



Focus Logistics Limited v Otiemo (Employment and Labour Relations Appeal E230 of 2024) [2025] KEELRC 1931 (KLR) (30 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1931 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E230 OF 2024**

**M MBARŪ, J
JUNE 30, 2025**

BETWEEN

FOCUS LOGISTICS LIMITED APPELLANT

AND

SAMUEL OWINO OTIENO RESPONDENT

(Being an appeal from the judgment of Hon. R. N. Akee delivered on 1 October 2024 in Mombasa CMELRC No. E074 of 2022)

JUDGMENT

1. The appeal originates from the judgment delivered on 1 October 2024 in Mombasa CMELRC No. E074 of 2022. Aggrieved by the decision, the appellant argues that the learned magistrate erred in law and fact by determining that there was an unfair termination of employment and by failing to find that the respondent was complicit in the termination of his employment. The respondent was aware that the cargo he carried was unauthorized; consequently, the awards were not justified. The judgment should be set aside with costs.
2. The respondent filed his claim based on his employment as a heavy commercial driver from January 2015 until 3 November 2020, when his employment was unfairly terminated. He was earning Ksh.30, 000 per month. The claim was that his employment was unjustly terminated because, on 2 November 2020, while driving from Nairobi to Mombasa, he was called by Zein Ali, the manager, who informed him that another truck belonging to the appellant had had an accident between Sultan Hamud and Salama. He was directed to proceed to the scene and load the consignment. He discovered that the truck had been towed to Sultan Hamud police station. As he prepared to load the consignment onto his truck, agents of ISPY Trackers, a company contracted by the appellant to monitor the movements of its fleet of vehicles, arrived and took photos of his truck, including luggage that was nearby. These photos were sent to the appellant, who alleged that the respondent had unauthorized cargo in his truck, which was incorrect. He claimed that he travelled to Mombasa with his truck empty and, upon arrival,



was confronted by the manager, Zein, who terminated his employment and refused to listen to his explanations regarding the photos sent. The respondent claimed that there was unfair termination of employment and that no terminal dues were paid. He claimed the following,

- a. Notice pay Ksh.30, 000.
 - b. Unpaid salary for October 2020 Ksh.30, 000.
 - c. Service pay for 2 years Ksh.30, 000.
 - d. Unremitted NSSF due for 2017 Ksh.3,600,
 - e. Leave for 5 years Ksh.84,000
 - f. Public holidays Ksh.83, 088.
 - g. Off days for 6 years Ksh.360, 048.
 - h. Underpayments for 15 months from 1 may 2015 to 30 august 2016 Ksh.25,792.50
1 may 2018 to 3 November 2020 for 30 months Ksh.18, 763.
 - i. 12 months compensation Ksh.360, 000.
 - j. Certificate of service.
 - k. Costs of the suit.
3. In response, the appellant argued that the employment was terminated in strict accordance with the law. He was given a hearing, but he failed to attend, resulting in summary dismissal as outlined under section 44 of the *Employment Act*. The respondent was found in possession of unauthorised cargo in the designated truck. This was against company rules and regulations and caused the appellant serious loss and damage. The respondent was asked to explain how he came to carry the unauthorised cargo, but he could not do so. The cargo was unlawfully paid to him, and seeking compensation would amount to unjust enrichment. All drivers were strictly instructed not to transport unauthorised goods or passengers, which the respondent violated. Zein, the manager, summoned the respondent to explain his conduct, to which the respondent replied that he had nothing to say. He was shown photographs taken by ISPY Trackers and failed to provide any acceptable explanation justifying summary dismissal.
4. The trial court heard both parties and found that there had been an unfair termination of employment, lacking due process and contradicting sections 41 and 45 of the *Employment Act*. As a result, the claims presented were allowed, except for the claims concerning off days, which the court ruled were unsupported by evidence.
5. On the appeal, the appellant submitted that the finding of unfair termination of employment was erroneous because there was a genuine reason for the respondent carrying unauthorised cargo in his allocated truck. In the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, the court held that where the employer has a valid reason for termination of employment, under section 43 of the *Employment Act* [the Act], such is justified.
6. The appellant argued that the respondent was invited by the manager, Zein, to show cause regarding his gross misconduct, yet he abandoned his employment without notice. The respondent often vanished for months and then returned without explanation. The appellant called Zein as a witness, who testified that it was common practice in the sector for drivers to desert their posts and seek new jobs. The respondent would also contact available drivers to transport goods to different destinations. Additionally, the respondent only paid NSSF dues for the months he was employed.



7. There was no termination of employment as alleged. The respondent left upon completing his journey. When asked about the unauthorised cargo, he refused to respond. In the case of *Bernard Muthoka Wambua v Bahari Forwarders Limited* [2019] eKLR, the court held that a reasonable test must be applied in all cases, and where a driver ferries goods without the authority of the employer, these form part of the valid reasons leading to termination of employment.
8. The appellant argued that the trial court erred in issuing the award despite evidence and photographs of the unauthorised cargo on board the truck assigned to the respondent. Notice pay and compensation were unjustified.
9. The appellant paid the respondent his wage for October 2020, which was admitted. The same award was double allocated.
10. The respondent argued that there were no substantive grounds for terminating his employment under sections 41, 43, 44, and 45 of the Act. The trial court examined the evidence and reached a correct conclusion. The appellant, through the company engaged to track the movement of trucks, ISPY Trackers, took photographs of goods next to his truck at the Sultan Hamud police station and sent them to the appellant. His claim that he was not connected to these goods was not well received, which led to the termination of his employment. Due process was not followed, and the evidence collected was against Section 106B of the *Evidence Act*, as established in *Nonny Gathoni Ngenga & another v Catherine Masitsa & Another* [2014] eKLR. The photographs were inadmissible because they were not properly taken and no certificate was produced.
11. The respondent submitted that he was denied procedural fairness when his employment was terminated without notice, a hearing, or the presence of another employee to support him. In the case of *Trufsa Kalegi Mugoya v Ukwala Supermarket Nakuru and Kericho Branch* [2018] eKLR, the court held that the provisions of Section 41 of the Act are mandatory. The award of notice pay and compensation was justified. There was no evidence regarding the payment of the October salary. For the months during which the NSSF was not remitted, such pay is due as service pay.
12. The respondent submitted that he had not taken his annual leave for five years, had not taken public holidays, and there were underpayments. The awards in this regard are justified.

Determination

13. As this is a first appeal, the court must consider the evidence presented before the trial court, evaluate it, and draw its conclusions, keeping in mind that the trial court had the opportunity to hear and observe the witnesses who testified. See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123.
14. An employer has the prerogative to regulate the shop floor. This includes establishing regulations regarding misconduct and gross misconduct that exceed the provisions of the Act under Sections 41 and 44. In this instance, the application had stipulated that drivers were not to carry unauthorised cargo or passengers. Such behaviour was not permitted.
15. However, the right to terminate employment for misconduct and gross misconduct is regulated under section 41 of the Act. Even where there is gross misconduct, such as a driver carrying unauthorised cargo, section 41[2] entitles the subject employee to notice and a hearing in the presence of another employee of his choice.
16. In this case, Zein was called as evidence by the appellant and testified that upon the respondent's return from his journey on 3 November 2020, he verbally directed him to show cause why disciplinary action



should not be taken against him; however, he challenged the directions and left his employment. He further testified that the practice in the sector was to enlist available drivers, as the respondent would be absent for months.

17. The employer must end the employment relationship as held in *Jecinta Waithiegeni Wambugu v Everest Enterprises Limited* [2020] KEELRC 1872 [KLR] and in the case of *Ayub Kombe Ziro v Umoja Rubber Products Limited* [2022] KEELRC 141 [KLR]. Where the employee is invited to show cause for gross misconduct and refuses to respond, the employer must issue notice to the employee terminating his employment to secure itself. The notice must be served on the Labour Officer under section 18 of the Act. This secures the employer against claims such as those herein.
18. In this regard, the appellant's failure to adhere to the provisions of Section 41 of the Act rendered the termination of employment unfair. To this extent, the trial court cannot be criticised.
19. Notice pay awarded is justified in cases where there is a lapse in due process; unless stated otherwise in the Wage Orders, this should amount to Ksh. 35,221.50.
20. In assessing the compensation, the trial court granted the maximum award under section 49 of the Act. However, under section 45[5] of the Act, when determining the number of months to allocate in compensation, the court must consider the employee's conduct. The fact that the respondent carried unauthorised cargo was not challenged significantly. He relied on section 106B of the *Evidence Act* to assert that there was no certificate for producing electronic evidence and photographs submitted to the court by the appellant. However, the provisions of the *Evidence Act* are not applicable when the employee approaches the court under the *Employment Act*. The principles of employment relationships are not akin to those of criminal or commercial disputes.
21. The trial court also failed to exercise its discretion in judicially awarding the maximum 12 months. The court must provide reasons for granting the highest available compensation as held in *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] KECA 65 [KLR], which states that the compensation award must be based on sound judicial principles. The court must justify or explain why the employee is entitled to the maximum award, and the exercise of discretion must not be capricious or whimsical. See also *Kawino v Population Services International [PSI]* [2025] KEELRC 1436 [KLR] and *Barasa v Kenya Forestry Research Institute* [2025] KEELRC 1086 [KLR].
22. In this case, considering the cause leading to the termination of employment and the loss incurred by the appellant when the respondent was found carrying unauthorised cargo in the allocated truck, due to a lapse in due process, an award of one month in compensation is deemed appropriate. Under the Wage Orders, the gross pay is Ksh. 221.50.
23. Regarding the claim for salary due for October 2020, this was remitted to the respondent via his bank account.
24. The claim for service pay for two years stated that it was due for 2015 to 2016.
25. Service pay accrues when there is no payment of statutory dues. Statutory dues accumulate monthly. When there is no payment of such dues, this constitutes a continuing injury that arises monthly. Under section 89 of the Act, this injury must be addressed within 12 months from the date of cessation, as held in *Wafula v Postal Corporation of Kenya* [2025] KEELRC 1478 [KLR].
26. The respondent's claim was alleged to have accrued in 2015. Such claims under section 89 have abated over time.
27. The claim for unremitted NSSF dues for 2017 is not owed to the employee who was not paid but to the statutory body.



28. Regarding the claim for accrued leave days over five years under section 28 of the Act, this right is protected. However, leave days do not accumulate beyond eighteen months unless approved by the employer. In this case, the appellant failed to submit any work records indicating how the respondent was allocated his annual leave. The assertion that the appellant would take available drivers, as permitted by the sector, only made the appellant vulnerable to these claims. The employer is allowed under section 10[3] of the Act to provide the employee with a written contract outlining the terms and conditions of employment. When the appellant assigned the respondent a truck for delivery based on fluctuating terms and his availability, the risk exposure was significant.
29. In this case, the respondent is entitled to 33 leave days without proof of allocated leave days, all at Ksh. 33,000 based on the wage paid.
30. The claims for underpayments from May 2015 to August 2016 abated under section 89 of the Act.
31. Regarding the claims for underpayment from 1 May 2018 to November 2020, given that this constitutes a continuing injury, the respondent could only claim for the last 12 months. According to the Wage Orders, a heavy commercial vehicle driver was entitled to a wage of Ksh. 30,627.45 plus a 15% house allowance of Ksh. 4,594.20, resulting in a gross pay of Ksh. 35,221.50.
32. The underpayment of Ksh. 5,221.50 x 12 = Ksh. 62,658.90.
33. Concerning the claim for public holidays, these are not general days. The Minister publishes them, and they must be specified.
34. Regarding the claim for rest days over the past six years, this is a right under section 27 of the Act. The employer must keep work records detailing how the employee's work hours are allocated to compensate for periods worked without a rest day. In the absence of such records, the claim remains valid. However, this constitutes a continuing injury, which must be addressed under the provisions of section 89 of the Act.
35. For the 12 months due, over 52 days, the rate applicable under the Wage Orders is Ksh. 275.95, along with Ksh. 14,349.40 for rest or off days.
36. A certificate of service is due at the end of employment.
37. Regarding costs, the appeal discussed above, each party shall bear its costs.
38. Based on the analysis above, the appeal concerning the judgment in Mombasa CMELRC No. E074 of 2022 is reviewed in the following terms:
 - a. Compensation Ksh.35, 221.50.
 - b. Notice pay Ksh.35, 221.50.
 - c. Off days Ksh.14, 349.40.
 - d. Leave days Ksh.33, 000.
 - e. Underpayments Ksh.62, 658.90.
 - f. Certificate of service.
 - g. For the appeal, each party is to bear its costs.

DELIVERED IN OPEN COURT AT MOMBASA, THIS 30 JUNE 2025.

M. MBARŪ



JUDGE

In the presence of:

Court Assistant: Japhet

