



**Sifa Investment Limited v Mutuku (Appeal E222 of 2024)
[2025] KEELRC 1231 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1231 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E222 OF 2024**

**M MBARÚ, J
APRIL 30, 2025**

BETWEEN

SIFA INVESTMENT LIMITED APPELLANT

AND

JOSEPH MUNYAO MUTUKU RESPONDENT

*(Being an appeal from the judgment of Hon. R. N Akee delivered
on 30 September 2024 in Mombasa CMELRC No. 447 of 2018)*

JUDGMENT

1. The appeal arises from the judgment delivered on 30 September 2024 in Mombasa CMELRC No. 447 of 2018. The appellant seeks that the judgment be set aside or reviewed because the findings of unfair termination of employment were in error, and the award of Ksh. 290,777 was more than the sum pleaded. The award of notice pay was not justified, whereas the court failed to consider the respondent's conduct in awarding full compensation. The award of service pay was not justified since the appellant had remitted to the NSSF, whereas the claim for public holidays as awarded was without proof.
2. The background to the appeal is a claim filed by the respondent on the basis that he was employed by the appellant from 14 July 2017 and worked until 10 July 2018 as an electrician. He was paid Ksh. 36,000 per month until 10 July 2017, when he reported to work and was issued with notice terminating his employment. The claim was that there was no notice or due process leading to unfair termination of employment, and he claimed terminal dues,
 - a. Notice pay Ksh. 36,000;
 - b. Service pay Ksh. 36,000;
 - c. Unpaid leave Ksh.29,077;
 - d. Public holidays Ksh.11,077;



- e. Overtime Ksh.379,038;
 - f. Costs of the suit.
3. In reply to the claim, the appellant admitted that the respondent was employed as an automobile electrician at a salary of Ksh. 36,000 per month. On 10 July 2018, his employment was terminated upon a 30-day notice and 13 leave days, which were to run concurrently since he had taken 15 days leave and had 6 days pending. The notice issued terminating employment was for valid reasons in that the respondent had a job card No.5600 dated 4 July 2018, a repaired truck KBX 858z, which developed an electrical transmission system failure and required repairs. On 6 July 2018, the supervisor, Juma Njole Mumba, assigned the respondent the same truck for repair on account of having been responsible for it. Still, he refused and demanded that he would only work after his June salary was paid. He left the supervisor to assign the job to another electrician. The conduct of the respondent was insubordination and a breach of duty that justified disciplinary action. The appellant issued him notice dated 6 July 2018 to show cause why disciplinary action should not be taken, and in reply, the respondent admitted to the misconduct with an apology. Dissatisfied, the appellant issued him a notice dated 10 July 2018 to terminate employment.
 4. The learned magistrate heard the parties and delivered judgment, holding that due process in terminating employment was not followed, resulting in unfair termination of employment, which justified compensation at 12 months. The trial court also awarded, as pleaded in the Memorandum of Claim, with costs and interests from the date of institution of suit.
 5. On the given background, both parties attended and agreed to address the appeal through written submissions.
 6. The appellant submitted that in addressing the claim, the trial court failed to consider the respondent's conduct, which he had admitted to acts of insubordination and breach of duty. The award of 12 months' compensation was excessive and not justified. The notice terminating employment on 10 July 2018 included 30 days within which he was to serve his leave days. There was payment of NSSF, and the award of service pay was not justified.
 7. The appellant submitted that the claim for public holidays was not particularised. The general claim awarded was not explained and hence erroneous.
 8. An employee's admission of wrongdoing is sufficient cause for termination of employment, as held in *Fredrick Milengeta v Sifa Investment Limited*, ELRC Cause No. 842 of 2015. By his conduct and admission, the subsequent termination of employment was justified. The awards by the trial court lacked a foundation and should be set aside with costs.
 9. The respondent submitted that before termination of employment, the respondent was not taken through a disciplinary process as required under Section 41 of the *Employment Act* (the Act). Upon the notice dated 10 July 2018, the appellant failed to accord the respondent due process and unfairly terminated employment.
Without the due process, notice pay awarded is justified.
 10. Without taking responsibility through the disciplinary process, the resulting unfair termination of employment justified the compensation award. In the case of *Roadtainers Mombasa Limited v Choga Tsuma* ELRCA E078 of 2024, the court held that where there are baseless and improper disciplinary procedures against the employee that amounts to unfair termination of employment. In this case, there is no record of the disciplinary procedures undertaken against the respondent.



11. The remedies available under Section 49 of the Act can be allocated in multiple or single series, as held in *Ken Freights (EA) Limited v Benson K Nguti* [2019] eKLR. The awards under Section 49 of the Act are based on the trial court's discretion, and unless such discretion is applied outside judicially acceptable principles, it should not be interfered with. In this case, the trial court assessed the claims well and made the correct awards. The appeal should be dismissed with costs.

Determination

12. This being a first appeal, the duty is to review, reassess the record and make conclusions. However, consider that the trial had the opportunity to hear the witnesses' evidence.
13. The employment relationship is not contested. However, through a notice dated 6 July 2018, the appellant directed the respondent to show cause why disciplinary action should not be taken against him for failing to undertake assigned duties by his supervisor unless his June salary was paid.
14. In the notice to show cause, the appellant accepted that no staff had been paid the June salary.
15. Upon the notice to show cause, the respondent replied with an apology. He stated that;

APOLOGY LETTER

I told Mr. Jumaa Njole that I needed money. My house has been locked by agencies, and I don't have money to pay rent, but he didn't understand me. Instead, he sent Mr. Omar to do the assignment. I continued checking other trucks in the second yard.

I ask for your apology.

16. On his admission and apology, the appellant issued the respondent's terminal notice dated 10 August 2018. The notice indicated that;
 - a. The respondent was paid Ksh 33,441 in terminal dues;
 - b. Certificate of service;
 - c. He had no further claims against the appellant.
17. In his evidence in court on 26 September 2019, the respondent asserted that he did not refuse to work as alleged. He was dressed ready to work and,

... I only asked to be paid my salary as my house had been locked. Letter dated 6/7/2018. I was asked to step aside from work to await their decision. 4 days later, I was terminated.

I did not refuse to work. I did not resign. I was terminated unprocedurally. ...
18. As of 6 July 2018, the underlying issue was the respondent's and other employees' unpaid salary. The appellant acknowledges this in the notice to show cause issued to the respondent.
19. Whereas refusing to undertake allocated duties may appear to be an act of insubordination, the noted underlying issue, unless addressed, would cause the court to mechanically go through the motions of the law without considering the root cause.
20. The employee who offers his labour to the employer is justified in being paid his due wages. When the due wage is not paid, the employer breaches a fundamental provision of the employment contract and damages the employment relationship.



21. In *Wangui & 3 others v Prime Bridge Group Limited* (Employment and Labour Relations Cause E391 of 2022) [2025] KEELRC, the court held that non-payment of the due wage affects the employee's dignity. The employee cannot attend to his duties and is worried about his welfare.
22. This position is reiterated in *Oweya v Sichangi Partners & Associates Network LLP* (Cause E037 of 2021) [2023] KEELRC 1936 (KLR) (27 July 2023) (Judgment). The court held that,

The non-payment of salary for work done and required to be paid at the end of the month is not only a serious breach of the employment contract but also negates the dignity of the employee. The employee who wakes up every day to attend work with the legitimate expectation that he has earned his labour and the reward is a salary at the end of the month, is reduced to slavery when such a date arrives and there is no pay. This is exacerbated where non-payment of the due salary continues beyond the one-month contract period.
23. The employee dignity that attaches to the salary pay at the end of a hard day cannot be overemphasised. Once the employer fails to pay the wage due, whatever the reason, the employee who continues to attend work without knowing when the wage due will arrive is subjected to indignity. Well addressed, this is slavery. This is prohibited under articles 28, 30 and 41 of *the constitution* for breach of the right to dignity, servitude and unfair labour practices.
24. In *Jonathan Spangler v Centre for African Family Studies (CAFS)* [2017] eKLR, the court considered the place of human dignity in employment and labour relations and held that the conduct of the employer that results in the contravention of the employee's inherent human dignity due to non-payment of the due wage violates the right to dignity. Such a right should be respected and protected on the shop floor, and where this occurs, it amounts to an unfair labour practice.
25. In this case, the respondent's alleged apology is given context. He could not work because he was distressed. The agent had locked his rented premises due to non-payment of rent. He could not pay his rent because his wages for June 2018 had not been paid. The causal link to the apology is the non-payment of the wage due.
26. The respondent ought not to have chosen to apologise due to the non-payment of his salary. Such non-payment of due wages for work done fundamentally repudiated his entire contract in terms of section 44(3) of the *Employment Act*, 2007.
27. In the case of *CNR; FITM & another(Respondent)* (Cause E204 of 2021) [2022] KEELRC 82 (KLR) the court held that the employee was no longer bound to the terms and conditions of his employment contract where the employer failed to pay his due salaries as agreed and every month end.
28. The motions that led to notice terminating employment cannot be justified in an open and democratic society, which calls for the respondent to abide by the rule of law. The failure to pay due wages in time cannot be sanctioned with a finding that the apology by the respondent was an admission to insubordination and breach of his duty. The appellant must bear responsibility for breach of duty for non-payment of the due salary. There is no notice that there will be a salary delay. The expectation by the respondent that he would be able to pay for his rented premises in time and hence attend work without the distress of where he would return after a hard day, justified his demands to be paid on 6 July 2018.
29. Save for the trial court addressing the issues before the court as unprocedural termination of employment, the record assessed, the underlying violations well considered, and the award of 12 months' compensation are justified in this context.



30. Notice pay is due when the employer, the appellant, breached the employment relationship for failure to pay the due wage in time without any justification or notice to the respondent. In *Kagure v Dot Com Bakery Limited* (Cause E087 of 2021) [2024] KEELRC 13372 (KLR), the court emphasised that;
- ... in any contract of employment, payment of an employee's salary as per the contract of employment is pivotal, as all that an employee has for sale in the employment/labour market is his/her labour and/or expertise. Non-payment of an employee's salary goes to the core of the employment contract and destroys and/or seriously damages an employment relationship.
31. The award of 12 months' compensation in this case is justified. No damages were claimed for this case's constitutional and statutory breaches. The due compensation is 36,000 x 12 = 432,000.
- Notice pay is due at Ksh 36,000.
32. On the claim for service pay, indeed, as submitted by the appellant, this should only arise where there is no compliance with section 35(6) of the Act. Where the employer remits statutory dues such as NSSF, service pay is not due unless separately addressed as a benefit under the written contract or through a private treaty or CBA. In this case, with payment of NSSF, service pay is not due.
33. On the claim for annual leave, the notice terminating employment took effect on 10 August 2018. It took into account the yearly leave and the pending 6 days. Such is addressed.
34. Again, on the claim for work during public holidays, as submitted by the appellant, such days are special and gazetted by the Minister. Each day at work should be particularised to allow the court to assess and allocate.
35. The particulars of the overtime work claim are not discussed. The respondent did not state when work started or closed. Under these provisions, the claimant must clearly state their case to allow the employer to respond.
36. On costs, the appeal addressed as above, the claim before the trial court was with good foundation, and the costs awarded are justified, save that under section 12(4) of the *Employment and Labour Relations Court Act*, the allocation of costs should be given a basis which is lacking in this case. The award of costs since the claim filing is not applicable before the court. In this regard, the due costs before the trial court should be from the date of judgement and where not paid upon assessment, such should accrue interest at court rates.
37. Accordingly, the appeal analysed above, the judgment in Mombasa CMELRC No. 447 of 2018 is hereby reviewed in the following terms;
- a. There was unfair termination of employment;
 - b. Compensation Ksh 432,000;
 - c. Notice pay Ksh 36,000;
 - d. Costs for the trial court proceedings;
 - e. For the appeal, each party bears its costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 30TH DAY OF APRIL 2025

M. MBARŪ

JUDGE



In the presence of:

Court Assistant: Japhet

..... and

