



REPUBLIC OF KENYA



**KENYA LAW**  
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**Lele v Mwaura t/a Gongoni Market (Appeal E013 of 2024)  
[2025] KEELRC 1076 (KLR) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1076 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI  
APPEAL E013 OF 2024**

**M MBARŪ, J  
APRIL 3, 2025**

**BETWEEN**

**CHULA KADENGE LELE ..... APPELLANT**

**AND**

**DAVID MUTURI MWAURA T/A GONGONI MARKET ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. James Ong'ondo  
delivered on 5 March 2024 in Malindi CMELRC No. E032 of 2021)*

**JUDGMENT**

1. The appeal arises from the judgment delivered on 5 March 2024 in Malindi CMELRC No. E032 of 2021. The appellant is seeking that the judgment be set aside and the claim be allowed with costs.
2. The appeal is that the trial court erred in finding that the appellant's summary dismissal was justified for willful neglect to perform work and that he carelessly and improperly performed his duties by damaging motor vehicle KCA 387S, the respondent's property. There was no notice to show cause, as alleged. There was an unfair termination of employment when the respondent failed to adhere to the provisions of Sections 41 and 44 of the Employment Act; thus, the summary dismissal was not justified.
3. The appellant submitted that he was employed by the respondent as a driver on 2 April 2019. He worked until 15 June 2021, when his employment was terminated without lawful cause. He reported his case to the Labour Office at Malindi. Still, the respondent refused to pay his terminal dues and instead raised fictitious claims against him at Wang'uru Law Court as blackmail to evade paying the terminal dues.
4. The appellant submitted that he is entitled to the following terminal dues;
  - a. 12 months compensation of 16,000 x 12 total Ksh.192,000;
  - b. Notice pay Ksh. 16,000;



- c. Service pay for 2 years Ksh.18,450;
  - d. Unpaid leave for 2 years Ksh.22,400;
  - e. Payment for extra duties as shop attendant for 26 months ksh.416,000;
  - f. Overtime for 2 hours each day Ksh.158,620;
  - g. Payment for public holidays Ksh. 34,440;
  - h. Costs of the suit.
5. The appellant submitted that on 28 June 2021, he was issued a notice dated 15 June 2021 terminating his employment over alleged gross misconduct. No notice, hearing, or any show cause notice was issued to allow him to respond as required under Sections 44 and 41 of the *Employment Act*. His case was that on 24 June 2021, he was charged at Wang'uru Law Court for ferrying goods for the respondent, where he had an accident. Only the side mirror was damaged, and he reported the matter to the respondent. His employment was terminated for causing the accident, but no disciplinary hearing was conducted for the appellant to state his case and give a response.
  6. The appellant submitted that he was denied his rights under section 41 of the *Employment Act* without due process, as held in *John Jaoko Othino v Interhealth International [2022]* eklr. The court should set aside the trial court's findings that the summary dismissal was justified for lack of procedural fairness and substantive justification, as held in *Fheoby Aloo Inyanga v Stockwell One Homes Management Limited & Another [2022]* eklr. The remedies sought should be allowed at a cost.
  7. In response, the respondent submitted that the appellant was employed as a driver earning Ksh. 16,000 per month. While on a delivery trip, he would be a general labourer for the day instead of idling in the workplace. Termination of employment was undertaken procedurally due to gross misconduct. Following a complaint in the labour office, terminal dues were calculated and deducted to cover the damage to Ksh. 100,000 occasions to the respondent from a motor vehicle registration No.KCA 387S. The appellant caused an accident while driving the vehicle at Ngurubani Township, Wang'uru. The appellant had a poor work record and had been issued with verbal warnings. He had caused damage to the respondent's vehicle and was charged with negligently driving a vehicle from Thika to Kirinyaga, posing a danger to himself and other road users. This justified the summary dismissal.
  8. The respondent submitted that in Wanguru Civil Suit No.107 of 2021 – *David Muturi Mwaura v Chula Lele Kandenge*, the appellant was liable for damages caused by negligence while driving the respondent's motor vehicle KCA 387S.
  9. Summary dismissal is allowed under Section 44(4) of the *Employment Act*. Due to negligence and causing the respondent financial loss, the action taken against the appellant was justified. Section 41 of the Act was adhered to, and the appellant was invited to a disciplinary hearing before summary dismissal, but he failed to respond satisfactorily. Gross negligence amounted to gross misconduct, and no notice or compensation is due as held in *Kenfreight (E.A) Limited v Benson K. Nguti [2016]* eklr. The trial court heard the parties apply the law and dismiss the claim. The appeal should be dismissed with costs.
  10. The appellant has admitted that he was issued a notice dated 15 June 2021 on 28 June 2021. It terminated his employment for gross misconduct.
  11. The appellant also admitted that he had an accident while driving the respondent's motor vehicle, No. KCA 387S, and was sued at Wang'uru Law Court and found liable.



12. The contestation is that there was no disciplinary hearing before the summary dismissal. Indeed, under Section 44 of the [Employment Act](#), an employer is allowed to dismiss the employee for gross misconduct summarily. However, the employee's rights under Section 41(2) of the Act must be addressed. The employee should be issued notice, however short and allowed to attend and make his representations as held in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] KECA 225 (KLR). The employee must be given a hearing to allow him to state his case on the shop floor, even where other external procedures have been employed. In *KBM v OSH Limited* [2022] KEELRC 13539 (KLR), the court held that the essence of disciplinary proceedings is to establish, with certainty, whether the employee has conducted himself in a manner that is so out of line that a disciplinary action needs to be taken against such an employee.
13. In this case, despite the appellant being found liable for negligent driving of motor vehicle KCA 387S, the internal disciplinary process was imperative to address workplace or gross misconduct. Such should be done within Sections 35 and 41 of the [Employment Act](#). A notice must be issued to allow the employee to attend and address.
14. In this case, the respondent did not file the notice issued to the appellant advising him to attend the disciplinary hearing with another employee of his choice. Indeed, as submitted by the appellant, when the respondent's witness testified in court, he could not remember when such notice was issued.
15. Employment was terminated unlawfully contrary to sections 35 and 41 of the [Employment Act](#).
16. The appellant was entitled to notice pay and compensation for the lapse in due process and adherence to the mandatory provisions of Section 41 of the [Employment Act](#).
17. In assessing the compensation payable, the court must examine the employee's work record and section 45(5) of the [Employment Act](#). The appellant was not diligent in his duties and caused loss and damage to the respondent's vehicle, KCA 387S. Three were damaged, amounting to Ksh. 100,000, and there is evidence in Wanguru Case No.107 of 2021 to confirm liability for negligence of duty.
18. At the end of employment, sections 17, 19 and 20 of the [Employment Act](#), read together with Sections 44(4) and 45(5) of the Act, allow the employer to make a deduction from the employee's terminal dues of any loss and damage caused to its property. Furthermore, the court must assess the damages to consider the employee's conduct and the matters leading to summary dismissal. In this case, the appellant's conduct addressed above, the trial court was justified in dismissing the compensation claim.

**Notice pay is due at ksh. 16,000 as pleaded.**

19. However, terminal dues should be assessed and addressed based on merits at the end of employment.
20. The appellant claimed that he was entitled to service pay for two years. Service pay is due under Section 35(5) and (6) of the [Employment Act](#). This arises when the employer fails to pay statutory dues. As the employer, the respondent is required under Sections 10(6) and (7) to read together with Section 74 of the [Employment Act](#) and file work records. There is no record under Section 20 of the Act to confirm the statutory payments effected for the appellant to confirm that he was a pension fund member or as required by law. His employment was from 2 April 2019 to 15 June 2021. The appellant is entitled to service pay at 15 days' wages for the two complete years, all at ksh.16,000.
21. On the claim for leave for 2 years, indeed, under Section 28 of the [Employment Act](#), every employee has a right to take 21 paid leave days each year unless there is an agreement for more days. No record shows that the appellant took his annual leave, and the claim is justified. The tabulation of annual leave is



premised on the basic wage. Without any records under Section 20 of the *Employment Act* on the due basic wage, the multiplier is Ksh.16,000 each year and the award of Ksh. 26,000 is justified.

22. On the claim for working as a shop attendant, the appellant had a single job as a driver. He did not do two jobs in one to justify a claim that the duties allocated while not driving were separate and distinct employment, removed from his employment with the respondent. Allowing such a claim to stand would invite vexatious claims for every duty allocated on the shop floor. Unless the applicant had a distinct and separate employment contract, he recommended the driver and allowed him to undertake other relevant duties.
23. On the claim for overtime pay, the appellant worked from 5 am to 6 pm from 2019 to March 2020 and from 6 am to 6 pm from April 2020 to June 2021. He gave an average of working overtime for 5 to 4 hours, respectively.
24. The requirement to work overtime is not stated. It is not humanly possible that an employee can be on the shop floor from 5 am to 6 pm daily non-stop, whereas, in this process, the appellant alleges that he was allocated duties of a shop attendant when not driving. These claims are exaggerated. In the absence of particular, such a claim is declined.
25. On the claim for working during public holidays, these are special days gazetted by the Minister. They do not form general days and must be particularized in a Memorandum of Claim to allow the employer to reply and for the court to assess and decide.
26. As outlined above, under Section 19 of the *Employment Act*, at the end of employment, the employer is allowed to deduct from the terminal dues any damage or loss incurred due to the employee's negligence.
27. In this appeal, the court finds that there was an unfair termination of employment; the appellant is entitled to notice pay of Ksh. 16,000, leave pay of Ksh. 26,000, service pay of Ksh. 16,000, and zero (0) compensation. These dues shall be paid less than Ksh. 100,000 is owed to the respondent if no payment is made through any other legal process. Each party is to bear its costs for the appeal and trial court proceedings.

**DELIVERED IN OPEN COURT AT MALINDI ON THIS 3<sup>RD</sup> DAY OF APRIL 2025.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Davis Wekesa

..... and .....

