

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
ELRC APPEAL NO. E023 OF 2025

BETWEEN

ROBEN ABERDARE LIMITED.....APPELLANT

AND

MUREGE MWOYA OBEDE.....

RESPONDENT

(Being an appeal from the Judgment of Hon. Viola Sandra Kosgei, Senior Resident Magistrate delivered on 27th May 2025 in Nyeri CMELRC No. E027 of 2024)

JUDGMENT

1. This judgment is with respect to both the Appeal and the Cross-Appeal arising in this matter. The main Appeal was lodged by Roben Aberdare Limited, while the Cross-Appeal was filed by Murege Mwoya Obede.

2. Both parties herein were litigants in *Nyeri Chief Magistrates' ELRC No. E027 of 2024, Murege Mwoya Obede v Roben Aberdare Limited*. In that suit, the Respondent in the Appeal (**Murege Mwoya Obede**) averred that he had been employed by the Appellant (**Roben Aberdare**) as a heavy commercial driver

from 2013 until 2023, when his employment was terminated. He contended that the termination was effected in disregard of the principles of natural justice.

3. He further asserted that he had not been granted leave for the entire period of 10 years he served Roben Aberdare. According to Obede, the decision to terminate his employment was actuated by bad faith, notwithstanding his diligent service and the absence of any prior concerns regarding his performance. On this basis, he sought a declaration that his termination was illegal, unlawful, unfair, and inhumane. He further prayed for **Kshs 2,780,981.50**, comprising notice pay, unpaid salary for September and October 2023, underpayment for public holidays, accrued leave, service pay, gratuity, house allowance, and compensation for wrongful loss of employment. Additionally, he sought the costs of the suit together with interest.
4. Roben Aberdare opposed the claim through its Statement of Response dated 15th May 2024. It contended that its fuel monitoring system revealed that Obede had been siphoning fuel from his assigned motor vehicle, registration number KDE 489K, in September 2023. Consequently, he was issued with a Notice to Show Cause on 9th October 2023, to which he responded on 11th October 2023. However, his response failed to exonerate him, resulting in his summary dismissal on 25th October 2023.

5. Roben Aberdare maintained that, in light of Obede's acts amounting to gross misconduct, it was entitled to summarily dismiss him without notice. It further contended that Obede was not entitled to the reliefs sought and urged the trial court to dismiss the claim, declare the termination lawful and fair, and order Obede to pay **Kshs 54,504.90** for lost fuel, to be set off against his terminal dues.
6. The matter proceeded to full hearing before the trial court, which, in a judgment delivered on 27th May 2025, found in favour of Obede. Consequently, the Trial Court awarded him maximum compensation, unpaid salary for September and October 2023, and costs of the suit with interest. It also directed Roben Aberdare to issue him with a certificate of service.
7. In its judgment, the trial court held that Roben Aberdare had discharged its burden of proof regarding the reason for Obede's summary dismissal, noting that a printout from the fleet management system evidencing the alleged fuel loss had been produced. The court further observed that Obede was a repeat offender, having previously been surcharged for a similar allegation in 2022. Accordingly, the court found that the reason for the summary dismissal was valid, reasonable, and justified.

8. However, the trial court found that the procedure leading to Obede's dismissal was unfair, as he had not been provided with particulars such as the dates and locations of the alleged fuel siphoning.
9. Both Roben Aberdare and Obede were dissatisfied with the decision of the trial court. Consequently, Roben Aberdare instituted the main Appeal, while Obede lodged a Cross-Appeal.

The Appeal and the Cross-Appeal

10. Roben Aberdare filed a Memorandum of Appeal dated 26th June 2025, challenging the judgment on the following five (5) grounds.

- 1) THAT the learned Trial Magistrate erred in law and fact by applying the wrong principles of law and thus erroneously dismissing the Appellant's prayers as containing a gross miscarriage of justice.***
- 2) THAT the learned trial Magistrate erred in law and fact by applying the wrong principles of law by failing to make a finding that the fair procedure was followed in dismissing the Respondents from his employment, thereby occasioning a gross miscarriage of justice.***
- 3) THAT the learned trial magistrate erred in law and fact by awarding the Respondent 12 months gross salary as maximum compensation whereas the Respondent had only pleaded one month salary as***

compensation for wrongful loss of employment, thereby occasioning a gross miscarriage of justice.

4) THAT the learned trial magistrate erred in law and fact by taking into account extraneous and irrelevant considerations thus arriving at erroneous findings in the judgment, thereby occasioning a gross miscarriage of justice.

5) THAT the learned trial magistrate failed to address her mind to the pleadings on the record and the evidence by the parties, thereby occasioning a gross miscarriage of justice.

11. Accordingly, Roben Aberdare prayed that the Appeal be allowed, the impugned judgment be varied and/or set aside, and be substituted with an order dismissing Obede's claim while allowing its Counterclaim with costs. It also sought the costs of the appeal.

12. On his part, Obede filed a Memorandum of Appeal dated 10th July 2025, raising the following six (6) grounds of appeal:

1) THAT the learned trial magistrate erred in law and in fact in applying the wrong principles of law and thus arriving at an erroneous decision

- in disregarding the Cross-Appellant's Statement of Claim, thereby occasioning a gross miscarriage of justice.*
- 2) *THAT the learned trial magistrate erred in law and in fact in disregarding the prayer for underpayment of 120 months of the cross-appellant, the testimonies tendered by the cross-appellant and the Appellant.*
 - 3) *THAT the learned trial magistrate misdirected herself in ignoring the law and principles applicable, the relevant authorities governing underpayment in the course of employment cited in the written submissions presented, and the testimonies during the hearing by the Cross Appellant.*
 - 4) *THAT the learned trial magistrate erred in law and in fact in failing to award underpayment based on assumptions and speculation and further failing to award in line with the decided cases.*
 - 5) *THAT the learned trial magistrate erred in law and in fact in ignoring the erudite input, research and presentation in the course of the hearing and conclusion of the matter.*
 - 6) *THAT the learned trial magistrate erred in law and in fact in failing to consider conventional awards in cases of similar nature.*

13. In this regard, Obede urged the Court to allow his Cross-Appeal, dismiss Roben Aberdare's Memorandum of Appeal, and set aside the judgment and decree of the trial Court.

14. The Appeal and the Cross-Appeal were canvassed by way of written submissions. Both parties duly filed their submissions, which the Court has considered.

The Submissions

15. On its part, Roben Aberdare submitted that the learned trial Magistrate misdirected herself in law by dismissing its prayer as set out in the Statement of Response and finding it unmerited. It contended that it not only pleaded but also proved that Obede had been siphoning fuel from the company vehicle. According to Roben Aberdare, the trial Magistrate failed to take into account this evidence, thereby occasioning a miscarriage of justice.

16. Roben Aberdare further asserted that it had established a valid counterclaim in the sum of Kshs 54,504.90, being the value of the fuel allegedly siphoned.

17. It was Roben Aberdare's position that it discharged the burden of proof as required under Sections 107, 108, and 109 of the Evidence Act, primarily

through the fuel monitoring report. On this score, it argued that upon producing such evidence, the evidentiary burden shifted to Obede to rebut the allegation and demonstrate that he did not siphon fuel from the assigned motor vehicle, failing which he would be liable for the loss.

18. Roben Aberdare further maintained that it lawfully terminated Obede's employment following due process, and that the trial Magistrate erred in finding the termination to be unfair.

19. According to Roben Aberdare, it placed sufficient material before the court to demonstrate that Obede was subjected to a fair and proper disciplinary process culminating in his summary dismissal, in full compliance with Section 41(1) of the Employment Act.

20. Roben Aberdare further submitted that it had proved the reasons for the summary dismissal, asserting that the grounds for termination were valid, genuine, and justified.

21. On the other hand, Obede contended that Roben Aberdare failed to discharge its burden of proof under Sections 107–109 and 112 of the Evidence Act. He argued that the fuel monitoring report amounted to mere uncorroborated suspicion, lacking any direct nexus, eyewitness testimony, or forensic evidence

linking him to the alleged loss. In support of this position, Obede relied on the cases of *Satia v West Kenya Sugar Company Limited [2025] KEELRC 485 (KLR)* and *Berlin Equipment Limited v Ojwang [2024] KEELRC 13502 (KLR)*.

22. Citing the case of *Wenani v Comply Industries Limited (Cause 745 of 2019) [2025] KEELRC 3169 (KLR)*, Obede further submitted that reliance on a single report, as in the present case, was insufficient and ought to be rejected to avoid speculative recovery by an employer.

23. Obede maintained that, notwithstanding the issuance of a Notice to Show Cause, his response, and the disciplinary hearing, the process was procedurally unfair. In this regard, he contended that the charges were altered midway through the proceedings, that he was not afforded adequate time to prepare following the change, and that he was denied the opportunity for representation as required under Section 41 of the Employment Act. In support of this argument, he relied on the cases of *Downtown Hotel v Mutua [2026] KEELRC 222 (KLR)* and *Ngagaya v Securitas Kenya Limited [2025] KEELRC 1714 (KLR)*.

24.Obede further submitted that his Cross-Appeal was meritorious, asserting that the trial court ought to have awarded the claimed underpayment arrears as pleaded.

Analysis and Determination

25.As this is a first appeal, the Court is obligated to re-examine and comprehensively re-evaluate the evidence adduced before the trial Court and arrive at its own independent conclusions, while bearing in mind that, unlike the trial court, it did not have the benefit of seeing and hearing the witnesses. This principle was reiterated by the Court of Appeal in the case of ***Selle & Another vs Associated Motor Boat Company Ltd & Others, [1968] EA 123.***

26.This Court is further guided by the settled principle that an appellate court will not ordinarily interfere with the findings of fact made by a trial court unless such findings are based on no evidence, arise from a misapprehension of the evidence, or it is shown that the court acted on wrong principles in arriving at its conclusions. This position was articulated in ***Mwanasokoni v Kenya Bus Service Ltd (1982–88) 1 KAR 278.***

27.Being mindful of the role of the Court at this juncture and having considered the Appeal, the Cross-Appeal, the entire Record of Appeal, the parties'

submissions, and the applicable law, the Court has distilled the following issues for determination: -

- a) Whether the trial Court erred in finding that the termination of Obede's employment was procedurally unfair.*
- b) Whether the remedies awarded by the trial Court are sustainable.*
- c) Whether the trial Court erred in dismissing the prayers sought by Roben Aberdare in its Statement of Response.*
- d) Whether the trial Court erred in rejecting Obede's claim for underpayments.*

Whether the trial Court erred in finding that the termination of Obede's employment was procedurally unfair;

28. In its Appeal, Roben Aberdare faults the trial Court for holding that due process was not followed in the dismissal of Obede from employment.

29. In its judgment, the trial Court found the dismissal process to be procedurally unfair on the basis that Obede was not furnished with the specific dates and locations of the alleged fuel siphoning to enable him adequately respond.

30. Upon re-examining the record, it is apparent that Obede was issued with a Notice to Show Cause dated 9th October 2023, alleging that the fuel monitoring

system had detected fuel siphoning from motor vehicle registration number KDE 489K, assigned to him, during the month of September 2023. He was required to submit a written explanation by 11th October 2023.

31. In his response to the Notice to Show Cause, Obede denied the allegations, stating that he could not physically access the truck's fuel tank as all ports were secured. He further indicated that he consistently submitted records of mileage vis-à-vis fuel consumption, which had never been questioned by management. Additionally, he maintained that he had not been provided with sufficient particulars, specifically the dates and locations of the alleged siphoning, to enable him give a comprehensive response.

32. Thereafter, by a letter dated 12th October 2023, Obede was informed that his explanation was unsatisfactory and was invited to attend a disciplinary hearing scheduled for 17th October 2023.

33. At the trial Court, Roben Aberdare produced minutes of the disciplinary hearing held on 17th October 2023. Following that hearing, Obede was summarily dismissed from employment on 25th October 2023.

34. Roben Aberdare also produced a detailed fuel report relating to motor vehicle KDE 489K, which outlined fuel consumption for specific dates in September

2023, including consumption rates and distances travelled based on internal GPS mileage readings.

35. However, it is not apparent from the record whether this fuel report was furnished to Obede prior to the disciplinary hearing, particularly after he had indicated in his response to the Notice to Show Cause that he required more specific particulars of the allegations.

36. In the absence of evidence demonstrating that the report was shared, this Court is persuaded that Obede attended the disciplinary hearing without full knowledge of the particulars of the allegations against him, notwithstanding that the fuel report contained detailed information, including dates and fuel consumption data.

37. A review of the Notice to Show Cause further reveals that the allegations levelled against Obede were general and lacked specificity. For him to meaningfully respond both to the Notice to Show Cause and at the disciplinary hearing, it was incumbent upon Roben Aberdare to provide detailed particulars of the alleged misconduct by Obede. This could have been achieved by availing the fuel report to Obede, as it contained the necessary information to enable him respond effectively to the accusations of fuel siphoning.

38. On this issue, the Court agrees with the holding in *Ol Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR*, where the Court of Appeal found that the allegations against an employee were general and lacking in specificity, hence rendering the termination unfair.

39. Therefore, while Obede was issued with a Notice to Show Cause, given an opportunity to respond, and allowed to attend a disciplinary hearing, the process was nonetheless flawed due to the failure to provide him with the specific details of the allegations. The Court finds that this omission impaired Obede's right to a fair hearing.

40. Accordingly, this Court sees no reason to fault the trial Court's finding that Obede was not afforded a fair procedure in the termination of his employment.

Whether the remedies awarded by the trial Court are sustainable

41. The trial Court, having found that Obede's dismissal was procedurally unfair, awarded him compensation equivalent to 12 months' gross salary. As it stands, the compensation awarded to Obede represented the maximum amount permissible under **Section 49(1)(c) of the Employment Act.**

42. **Section 49(4) of the Employment Act** outlines 13 factors to guide the Court in determining the appropriate quantum of compensation for wrongful dismissal or unfair termination.

43. In the present case, the trial Court did not specify the factors it considered when awarding Obede maximum compensation. A key factor in this matter was Obede's contribution to the circumstances leading to his dismissal. The trial Court had indeed found that Obede was a repeat offender and had concluded that the reason for his termination was valid, reasonable, and justified. However, this factor was not reflected in the determination of compensation due to Obede. Accordingly, the Court finds that the trial Court erred by failing to take into account relevant factors under Section 49(4) of the Employment Act.

44. Taking into account Obede's contribution to the termination of his employment and the length of the employment relationship, this Court reduces the award for unfair termination from 12 months to 3 months' gross salary.

Whether the trial Court erred in dismissing the prayers sought by Roben Aberdare in its Statement of Response

45. In its Memorandum of Appeal, Roben Aberdare urged the Court to allow its Counterclaim with costs.

46. In its Statement of Response, Roben Aberdare had sought payment of **Kshs 54,504.90** in respect of lost fuel and further requested that this amount be set off against Obede's terminal dues.

47. It is noteworthy that the reliefs sought by Roben Aberdare in its Statement of Response were not presented through a Counterclaim as required under **Rule 29(2)(g) of the Employment and Labour Relations Court (Procedure) Rules, 2024**.

48. In the event Roben Aberdare intended to recover **Kshs 54,504.90** from Obede for lost fuel, the proper course was to file a Counterclaim in accordance with **Rule 29(2)(g)** of the Court's Rules. Having failed to do so, the trial Court cannot be faulted for not awarding the sum sought.

Whether the trial Court erred in rejecting Obede's claim for underpayments

49. In the Cross-Appeal, Obede contends that the trial Magistrate erred in dismissing his claim for underpayments.

50. The record bears that at the trial Court, Obede sought **Kshs 1,472,640.00**, representing alleged salary underpayments over 10 years (120 months).

51. On this issue, the trial Magistrate observed that Obede had not specified when he was due for a salary review. Accordingly, the trial Court did not assess Obede's salary against the prescribed statutory minimum wage for employees in his category to determine if he was underpaid at any point during his employment. In this respect, the trial Magistrate fell into error.

52. It is noteworthy that Obede calculated the alleged underpayment he claimed at the trial Court based on a flat rate of **Kshs 30,267.00** per month. This was based on Legal Notice No. 2 of 2018, which applied to heavy commercial drivers in Nairobi, Kisumu, and Mombasa cities.

53. This was erroneous, as the statutory minimum wage is determined periodically and varies according to job category and location.

54. Further to the foregoing, there is no evidence that Obede was based in Nairobi, Mombasa, or Kisumu at the material time, which would entitle him to the claimed salary of **Kshs. 30,267.00**. It should also be appreciated that the statutory minimum wage varied over time, including the 10-year period during which Obede was employed by Roben Aberdare.

55. From the employment contract on record, Obede was employed as a driver from 15th May 2013 with a monthly salary of **Kshs 18,000.00**, inclusive of house allowance. According to Legal Notice No. 196 of 2013, the minimum statutory wage for a driver based in Nyeri as Obede, was Kshs 15,259.35, exclusive of house allowance. With a 15% house allowance, his minimum consolidated salary would have been **Kshs 17,548.25**. Thus, during this period, Obede was not underpaid, as his salary, including house allowance, exceeded the prescribed statutory minimum.

56. For the period 1st May 2015 to 30th April 2017, the statutory minimum wage for workers in Obede's category in Nyeri was Kshs 17,090.50. Including a 15% house allowance, the minimum consolidated salary was **Kshs 19,654.07**.

57. The pay slips exhibited pertain only to 2022, showing a gross monthly salary of Kshs 22,000.00. There is no evidence showing when Obede's salary increased from Kshs 18,000.00 to Kshs 22,000.00, nor proof that his salary between 1st May 2015 and 30th April 2017 was below the statutory minimum.

58. It was incumbent upon Obede, to prove that his salary was below the statutory minimum during the relevant periods, which could have been demonstrated through his pay slips.

59. In the absence of such evidence, the Court cannot determine that Obede's salary between 1st May 2015 and 30th April 2017 was below the statutory minimum.

60. For the period 1st May 2017 to 30th April 2018, the statutory minimum wage for Obede's category was Kshs 20,166.80. Inclusive of a 15% house allowance, the minimum consolidated salary was **Kshs 23,191.82**, pursuant to Legal Notice No. 111 of 2017.

61. Yet again, there is no direct evidence of Obede's salary during this period. Be that as it may, his 2022 pay slips indicate a salary of Kshs 22,000.00, which is below the statutory minimum of Kshs 23,191.82. The Court therefore concludes that Obede was underpaid and is entitled to compensation for this underpayment.

62. For the period 1st May 2018 to 30th April 2022, the statutory minimum wage for workers in Obede's category working in Nyeri was Kshs 21,175.15. Including a 15% house allowance, the minimum consolidated salary was **24,351.42**, pursuant to Legal Notice No. 2 of 2018.

63. Obede's 2022 pay slips show a salary of Kshs 22,000.00, which is below the statutory consolidated minimum of Kshs 24,351.42. Accordingly, he was underpaid and is entitled to compensation to the extent of the shortfall.

64.Regarding the period beginning 1st May 2022 to October 2023, when Obede left employment, the statutory minimum wage for workers in his category working in Nyeri was Kshs 23,716.20, as provided under Legal Notice No. 125 of 2022. Including a 15% house allowance, the minimum consolidated salary amounted to **Kshs 27,273.63**. This demonstrates that Obede was underpaid, and he is accordingly entitled to compensation for the shortfall.

65.In light of the foregoing, it is clear that Obede was underpaid in certain periods during his employment and the trial Court erred in finding otherwise.

Orders

66.In the final analysis, the Court partly allows both the Appeal and the Cross Appeal and makes the following orders: -

- a) The award of compensation equivalent to twelve (12) months' gross salary is set aside and substituted with an award of three (3) months' salary, amounting to Kshs 81,820.89 (27,273.63 × 3).**
- b) The Cross-Appellant is awarded Kshs 14,301.84 (Kshs 1,191.82 × 12 months) in respect of underpayments from 1st May 2017 to 30th April 2018.**

- c) **The Cross-Appellant is awarded Kshs 112,868.16 (Kshs 2,351.42× 48 months) in respect of underpayments from 1st May 2018 to 30th April 2022.**
- d) **The Cross-Appellant is awarded Kshs 94,925.34 (Kshs 5,273.63× 18 months) in respect of underpayments from 1st May 2022 to 25th October 2023, the date of termination of his employment.**
- e) **The award of unpaid salary for September and October 2023 is upheld at Kshs 44,000.00, noting that the salary underpayments have been factored in (d) above.**
- f) **The total decretal sum is determined at Kshs 347,916.23.**
- g) **Interest on the amount in (f) shall accrue at court rates from the date of this Judgment until full payment.**

67. Costs in this Court and at the trial Court shall be borne by the Appellant and shall be pegged on the final award.

DATED, SIGNED and DELIVERED at NYERI this 17th day of April 2026.

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STELLA RUTTO

JUDGE

In the presence of:

For the Appellant	Mr. Magua
For the Respondent/Cross Appellant	No appearance
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