantum is revised to the equivalent of five (5) months' gross salary.**
- (d) The total decretal sum of Kshs 720,000.00 is set aside, with the final award being determined at Kshs 480,000.00.**
- (e) Interest on the sum in (d) shall accrue at court rates from the date of this Judgment until full payment.**

39. Since the Appeal has succeeded in part, but the finding of unfair termination is upheld, the Appellant shall bear the costs of both this Court and the trial Court, to be assessed based on the final award.

**DATED, SIGNED and DELIVERED at NYERI this 17<sup>th</sup> day of April 2026.**

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**STELLA RUTTO**

**JUDGE**

**In the presence of:**

For the Appellant	Dr. Chokaa
For the Respondent	Ms. Mutua
Court Assistant	Ndati

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act

(Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**

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