



REPUBLIC OF KENYA



**KENYA LAW**  
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**Omar t/a Meat Magic Enterprises v Kalu (Appeal E088 of 2024)  
[2025] KEELRC 325 (KLR) (6 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 325 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E088 OF 2024  
M MBARÚ, J  
FEBRUARY 6, 2025**

**BETWEEN**

**MOHAMED HUSSEIN OMAR T/A MEAT MAGIC  
ENTERPRISES ..... APPELLANT**

**AND**

**KALU KOMBO KALU ..... RESPONDENT**

*(Being an appeal from the judgment of L. Sindani delivered  
on 28 March 2024 in Mombasa MCELRC E132 of 2020)*

**JUDGMENT**

1. The appeal herein arises from the judgment delivered on 28 March 2024 in Mombasa CMELRC E132 of 2020. The appellant is seeking that the judgment be set aside with costs.
2. The background of the appeal is a claim filed by the respondent on the basis that he was employed by the appellant as a meat salesman on 30 October 2018 at a wage of Ksh.16, 500. On 5 August 2020, the appellant informed him together with his workmates to go home as work had significantly reduced. He was never recalled back to work or paid terminal dues. There was no prior notice and the appellant did not follow the due process under Sections 41, 43, 44 and 45 of the *Employment Act*. He claimed the following;
  - a. One month notice pay Ksh.25,435.20;
  - b. Unpaid leave for 30 October 2018 to 30 October 2019 Ksh.20,543.67;
  - c. Unpaid prorated leave for 8 months Ksh.13,695.78;
  - d. Severance pay for one year Ksh.14,674.05;
  - e. Service pay for one year Ksh.14,694.05;



- f. House allowance for 20 months at 15% Ksh.76,305.60;
  - g. Underpayments for 20 months Ksh.178,704;
  - h. Unpaid public holidays Ksh.9,782.70;
  - i. 12 months compensation Ksh.305,222.40;
  - j. Costs of the suit.
2. In response, the appellant's case was that during the COVID period, work was reduced significantly, which affected business. They could not pay the respondent. This was communicated, but the respondent opted to abscond duty upon this information. Efforts to reach the respondent were fruitless, and the appellant was forced to look for somebody else to take up his responsibilities since they could not close the business. The respondent left his employment willingly, and no notice was issued terminating his employment. The wage paid included a house allowance, and the claim for notice pay and compensation was not justified due to the abandonment of employment. Annual leave was allocated, and employment did not provide for service pay. The wage is paid as per the scale.
  3. In the judgment, the trial court held that there was an unfair termination of employment that was not procedural and hence granted Ksh.564, 141 in terminal dues as claimed with costs and interests.
  4. Aggrieved, the appellant filed the appeal on the grounds;
    1. The learned magistrate erred in law and fact in not finding that the respondent had not proved his case to the required degree.
    2. The learned magistrate erred in fact and law in finding that the respondent's services were unlawfully terminated by the respondent.
    3. The learned magistrate erred in finding that the claimant was entitled to an award of Ksh.564, 141 without evidential proof and giving judgment in favour of the claimant as an employee who had been unfairly terminated.
    4. The learned magistrate erred in finding that the claimant absconded duty and that it was the respondent's duty to know the whereabouts of the claimant and the claimant was not entitled to any remedy.
    5. The learned magistrate erred in law and fact I finding that the respondent had worked for a long time and warding the maximum award of 5 months gross salary calculated at Ksh.225, 000 which is not mathematically correct.
    6. The learned magistrate erred in law and fact in shifting the burden of proof from the respondent then a claimant to the appellant then to the respondent.
    7. The learned magistrate erred in law and fact by treating the evidence tendered by the appellant so perfunctorily which made her arrive at a wrong and unjust decision.
    8. The learned magistrate erred in law and fact in wholly replying to the evidence by the claimant without considering the evidence of the respondent and their written submissions.
    9. The learned magistrate erred in law and fact in making findings which were a total misdirection from the provisions of the law.
  5. Both parties attended and agreed to address the appeal by way of written submissions.



6. The appellant submitted that section 109 of the *Evidence Act* places the burden of proof on the party who pleads, while section 47(5) of the *Employment Act* places the burden of proof on the employee who claims unfair termination of employment. Section 90 of the *Employment Act* requires a claim of unfair termination of employment to be addressed within 3 years. Upon a claim of unfair termination of employment, Section 43 of the *Employment Act* requires the employer to justify the grounds for termination. The trial court failed to find that the respondent did not prove his case to the required standard. On 5 August 2020, the appellant notified the respondent that there was reduced work and that he would be recalled once there was improvement. In evidence, the respondent confirmed that he got notice and that the appellant would pay NSSF. He also testified that he stopped going to work due to COVID. The burden of proof that there was unfair termination of employment was not discharged as held in *Kirugi & another v Kabiya & 3 others* [1983] eKLR.
7. The appellant submitted that the respondent deserted duty, and efforts to call him did not bear fruit. The appellant reasonably believed that he had left employment. Under Section 43(2) of the *Employment Act*, the appellant acted within reasonable cause, as held in *British Leyland UK Ltd v Swift* [1981].
8. The award of Ksh.564, 141 without evidential proof has no basis. Under Section 49 of the *Employment Act*, the award should be given a basis as held in *Kenya Ports Authority v Festus Kipkorir Kiprotich* [2014] eKLR. The trial court awarded the respondent notice pay of one month and 12 months compensation. In the case of *Galgalo Jarso Jillo v Agriculture Finance Corporation Cause No.13 of 2019*, the court held that annual leave should only be awarded up to 18 months. The conflation of service/ severance pay is a misnomer and should not apply to either. Each aspect is regulated by law.
9. The appellant submitted that for public holidays, the claim for overtime and work during public holidays should be rationalized and not duplicated, as held in *Edward Ochieng v Dan Okumu* [2022] eKLR. A claim for house allowances should be applied as a continuing injury under Section 90 of the *Employment Act*. In this regard, the trial court failed to outline the awards, and a global general award should be set aside and the appeal allowed with costs.
10. The respondent submitted that he was employed as a meat salesman at a wage of Ksh. 25,000. On 8 August 2020, he was informed that his work had significantly reduced and that he should go home. No notice was issued, nor was payment of terminal dues made. The appellant admitted that it sent the respondent home due to reduced work. There was no due process or payment of the terminal dues.
11. The respondent proved his case to the required degree, but the appellant failed to discharge its burden under Section 43 of the *Employment Act*. It did not justify the reasons leading to termination of employment. In the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR, the court held that the employee must be given due process before termination of employment. Under section 41 of the *Employment Act*, the employee is entitled to notice and reasons leading to termination of employment.
12. The award of Ksh.574, 141 is justified upon the parties' proper assessment of the claims and evidence. There was no proof that the respondent had absconded duty as alleged by the appellant. No evidence was demonstrated that there were efforts to find his whereabouts. Under Section 49(1) (a) of the *Employment Act*, the trial court had the discretion to award compensation as held in *Kenfreight (E.A) Limited v Benson K. Nguti* [2019] eKLR. The awards by the trial court were based on the last wage earned by the respondent. The appeal should be dismissed with costs.



## Determination

13. This is a first appeal. The court's mandate is to review, re-assess, and analyse the entire record and make conclusions. However, the trial court had to see and hear witnesses testify.
14. In this appeal, the issues that emerge for determination are whether the respondent discharged his burden of proof, whether there was unfair termination of employment, whether the award of Ksh.546, 141 was justified, and whether the appeal has merit.
15. The appellant's case is that work was reduced due to the COVID-19 pandemic, and in August 2020, the respondent was advised to go home to be recalled when work had improved. The respondent admits that on 8 August 2020, together with his colleagues at work, they were directed to go home due to reduced work. There was no written notice or payment of terminal dues.
16. Indeed, an employer is allowed under Section 40 of the *Employment Act* to lay off its employees due to operational requirements such as reduced work. This is a justified ground for termination of employment under Section 40 and Section 45(2) (b) of the *Employment Act* as held in the case of *Naima Khamis v Oxford University Press (E.A) Ltd* [2017] KECA 480 (KLR) and *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017] KECA 329 (KLR). However, the employer must notify the employee of the reasons leading to such operational requirements and the decision to terminate employment. Even where the layoff is temporary, the employer must ensure that the employee is notified.
17. In this case, the appellant's case is that the respondent left employment out of his own free will, and efforts to trace him were fruitless. Efforts to call him through his phone number did not bear fruit. He had effectively terminated his employment.
18. An employee who deserts work refuses to attend to his duties, or abandons employment commits gross misconduct contrary to Section 44 of the *Employment Act*. Such an employee is subject to summary dismissal. However, the employer has the burden to initiate the process. Leaving the employee at large only works to the detriment of the employer. The employer must bring closure to the employment relationship as held *Thoya v Delfy Security Limited* [2023] KEELRC 2691 (KLR); *John David Omanyala v Santram Hardware Limited* [2017] KEELRC 1467 (KLR); and *Opondo v Kizito* [2022] KEELRC 3933 (KLR).
19. The employer must demonstrate the efforts taken in addressing a case of an employee who has abandoned his employment. The contract under Section 10(3) of the *Employment Act* applies to getting the employee through the physical and postal addresses given at the start of employment. Where there is no written contract, the employer is violating the law. Where the employer cannot trace the employee, notice terminating employment must be issued to the last known address with a copy to the Labour Officer under the provisions of Section 18(5) (b) of the *Employment Act*,
  - (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.
20. These requirements are necessary to bring closure to the employment relationship.



21. Whatever reasons lead to loss of employment, the subject employee must be paid terminal dues under the law.
22. In this case, the appellant's case that the respondent abandoned employment is without due process. He is entitled to notice pay.
23. Without proof of the written reasons leading to loss of employment, whether by abandoning work or lay off due to reduced work, such resulted in unfair termination of employment. Under Sections 45 and 49 of the *Employment Act*, the respondent was entitled to compensation.
24. In this case, the trial court made a global award of ksh.564, 141. The claim arose out of unfair termination of employment. Each claim should have been addressed on its merits. A general or general award does not suffice in an employment claim as held by the Supreme Court in the case of Kenya Ports Authority v Munyao & 4 others [2023] KESC 112 (KLR) that upon the finding that there is unfair termination of employment, the remedies under Section 49 of the *Employment Act* should not be conflated under the court discretion to awards under Section 12 of the *Employment and Labour Relations Court Act*. Each claim has a legal underpinning and should be addressed, and a specific award should be allocated.
25. Based on the claim made and the finding that this was a case of unfair termination of employment, notice pay is due based on the last wage paid, which is ksh. 25 000.
26. The respondent worked for the appellant for five years, from 1 May 2015 to 5 August 2020. The trial court had given a basis for awarding five months' compensation but proceeded to tabulate the dues wrongly. The justification given is correct, save that this should add up to ksh.125 000.
27. On the claim for prorated leave for 5 years, indeed, under Section 28(4) of the *Employment Act*, leave should be accumulated up to 18 months. In this regard, the respondent is only entitled to 18 months of untaken leave days, which results in 33 leave days. On his wage of Ksh.25 000 per month, the leave pay due is Ksh.27 500.
28. Severance pay does not accrue upon the finding that this was a case of unfair termination of employment.
29. Equally, service pay is not due upon the respondent's admission that his statutory payment of NSSF and NHIF was remitted.
30. There is no employment contract on the claim for a house allowance and underpayments. Under the Wage Orders, employment is not regulated. The wage paid at Ksh.25 000 per month is over and above the minimum due to a protected employee such as the respondent. The claim for payment of a house allowance over and above the wage paid is unjust enrichment.
31. The appellant also raised the question of the claims for house allowance being contrary to Section 90 of the *Employment Act*. Indeed, where these were to be due, such accrues monthly and should have been addressed as continuing injuries as held in *The German School Society & another v OH any & another* [2023] KECA 894 (KLR); *Bichanga v Mount Kenya University* [2024] KEELRC 985 (KLR); and *Musee v International School Of Kenya Ltd* [2023] KEELRC 2102 (KLR). All continuing injuries must be addressed within 12 months from the cessation of such injury, wrong or damage.
32. On the claims for work during public holidays, the respondent particularized the special days that he was at work. The appellant did not file any worksheets to counter such a claim. The respondent was given the day off or compensated for working during such public holidays as gazette by the Minister, and in this regard, the claim for the 10 days is justified. Save, the wage applied for the multiplier is based



on the alleged underpayments, which is incorrect. On the salary of Ksh.25, 000 for work during ten public holidays, the respondent is entitled to Ksh.16, 667.

33. On the claim for costs, the respondent's claim was well-founded, and the costs awarded were justified. For the appeal, as outlined above, the basis of the global award was not specified, and hence, each party bears its costs.
34. Accordingly, the judgment in Mombasa MCELRC E132 of 2020 is hereby reviewed with the following awards;
  - a. Employment terminated unfairly;
  - b. Compensation Ksh.125,000;
  - c. Notice pay Ksh.25,000;
  - d. Leave pay ksh.27,500;
  - e. Public holidays Ksh.16,667;
  - f. Costs for the trial court as awarded;
  - g. For the appeal, each party bears its costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 6 DAY OF FEBRUARY 2025.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

