



REPUBLIC OF KENYA



**KENYA LAW**  
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**Finsbury Trading Limited v Kinama (Appeal E002 of 2024)  
[2025] KEELRC 161 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 161 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E002 OF 2024  
M MBARŪ, J  
JANUARY 30, 2025**

**BETWEEN**

**FINSBURY TRADING LIMITED ..... CLAIMANT**

**AND**

**AMOS KITONGA KINAMA ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. R. N. Akee delivered  
on 6 December 2023 in Mombasa CMELRC Cause No.162 of 2021)*

**JUDGMENT**

1. The appeal arises from the judgment delivered on 6 December 2023 in Mombasa CMELRC No.162 of 2021. The appellant is seeking that the judgment be set aside and the claim dismissed with costs.
2. The background to this appeal is a claim filed by the respondent, Amos Kitonga Kinama, before the trial court. His case was that the appellant employed him on 31 May 2019 as a loader earning Ksh.15, 000 per month. He worked until 26 January 2021, when the appellant unfairly terminated his employment without notice or hearing and no payment of terminal dues. His case was that on 24 January 2021, his colleague had stolen goods while on duty. When he reported on 26 January 2021, he was confronted by the manager who terminated his employment or required him to produce his colleague who had disappeared with the stolen goods. The respondent reported the matter to Changanwe police station and returned to work but was forced out of the premises. He reported the matter to the labour office, but the appellant refused to attend. He claimed for the following dues;
  - a. Notice pay Ksh.15,000;'
  - b. Unpaid salary for January 2021 Ksh.15,000;
  - c. House allowance for 19 months Ksh.42,000;
  - d. Unpaid leave for 2 years Ksh.21,000;



- e. Unpaid overtime for 19 months Ksh.138,282;
  - f. 12 months compensation Ksh.180,000;
  - g. Service pay ksh.15,000
  - h. Certificate of service;
  - i. Costs of the suit.
3. In response, the appellant admitted that the respondent was employed at a wage of Ksh.15, 609 per month from 31 May 2019. He worked until 21 January 2021, when, without leave, he absconded duty. The respondent, jointly with another employee, Isaac Mwenda, stole goods from the appellant's customer when they were assigned to deliver them. They failed to deliver the goods, and when the director summoned them, they failed to give satisfactory responses for their gross misconduct. They refused to disclose the whereabouts of the stolen goods. They fled from the premises to date. The appellant demanded that they return the stolen goods, but they failed. Efforts to trace the respondent did not bear fruit, and the matter was reported to the Labour office. The respondent was aware that stealing was contrary to the appellant's policy and signed it on 31 May 2019 upon employment. The claims are unjustified since the respondent absconded duty following the theft. Work was from 8 am to 5 pm without overtime. The wage paid was consolidated, including the house allowance. There were statutory payments, and the claims made were not justified for leaving employment at his volition.
  4. The trial court heard the parties and held that employment was terminated unfairly and without due process. The court awarded general damages of Ksh.300 000 plus costs and interests from the date of filing suit.
  5. Aggrieved, the appellant filed the appeal on the basis;
    1. The learned magistrate erred in fact by misapprehending the factual evidence and proceeding to decide and finding of wrongful and unfair dismissal.
    2. In arriving at the determination of wrongful dismissal and unfair termination, the court erred in law and fact by failing to appreciate that the respondent had admitted in his oral testimony during cross-examination that he had not been terminated when he was summoned to the appellant's director's office.
    3. In failing to consider the above-mentioned express admission, the court erred in law and fact by consequently awarding general damages despite the respondent's not requesting them in his statement of claim.
    4. The court erred in law and fact in awarding the respondent general damages for wrongful and unfair termination contrary to the principles concerning wrongful dismissal as set down under the provisions of Section 49 of the *Employment Act*.
    5. The court erred in law and fact by placing too much reliance on the respondent's statements instead of on the facts, substance, and weight of the evidence adduced by the appellant.
    6. The court erred in law and fact by failing to consider conclusive documentary evidence that the resultant action of summoning the respondent to the appellant's director's office was in line and accordance with the appellant's general rules and regulations, tendered by the appellant as the appellant exhibit N. 4, proving that the respondent was, in fact, summoned to be verbally warned of the theft and not terminated.



7. The trial court erred in law and fact and misapplied the discretion in awarding interests on the decretal amount from the date of filing the suit despite the claim being non-liquidated.
  8. The court erred and misdirected itself by ignoring the appellant's written submissions.
  9. The court erred in delivering judgment without legal basis or sound reasoning, which went against the meaning and import of fair play in the court of delivery of justice.
  10. The entire judgment was based on faulty appreciation of the law, resulting in an injudicious direction exercise.
6. Both parties attended and agreed to address the appeal through written submissions.
  7. The appellant submitted that the trial court failed to consider the respondent's admission that he was invited to attend before the director's office, and there was no termination of employment as alleged. The respondent left employment at his volition as opposed to terminating employment. This followed a case of theft, and the goods were not recovered. In the case of Ronald Nyambu Daudi v Tornado Carriers Limited Cause No.236 of 2016, the court held that it is not sufficient to state the employee left on his volition but must demonstrate the efforts taken to address such desertion. The appellant tried to trace the respondent through his cell phone without success. These efforts were admitted in evidence; hence, the burden of proof shifted to the respondent under Section 47(5) of the [Employment Act](#) as held in Simon Mbithi Mbane v Inter Security Services Limited [2018] eKLR.
  8. The appellant submitted that the award of general damages was not pleaded or justified. In the case of Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR, the court held that an award of general damages is not awardable for wrongful termination of employment. This position is reiterated in Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR that under Section 49 of the [Employment Act](#), upon a finding of unfair termination of employment, compensation is awardable and not general damages. In this case, the trial court erred in the final award, and the appeal should be allowed as prayed.
  9. The respondent submitted that the termination of employment was unfair and contrary to due process, and the trial court addressed the matter well. The respondent was an employee of the appellant as a loader. There was no proof of theft as alleged, and when he reported to work, the manager directed him to produce the employee who had stolen the goods or never report back to work. In the case of Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] eKLR, the court held that under Section 47(5) of the [Employment Act](#), the employee has the burden of proof that there is unfair termination of employment upon which the employer must justify the reasons leading to termination of employment. In this case, there was no justification for termination of employment.
  10. In the case of Josephine M. Ndungu & others v Plan International Inc [2019] eKLR, the court held that the employer must provide evidence and establish the validity of the termination in terms of Sections 43 and 45 of the [Employment Act](#). In this case, the appellant failed to discharge the burden, resulting in unfair employment termination. The appellant knew the whereabouts of the respondent but failed to summon him for a disciplinary hearing was held in Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR and Walter Ogal Anuro v Teachers Service Commission [2013] eKLR.
  11. The trial court made correct findings in this case, and the appeal should be dismissed with costs.



## Determination

12. This is a first appeal. The role of a first appeal court as restated in *Selle & Another v Associated Motor Boat Co. Ltd. & Others*(1968) EA as follows:

...An appeal to this court ... is by way of retrial, and the principles upon which this court acts in such an appeal are well settled. This court must reconsider the evidence, evaluate it, and conclude. However, it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance to this respect; in particular, this court is not necessarily bound on some point to take account of specific circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistency with the evidence in the case generally.

13. The appeal is that the respondent absconded duty after being summoned by the director on 26 January 2021 to explain the whereabouts of goods that were to be delivered to a customer but were not delivered. The respondent stated that his colleague had stolen the goods, but they were not recovered. He then voluntarily left his employment, and efforts to trace him did not bear fruit.
14. The respondent, for his part, testified that he was not involved in loading the alleged stolen goods and only learnt that his colleague had failed to make the delivery. He reported the matter to the police to clear himself, but when he returned to work, his manager sent him away, effectively terminating his employment.
15. Where an employer alleges that the employee has absconded or abandoned his employment, the employer must demonstrate such matter. The principle is that the employee does not terminate his employment where there is abscondment or abandonment. The employer must bring the employment relationship to a close as held in the case of *Haji v Syed Hassan Zaidi t/a Imamia Electrical & Hardware* [2023] KEELRC 1200 (KLR); *Ayub Kombe Ziro v Umoja Rubber Products Limited* [2022] KEELRC 141 (KLR); and *Ibia v Resort Kenya Limited* [2022] KEELRC 1717 (KLR) where the courts have held that It is not open to the employer to simply plead abandonment of duty by the employee as evidence of termination of the contract. The employer must demonstrate that he has taken reasonable steps to find out the employee's whereabouts and required him to resume duty to no avail. The employer must, where possible, demonstrate that he has addressed the matter of the employee's unexplained absenteeism through the available internal disciplinary channels. Where such efforts fail, recourse is issuance of notice terminating employment with a copy to the Labour Officer in terms of Section 18(5) (b) of the *Employment Act*.
16. The employer must bring the employment relationship to a close. By application of Section 18(5) (b) of the *Employment Act*, the employer is secured from an employee who is alleged to have voluntarily absconded duty without notice;
- 5) Upon the termination of a contract of service—
- (a) ...
- (b) by dismissal, the employer shall, within seven days, deliver to a labour officer in the district in which the employee was working a written report specifying the circumstances leading to, and the reasons for, the dismissal and stating the period of notice and the amount of wages in lieu thereof to which the employee would, but for the dismissal, have been entitled, and the report shall specify the amount of any wages and other allowance earned by him since the date of the employee's dismissal.



17. In this case, the findings that there was an unfair termination of employment contrary to Sections 41, 43, and 45 of the *Employment Act* are correct, without the appellant discharging its legal duty.
18. The learned magistrate analyzed the evidence well and concluded that upon unfair termination of employment, the available remedies are under Section 49 of the *Employment Act*. However, the court made an award of general damages. This was not pleaded and did not align with Section 49 of the *Employment Act*. It was a complete departure from the principles upon which the claim was premised.
19. In addressing a similar matter, the Supreme Court, in the case of Kenya Ports Authority v Munyao & 4 others [2023] KESC 112 (KLR), held that;

... Having keenly perused the provisions of section 49 of the *Employment Act*, we have no doubt that once a trial court finds that a termination of employment is wrongful or unfair, it is only left with one question to determine, namely, what is the appropriate remedy? The Act provides several remedies for unlawful or wrongful termination under Section 49, and it is up to the judge to exercise his discretion in determining whether to allow any or all of the remedies provided thereunder. To us, it does not matter how the termination was done, provided the same was challenged in a court of law, and where a court found the same to be unfair or wrongful, section 49 applies. ...

20. Under these provisions, compensation is awardable. However, concerning the award of general damages, the Supreme Court held that;

Whereas the *Employment Act* is expressive of the rights under Article 41, we find that damages under the head of Article 41, as a constitutional provision, ought to be specifically pleaded and proved. Any other constitutional provisions that would have been infringed can equally be canvassed alongside and under this head. This is different and distinguishable from the provisions under section 49, as read in section 50 of the *Employment Act*, which are limited to the provisions under the *Employment Act*. The wording of the *Employment Act* under section 49 only relates to an instance where an employee has been terminated. This court determined in Ken Freight (E.A) Limited v Benson K. Nguti (supra) that section 49 of the *Employment Act* is applicable upon the finding that a person has been unlawfully terminated. ...

The wording of section 12 grants the employment and labour relations court power to issue such orders as contemplated under the Act and any other written law; it also grants the court jurisdiction to issue any appropriate relief as it may deem fit.

...

30. From the above analysis and the wording of section 49, it is clear to us that section 49 applies to only instances as have been set out under the Act; section 49 only applies where an employee is terminated; in any other instance, the court is expected to exercise its discretion as granted by the Constitution, the Employment and *Labour Relations Act* and any other statutory provisions. In exercising such judicial discretion, a judge or magistrate bears the burden of accounting for their decision, and to discharge this burden, the judge or magistrate ought to explain the basis of their decision.
31. In this regard, the respondent did not plead to any constitutional violations or the remedy of general damages. The trial court erred in allocating general damages despite a finding that the remedies available were under Section 49 of the *Employment Act*.
32. The award of Ksh.300, 000 has no legal justification.



33. The finding that there was unfair termination of employment that was devoid of due process avails the respondent notice of pay and compensation under the provisions of Sections 45 and 49 of the *Employment Act*.
34. The respondent claimed notice pay of Ksh. 15, 609, as confirmed by the appellant, which is due.
35. The respondent worked from 31 May 2019 to 26 January 2021, a period of less than two years. His case revolved around the loss of goods, and he reported the matter to the police station to clear his name. Although he was invited to attend before the managing director, as analyzed above, there was no due process. He is entitled to compensation at three months' wages, all at Ksh.46, 827.
36. The reasons leading to the termination of employment were addressed, and the trial court should have analyzed each claim on the merits. Whatever reasons led to the termination of employment, employment claims, unlike commercial disputes, must be addressed on the merits. A general award of damages does not suffice.
37. The appellant's claim for unpaid wages for January 2021 is not supported by evidence. For work done until 26 January 2021, the respondent was entitled to his earned wages. For the 26 days, the sum of ksh.13,000 is due.
38. On the claim for a house allowance of 15 per cent each month for 19 months, the minimum wage due to the respondent as a loader working in Mombasa is Ksh.13, 572.90 plus the due house allowance of Ksh. 2, 035.80. The gross wage is Ksh.15, 608.70, and the appellant paid Ksh.15, 609. This is the wage paid by the appellant, and a payment statement filed confirms this fact. As alleged, there was no underpayment or a separate house allowance due to the respondent.
39. On the claim for overtime pay, the respondent argued that he worked overtime for 3 hours each day. He did not give his start or end hours. The appellant's evidence was that the working hours were from 8 am to 5 pm. This evidence is more plausible and was not challenged.
40. On the claim for untaken leave days for 2 years, the appellant, as the employer, should have submitted work records on how accrued leave days were allocated. For the 19 months, based on Section 28(2) of the *Employment Act*, the appellant accrued 35 leave days. On the wage of Ksh.15, 609 the due leave pay is Ksh.22, 585.50
41. The payment statement filed by the appellant indicates remittances of statutory dues on the claim for service pay. Under Section 35(5) and (6) of the *Employment Act*, service pay is not due to the respondent.
42. A certificate of service is due at the end of employment, whatever reason led to unfair termination. The respondent should visit the shop floor for clearance and the certificate to be issued.
43. On the findings that there was unfair termination of employment, the trial court's costs are as awarded, save no interests are due. The appeal is partially successful, and hence, each party should bear its costs.
44. Accordingly, the judgment in Mombasa CMELRC 162 of 2021 is hereby reviewed in the following terms;
  - a. There was unfair termination of employment;
  - b. Compensation Ksh.46,827;
  - c. Notice pay Ksh.15,609;
  - d. Pay for January 2021 Ksh.13,000;



- e. Leave pay ksh.22,585.50;
- f. Certificate of service;
- g. Costs of the lower court proceedings;
- h. For the appeal, each party bears its costs.

**DELIVERED IN OPEN COURT AT MOMBASA ON THIS 30 DAY OF JANUARY 2025.**

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**M. MBARŪ**

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**JUDGE**

