

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

APPEAL E 076 OF 2025

TRANSPARES K LIMITED

APPELLANT

VERSUS

JOSEPH MRICHWA KATANA.....

RESPONDENT

JUDGMENT

Background

1. By a Memorandum of Claim dated 15th August, 2023, the Respondent sued the Appellant in the above- mentioned suit, seeking a declaration that the termination of his employment at the initiative of the Respondent was unfair, and compensatory reliefs amounting to KShs. 777,313.

2. The Appellant opposed the claim by filing a Statement of Response. It denied the Claimant's cause of action and entitlement to the reliefs sought.
3. At the hearing, the parties adopted their filed witness statements as their respective evidence in chief and tendered as documentary evidence the documents they had filed under their lists of documents.
4. After hearing the parties on their respective cases and considering their evidence and submissions, the learned trial Magistrate found in favour of the Respondent's case, declared that the termination of his employment was unfair, and directed that he be paid a cumulative sum of KShs.305,256 under the various heads of his claim. The judgment is the subject matter of the instant appeal.

The Respondent's case before the Lower Court

5. It was the Respondent's case that he was first employed by the Appellant as a long- distance truck driver on 2nd January 2017, at a monthly salary of Kshs. 35,000.

6. He worked continuously for the Appellant until 20th April 2021, when his employment was terminated by the Appellant in flagrant disregard of the prescripts of the law.
7. The Respondent stated that on 27th March, 2021, he was involved in a road traffic accident while in the course of his employment. As a result, he was admitted to hospital and discharged on 17th April 2021.
8. On 20th April 2021, when he reported back to work, he was summoned to the Appellant's Manager's office, Ms. Irene, who informed him that his services were no longer required as the injuries he had suffered could not allow him to properly perform his duties as a driver.
9. His termination was without a justifiable reason. He was not heard before his employment was terminated, contrary to the requirements of procedural fairness.
10. He further stated that during the tenure of his employment, the Appellant did not allow him at any point to take his annual leave. He further contended that despite the

Appellant deducting NSSF contributions, he did not remit the amounts deducted to the relevant Fund.

11. By reason of the premises, he contended that he was entitled to;

- I. One month's salary in lieu of notice.....KShs. 35, 222.
- II. Unpaid salary for 20 days worked in April, 2021...
KShs. 23, 480.
- III. Unpaid salary for March 2021.....KShs. 35,222.
- IV. Unpaid leave days during the 5 years.....KShs. 123, 270
- V. Compensation for unlawful termination.....KShs.
422, 664.00
- VI. Unremitted NHIF deductions.....KShs.
49, 400.00
- VII. Service pay.....
KShs. 88, 055.00

TotalKShs.

777.313.00

The Appellant's Case before the trial Court.

12. The Appellant called two witnesses to testify on its behalf. From the evidence of the two witnesses, it can be discerned that at all material times, the Respondent was employed as its heavy Commercial Driver from 9th October 2017 on fixed - term contracts.
13. The Respondent's last contract was for the year commencing 9th October 2020 with a basic salary of KShs. 30,627 and a house allowance of KShs. 4, 595, making a total of KShs. 35,222.
14. On 27th March 2021, the Respondent was involved in a road traffic accident while driving the Appellant's Motor Vehicle and was admitted to Hospital on 28th March 2021 and later discharged on 17th April 2021.
15. It was its further case that the Respondent did not furnish it with his medical report as required, but only invoices and a

discharge summary. On 4th August, the Appellant's Human Resources Manager [Rw 1, before the lower court] wrote to the Respondent requesting that he supply a detailed medical report from a doctor stating the progress of his treatment and the number of days he was required to be on sick leave.

16. Sometimes in September 2021, the Respondent, through one Faki Kombo, submitted treatment notes without the Medical Report from the Doctor, as requested.
17. The Respondent continued to receive his salary until February 2022, despite not being on duty. The salary could be paid into his account or in cash. His salary for September 2021 to January 2022 was paid in cash through the Respondent's Clerk, Faki Kombo. The salary for February 2022 was collected by the Respondent's daughter, Bahati Kazungu. After February 2022, the Respondent was advised that he would receive no further payments until he submitted a medical report outlining his medical condition. The Respondent never did so.

18. The Appellant did not terminate the Respondent's employment on 20th April 2021 as alleged by the latter. NSSF and NHIF remittances were dutifully made to the relevant Authorities as and when due.

19. The Respondent was accorded his leave days save for the year 2020.

The Judgment by the Lower Court.

20. As mentioned in the introductory section of this Judgment , upon hearing the parties on their respective cases and considering their evidence, the learned trial Magistrate found that the termination of the Respondent's employment was at the initiative of the Appellant, declared that the termination was unfair, and directed that the Respondent be paid various sums under the various heads of his claim

The Appeal

21. Aggrieved by the decision of the trial Court, the Appellant has impugned the Judgment, setting forth the following grounds;

- a) The learned trial Magistrate erred in law and in fact by shifting the burden of proof to the Appellant contrary to section 47[5] of the Employment Act.
- b) The Learned trial Magistrate erred in law and fact by holding that the Claimant had satisfied the burden of proof of unlawful termination as provided for under Section 47[5].
- c) The Learned trial Magistrate erred in law and in fact by holding that the Appellant had unlawfully and unfairly terminated the Respondent.
- d) The Learned trial Magistrate erred in law and in fact by misapprehending the documentary evidence presented by the Appellant.
- e) The Learned trial Magistrate erred in law and in fact by awarding notice pay.
- f) The Learned trial Magistrate erred in law and in fact by awarding compensation computed from the six-month balance of the Respondent contract.

g) The Learned trial Magistrate erred in law and in fact in holding that it was not disputed that the Respondent issued a demand letter upon the Appellant.

Determination and Analysis.

22. I have carefully considered the record, the grounds of appeal and the submissions filed herein, and hold that the appeal herein revolves around three principal issues, namely, did the Respondent discharge his legal burden under the provisions of Section 47[5] of the Employment Act? Was the termination of the Respondent's employment at the initiative of the Appellant unfair, and was the Respondent entitled to the reliefs awarded by the learned trial Magistrate?
23. The role of this Court, as a first Appellate Court, is to re-evaluate the material placed before the trial Court and reach its own independent conclusions. However, in doing so, it must not lose sight of the fact that it neither heard nor saw the witnesses testify, and must give due allowance.

24. Section 47[5] of the Employment Act establishes a dualistic framework for the burden of proof in employment termination suits. The initial burden of proof rests with the employee who claims unfair termination or wrongful summary dismissal to demonstrate that it occurred. Only after the employee satisfies this burden does the evidential burden shift to the employer to justify the termination.
25. In the case of **Galgalo Jarso Jillo versus Agricultural Finance Corporation [2021] eKLR**, the Court stated;
“Section 47[5] of the Employment Act sometimes presents a challenge regarding how to navigate the aspect of the burden of proof in addressing disputes arising from terminations. It does suggest two burdens: The employee has the burden of proving the unlawfulness of the termination; the employer has the burden of justifying the termination. The interpretation given to the section by the court is that all the employee needs to do in order to discharge the burden of proof on him/her is to place before the court prima facie evidence that the said termination

lacks substantive justification and or is procedurally flawed. Once the employee makes a prima facie case, the burden then shifts to the employer to justify the termination.”

26. I agree with the Appellant’s submissions that a failure by the employee to discharge their duty under this provision of the law would automatically result in the collapse of the employee’s case.
27. I have carefully considered the Respondent’s assertions before the trial Court concerning the lack of procedural fairness and substantive justification, in the process leading to the Appellant’s action to terminate his employment, and in the decision itself, respectively, and the evidence he adduced in support thereof, and wish to point out that he indeed demonstrated *prima facie* the deficiency.
28. By reason of the foregoing premises, I am not persuaded that the learned trial Magistrate failed to navigate with the burden of proof framework under the provision. Indeed, the

Judgment is explicit; he appreciated where the burden lay and at what time.

29. Having discharged his burden under the stated Section of the law, the burden of proof shifted to the Appellant to prove that: termination was in accord with the edicts of procedural fairness [Section 41 of the Employment Act], the reason for the termination [Section 43], that the reason was valid and fair [Section 45], and that the reason was justified [Section 47[5]. See also **Pius Machafu Isindu vs Lavington Security Guards Limited [2017] eKLR.**
30. The Appellant asserted that, contrary to the Respondent's assertion, it did not terminate his employment. The Respondent, on the other hand, averred that his employment was terminated verbally on 20th April 2021. The Respondent's witnesses state in their witness statements that the Respondent earned a salary up to February 2022, and as such, his assertion that his employment was terminated on the stated date is sound.

31. This Court notes the contents of paragraph 19 of the witness statement of the Appellant's witness, Irene W. Kariuki. She clearly states that the Respondent did not work for the Appellant since 27.03.2021, and as such would not be entitled to leave benefits for a period beyond this date. This, in my view, gives a clear impression that, beyond the date, the Respondent was no longer an employee of the Appellant to be entitled to benefits like leave or payment in lieu thereof.
32. I have carefully considered the evidence of the Appellant's two witnesses. It does not at all show how the separation occurred. In my view, the separation was deliberate and occurred in ignorance of the legal burdens that were on the Appellant pursuant to the provisions of the law mentioned hereinabove. By adopting this approach, the Appellant did not place forth any evidence to discount the Respondent's claim of unprocedural and substantively unfair termination. It therefore did not discharge the burden under sections 41, 43, 45, and 47[5] of the Employment Act. The learned trial

Magistrate's conclusion, though from a different perspective, that the termination was unfair, cannot be faulted.

33. The Appellant contends that the learned trial Magistrate erred in awarding the Respondent six months' salary as compensation for unfair termination, being the six months remaining until the expiry of the contract under which he served.
34. Section 49[1] of the Employment Act confers on the Courts the authority to grant an employee who has successfully challenged their employer's decision to terminate their employment compensatory relief for unfair termination. However, it is important to note that this authority is discretionary and exercised on a case-by-case basis. Section 49 of the Act sets out the factors a court would consider when exercising its discretion. One factor is the length of the period the employee expected to remain in the employer's employment. By considering the six months, the remainder of the contract was not a failure to consider a relevant

matter, nor was it a consideration of an irrelevant matter. This Court declines to interfere with a discretionary award.

35. The Respondent's employment was terminable by notice under section 35 of the Employment Act. Undoubtedly, no notice was issued. Having found that the termination was unfair and without notice, I am not persuaded to hold that the improperly awarded.

36. By reason of the foregoing premises, I find the appeal lacking in merit. It is hereby dismissed with costs.

Read Signed and Delivered this 30th Day of April 2026.

OCHARO KEBIRA

JUDGE