



**Dakawou Transport Limited v Kithuku (Appeal E060 of 2024)
[2025] KEELRC 452 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 452 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E060 OF 2024
M MBARŪ, J
FEBRUARY 20, 2025**

BETWEEN

DAKAWOU TRANSPORT LIMITED APPELLANT

AND

SAMMY MUNYOKI KITHUKU RESPONDENT

*(Being an appeal from the judgment of Hon. D.O. Mbeja delivered
on 29 February 2024 in Mombasa CMELRC No.E393 of 2021)*

JUDGMENT

1. The appeal arises from the judgment delivered on 29 February 2024 in Mombasa CMELRC No.E393 of 2021. The appellant is seeking the judgment to be set aside and substantiated with an order dismissing the claims with costs.
2. The background to the appeal is a claim filed by the respondent. His case was that on 5 March 2018, he was employed by the appellant as a mechanic at a monthly wage of Ksh.27, 000. His workstation was in Changamwe working from 8 am to 8 pm for 7 days a week. On 21 March 2021, the respondent reported to work, that there was a motor vehicle that had stalled at the gate and he started repairing it as directed by the operations manager, Mohamed. However, Mohamed started insulting him and stated that he was not the right mechanic for the repairs. He called another mechanic and directed the respondent to hand over his work tools and leave. On 27 April 2021, the respondent returned for his terminal dues and the manager, Ali paid him Ksh.10, 050 without further communication. He claimed that termination of employment over alleged poor performance was not justified. He claimed the following terminal dues;
 - a. Notice pay Ksh.27,000;
 - b. Unpaid leave for 3 years ksh.65,422.98;



- c. House allowance for 36 months Ksh.145,800;
 - d. Unpaid public holidays Ksh.31,153.80;
 - e. Overtime for 36 months Ksh.228,980.43;
 - f. Service pay for 3 years ksh.46,730;
 - g. 12 months compensation Ksh.702,000;
 - h. Certificate of service;
 - i. Costs of the suit.
3. In response, the appellant admitted that the respondent was an employee working in Changamwe from 8 am to 5 pm 6 days a week. All employees were entitled to a day off each week. The respondent reported to work on 21 March 2021, but the alleged directions from the operations manager were not issued as alleged. The respondent was careless in his work, and the appellant officer corrected him, as was the norm. He opted to leave work upon resignation through a letter dated 21 March 2021. He returned on 27 April 2021 and was paid his terminal dues of ksh.26, 300 and his wages for March 2021. Employment is terminated through resignation, and the claims made are without merit.
 4. The trial court heard the parties, delivered judgment, and held that there was unfair termination of employment with an award of Ksh.957, 981 but the claims for service pay, public holidays and leave were declined. The award included payment for;
 - a. Notice pay;
 - b. Unpaid overtime;
 - c. 12 months compensation;
 - d. Costs plus interests from the date of filing suit.
 5. Dissatisfied with the judgment, the appellant has ten (10) grounds of appeal that the learned magistrate erred in accepting uncorroborated evidence of the respondent in finding unfair employment termination. The court failed to appreciate that the respondent resigned from his employment, and hence, the awards were not justified and should be set aside with costs.
 6. Both parties attended and agreed to address the appeal through written submissions.
 7. The appellant submitted that upon the respondent's resignation, he was paid his terminal dues and the employment relations severed. Section 45(2) of the *Employment Act* provides that termination of employment is unfair if the employer fails to give a valid and fair reason leading to termination of employment. Upon his resignation, the respondent was released, and there was no case of unfair termination of employment. In the case of *Ayonga v Falcon Signs Limited* [2023] eKLR, the court held that resignation is one mode of terminating employment. Upon release, the employee cannot turn around and claim unfair termination of employment.
 8. Upon resignation, the appellant was bound to accept it as failure to do so would amount to servitude contrary to Article 30 of *the Constitution* as held in *Bernard Gachuri v Jamii Bora Bank Limited* [2020] eKLR and a violation of Article 36 of *the constitution* as held in *David K Cheruiyot v Barclays Bank of Kenya Limited* [2015] eKLR.
 9. Under Section 47(5) of the *Employment Act*, the respondent failed to prove a prima facie case of unfair termination of his employment. Without discharging his burden of proof, the appellant had no burden



- to discharge as held in *Kennedy Maina Mirera v Barclays Bank of Kenya Limited* [2018] eKLR. The reliefs granted by the trial court were not justified. Notice pay and compensation only accrue when termination of employment is found unfair, which is not the case here but a resignation.
10. The respondent was paid a consolidated wage and was working from 8 am to 5 pm for 6 days a week without overtime, and on all public holidays, the premises were closed. The appeal should be allowed with costs.
 11. The respondent submitted that he objected to the production of the alleged letter of resignation, which did not form part of the record. There was no proof that there was a resignation but an unfair termination of employment that lacked due process and was contrary to the mandatory provisions of Sections 35, 41, 43 and 45 of the *Employment Act*. In the case of *Des Raj Sharma v Reginam* [1953] EACA, the court held that an exhibit marked for identification is not formally proved. The trial court stood down the appellant's witness to produce the original document but failed to do so. The court cannot rely on irregularly filed documents.
 12. The respondent submitted that his employment was terminated contrary to the law. In the case of *Janet Nyandiko v Kenya Commercial Bank Limited* [2017] eKLR, the court held that sections 41 and 45 of the *Employment Act* require the employer to ensure valid and fair reasons before termination of employment. In this case, without due regard to the law, the trial court's award against the appellant was justified. The appeal should be dismissed with costs.

Determination

13. As a first appeal, the court must analyse the record and review the findings with a conclusion. However, it should be considered that the trial court had the opportunity to hear the witnesses.
14. The appellant asserts that the respondent resigned from his employment; hence, there is no case of unfair termination of employment as alleged.
15. The respondent, on his part, has challenged the filed letter of resignation. He contested that he did not resign, but his employment was unfairly terminated.
16. Indeed, a resignation is a valid mode of terminating employment. The employer is bound to accept the notice subject to the employee serving a notice period, payment in lieu thereof or application of Section 36 of the *Employment Act* where, by mutual agreement, parties agree on a separation.
17. Before the trial court, the appellant produced a letter dated 21 March 2021. The respondent objected to the document's production and asked for the original record.
18. The trial court stepped down the witness, Mohamed Hussein, for the appellant with directions that;

Witness stood down to enable him to furnish the court with the original document filed on 1.1.2022. ...

On the next hearing date, the appellant closed its case.

The authenticity of the letter of resignation remained balanced.
19. Contested, without the original record alleged to have been submitted by the respondent, a crucial link to the claim that there was unfair termination of employment countered with the notice of resignation became a significant issue for determination. In the trial court's judgment, this issue has not been addressed. The alleged notice of resignation was not produced or addressed with a conclusion.

The facts, as stated by the respondent, stand.



20. He left employment upon being directed by his manager to leave following poor performance of his duties.
21. Under Section 41 of the *Employment Act*, where an employer alleges poor or careless performance of duty, the burden is on such party to prove what measures were taken to support the employee to improve as held in *Population Services Kenya v Wetende & 2 others* [2024] KECA 450 (KLR). In the case of *Kwale International Sugar Company Ltd v Mbaya* [2024] KECA 795 (KLR), the court held that the employer did not adduce any evidence to show that there were measures in place to enable them to assess the employee's performance or indicate what measures were taken to address the alleged poor performance.
22. In this case, the mandatory provisions of Sections 41, 43 and 45 of the *Employment Act* were not adhered to. This resulted in unfair termination of employment.
The award of notice pay was justified at ksh.27, 000.
23. On the award of compensation, the 12 months awarded form the maximum available compensation under Section 49 of the *Employment Act*. Although the allocated award is at the trial court's discretion, such discretion must be judicially applied. The appropriate award should be justified as held in *Teacher Service Commission v Adhiambo* [2024] KECA 620 (KLR). The award of 12 months compensation is reserved for instances where the employer's conduct has been callous, actuated by ulterior motives, malicious or in bad faith. See *Munyua v Aruasa & 3 others* [2024] KECA 1696 (KLR).
24. In this case, the trial court did not give the rationale for the maximum award. This court is justified in interfering with the discretion. The respondent was paid his terminal dues immediately upon cessation of employment. He has worked for 3 years, and no record has been filed. This is required under Section 45(5) of the *Employment Act*; an award of 3 months is hereby found appropriate, all at ksh.81 000.
25. On the claims for unpaid leave for 3 years, no work records were filed to demonstrate the period the respondent took his annual leave. The legal duty to file records is on the employer under Section 10(6) and (7) of the *Employment Act*.
26. Section 28 of the *Employment Act* allows employees to have 21 annual leave days. However, Section 28(4) caps the accumulation of leave days to 18 months only. In this case, without any record of the respondent taking annual leave, he is entitled to 33 leave days at Ksh. 29,700.
27. Regarding the claim for a house allowance, the parties have not produced any employment contracts. The appellant admitted that the respondent was a mechanic working in Changamwe, Mombasa County. Under the Wage Orders applicable in March 2021, a mechanic had a basic wage of Ksh.18, 319.50 plus a 15 per cent house allowance of Ksh.2, 747.95 gross Ksh.21, 067.45. The respondent was paid Ksh.27,000 per month over and above the due minimum wage, and a claim over and above such wage is to seek unjust enrichment.
28. On the claim for work during public holidays, the appellant did not file any worksheets to confirm the days at work. Each public holiday worked as published by the Minister attracts a special rate of payment.
29. The respondent particularized the days he was at work during public holidays. Without records, the Ksh.31, 153.80 claim is reasonable and justified.
30. On the claim for overtime pay, the respondent based his claim on the fact that he worked from 8 am to 8 pm each day of the week. It is not humanly possible that for 3 continuous years, one is working nonstop for such timelines. Even when possible, overtime work was not the case here; the wage was paid



at Ksh.27, 000 per month was over and above the minimum due. Instead of earning Ksh.21, 067.45, the respondent earned Ksh.27, 000, which compensated him well for his labour.

31. In any event, claims for house allowance and overtime are continuing injuries which must be addressed within 12 months from the date of cessation under Section 89 of the *Employment Act*. See Kenya Railways Corporation v Ododa & 216 others [2024] KECA 1620 (KLR) and Ddaiddo v Bank of India (K) Ltd [2024] KECA 749 (KLR).
32. On costs, the claim for unfair termination of employment found with merit, costs are due save no interests should be awarded under Section 12(4) of the *Employment and Labour Relations Court Act* unless the claim is liquidated.
33. Accordingly, the judgment in Mombasa CMELRC E393 of 2021 is hereby reviewed in the following terms;
 - a. Employment terminated unfairly;
 - b. Compensation Ksh.81,000;
 - c. Notice pay Ksh.27,000;
 - d. Leave pay Ksh.29,700;
 - e. Certificate of service;
 - f. Costs of proceedings before the trial court as awarded to the respondent;
 - g. For the appeal, each party bears its costs.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 20TH DAY OF FEBRUARY 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

