



**Muema (The Chairperson of Vescon One Residents Welfare Group) v Nzai  
(Appeal E250 of 2024) [2025] KEELRC 1240 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1240 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E250 OF 2024**

**M MBARÚ, J  
APRIL 30, 2025**

**BETWEEN**

**PHYLIS MUEMA ..... APPELLANT**

**THE CHAIRPERSON OF VESCON ONE RESIDENTS WELFARE GROUP**

**AND**

**KITSAO MENZA NZAI ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. N. R. Akee delivered  
on 28 June 2024 in Mombasa CMELRC No. E479 of 2022)*

**JUDGMENT**

1. The appeal arises from the judgment delivered on 28 June 2024 in Mombasa CMELRC No. E479 of 2022. The appellant is seeking that the judgment be set aside and the awards dismissed with costs.
2. The appeal is that the trial court erred in finding that the respondent was entitled to the relief sought without proof of any unfair termination of employment as alleged. The 12 months' compensation award was without proper justification since the respondent failed to attend work after taking annual leave. The award of house allowances of Ksh. 168,000 for 9 years failed to consider that these claims were time-barred. It was an error to award costs and interest contrary to well-established principles; hence, the appeal should be allowed.
3. The respondent filed a claim before the trial court on the basis that there was employment from 1 September 2012 as a learner in Mombasa. The wage paid was ksh.10, 000 per month before the minimum Wage Orders. The respondent worked until 1 January 2022, when the appellant unfairly terminated employment on the allegations that after the respondent went on annual leave on 2 September 2021, but was recalled back on 3 September 2021 and directed to train another employee, then proceeded on leave on 15 September 2021. Upon resuming duty on 15 October 2021, the respondent was told that there was no more work and should return on 1 January 2022. The appellant



gave Ksh. 4,400 as compensation and indicated there was no work. The respondent hence claimed there was unfair termination of employment without due process and claimed the following;

- a. Notice pay Ksh. 10,000;
  - b. House allowance for 9 years Ksh. 168,000;
  - c. Unpaid leave for 9 years Ksh.123,435;
  - d. Underpayments for 112 months Ksh.400,164;
  - e. 12 months' compensation Ksh.120,000;
  - f. Overtime of 1 hour for 112 months Ksh.407,568;
  - g. Unpaid NHIF for 112 months Ksh.56,000;
  - h. Service pay for 9 years Ksh.45,000;
  - i. Costs of the suit and interests.
4. The appellant submitted that the claim for house allowance for 9 years is time-barred as held in *Shanga Kitsao Mumba v Mabati Rolling Mill* [2017] eKLR. A claim for public holidays worked was too generalized. A claim for house allowance as a continuing injury should be addressed within 12 months upon cessation.
  5. The appellant submitted that they paid the respondent a gross pay inclusive of house allowance as held in *BIFU v Maisha Bora Sacco Society Ltd* [2018] eKLR. In this case, the wage of Ksh.11, 000 per month was inclusive of a house allowance. It accrued monthly, and any claim became a continuing injury that should be addressed within 12 months.
  6. The award of 12 months of compensation went against the laid-down principles. The respondent failed to resume work after taking his annual leave. Two notices were issued recalling him, but he failed to adhere to them. There was no termination of employment on the part of the appellant. The respondent deserted duty voluntarily; hence, no compensation is due, as held in *Azima Mohammed Akbar Khan v Victoria Furniture Ltd*. In awarding 12 months' salary, the trial court failed to consider factors set out under section 50 of the *Employment Act* and the employee's conduct before he abandoned his employment.
  7. The award of costs and interests from the date of filing suit was in error. In the case of *Radar Limited v Mwinyi Hamisi Sare Ali* [2024] eKLR, the court held that under Section 12(4) of the *Employment and Labour Relations Court Act*, the award of costs is discretionary, and reasons for the award should be stated. In this case, no reasons are given for the awarded costs or interests.
  8. In response, the appellant's case was that the respondent was employed as a cleaner and paid Ksh. 11,000 per month. The respondent would complain upon allocation of duties, claiming old age. A disciplinary committee was called on 14 December 2021, and it was resolved that the respondent report back to work in January 2022 and work for 6 months, since he was due for retirement. He did not report back to work. There was no termination of employment as alleged. The appellant wrote to the respondent twice on 9 November 2022 and 13 January 2022, but he failed to report back, which was taken as resignation. The wage included a house allowance, and the claims were unjustified.
  9. The respondent submitted that upon the claim of unfair termination of employment, the burden shifts to the employer to prove and justify the reasons under section 47(5) of the *Employment Act*, as held in *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR. In this case, the appellant



did not prove the reasons for the respondent's termination of employment. The notices alleged to have been issued by the appellant did not address any workplace misconduct. Where the appellant knew the respondent's whereabouts, nothing was done to address any alleged wrongdoing.

10. The case where the respondent resigned from his employment is without proof. No notice was issued to this effect. In the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR, the court held that where there is alleged misconduct or gross misconduct, the employer must give notice to the employee to attend and make their representations.
11. The employment was terminated unfairly without discharging the requisite mandate, and the award allocated is justified. The appeal is without merit and should be dismissed with costs.
12. In judgment, the learned magistrate held that there was an unfair termination of employment and that the respondent was entitled to compensation of Ksh. 120,000, a house allowance of Ksh. 168,000, plus costs and interests from the date of filing suit.

### **Determination**

13. This is a first appeal. It requires a broad and exhaustive examination, reevaluation, and analysis of the entire record to allow a conclusion based on the given facts and the applicable law, as held in *Mombasa Water Products Ltd v Kenya National Highways Authority* [2025] KECA 663 (KLR).
14. The appellant's case is that the respondent took his annual leave and failed to resume work. On 14 December 2021, he was invited to a disciplinary hearing, and it was resolved that he should report back in January 2022 to work for 6 months towards retirement. He, however, did not resume duty.
15. The case also states that the appellant wrote two letters to the respondent on 9 November 2022 and 13 January 2022. The letters filed are dated 9 and 13 January 2022.
16. These letters indicate that the respondent was absent from work without permission. The letters threatened that failure to resume work would attract a severe sanction.
17. No sanction issued. The appellant assumed the respondent had resigned from his employment, even though no notice was issued.
18. Absence from work without authorisation by the employer is defined under Section 44(4) (a) of the *Employment Act* as gross misconduct. The employee must be invited to attend and address. Where the employee refuses to address the gross misconduct, notice of summary dismissal must issue as held in *Kensalt Limited v Mwaruwa* [2024] KEELRC 1367 (KLR) that;

The employee does not terminate his employment through absenteeism or abandonment of work. The employer must remain proactive and secure itself through the law. Absenteeism and absconding duty are acts of gross misconduct that the employer must address.

19. Under section 18(5) (b) of the *Employment Act*, the employer must close the employment relationship. If the employee is alleged to be absent from work upon notice to resume duty, yet the employee persists, the employer is required to issue notice and serve the labour officer:

- (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. In this case, upon the notices dated 9 and 13 January 2022, the appellant did not address the continued alleged absence from duty. The respondent's evidence was that he reported back on 1 January 2022 and was sent away. Without the requisite statutory notice under sections 44 and 18 of the *Employment Act*, the court must believe the respondent's record of events.
21. Employment was terminated without due process and contrary to the law.
22. The respondent was entitled to compensation under Sections 45 and 49 of the *Employment Act*.
23. Indeed, on the award of 12 months' compensation, as submitted by the appellant, the court must give reasons justifying the maximum award. This being the maximum available, allocating the highest must have a basis.
24. The trial court does not give any reasons whatsoever for the award of 12 months. This discretion can hence be interfered with. The respondent worked for the appellant for 9 years. No record is filed on his conduct as required under Section 45(5) of the *Employment Act*. Thus, a ward of 93 months' gross salary is justified.
25. On the claim for house allowance, indeed, this is a continuing injury that arises monthly and must be claimed within 12 months from the date of cessation under Section 89 of the *Employment Act*. The Court of Appeal reinforced this position in the case of Kenya Railways Corporation v Ododa & 216 others [2024] KECA 1620 (KLR).
26. In this case, the respondent claimed he earned a basic Ksh wage. 10,000, while the appellant argued that they paid the respondent a gross salary of Ksh. 11,000.
27. The appellant did not file any payment statement to support the Ksh. 11,000 monthly payment.
28. The respondent filed his payment statement for November 2019 for Ksh. 10,000 per month.
29. In January 2022, a cleaner working in Mombasa earned a basic wage of Ksh. 13,752.90 per month. The due house allowance is Ksh. 2,035.95, and the total gross salary is Ksh. 15,608.85 per month. There was an underpayment of wages by Ksh. 5,608.86 per month.
30. Applying the provisions of section 89 of the Act and the underpayment being a continuing injury, the respondent can only claim for the 12 months before termination of employment. For the 12 months, the total underpayment of wages is Ksh. 67,306.10.
31. On this basis, the compensation due is based on the gross wage of Ksh.15, 608.65 x 3 = Ksh. 46,826.55. Notice pay is due at ksh.15, 608.85.
32. The Memorandum of Claim did not particularise the overtime claim; the respondent only made a general claim.
33. On the claim for unpaid NHIF dues, these are not due to the employee but the statutory body.
34. As analyzed above, the appellant did not file a payment statement for the claim for service pay. The statement filed by the respondent only accounts for the basic wage.
35. Under section 35 of the *Employment Act*, service pay for each full year worked is due. He has based the claim on the paid wage, which is awarded at ksh.45 000.



36. The main issue in dispute regarding the claim for unpaid leave for 9 years is that after taking his annual leave, the respondent was not allowed back at work. He enjoyed his annual leave. To claim under this provision is not justified.
37. On the award of costs, as submitted by the appellant, costs before this court are regulated under Section 12(4) of the *Employment and Labour Relations Court Act*. These are discretionary and reasons for the award must be given.
38. In this case, the appeal analysed as above, each party should bear its costs for the appeal and the trial court.
39. Accordingly, the appeal addressed, the award of the trial court is reviewed in the following terms
  - a. Compensation Ksh.46,826.55;
  - b. Notice pay Ksh. 15,608.85;
  - c. Service pay Ksh.45,000;
  - d. Underpayments include the house allowance Ksh. 67,306.10.
  - e. Each party to bear its costs for the appeal and trial court costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 30<sup>TH</sup> DAY OF APRIL 2025**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

