



**Universe Freight Services Limited v Thiong'o (Appeal E163 of 2024)
[2025] KEELRC 1949 (KLR) (30 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1949 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E163 OF 2024**

**M MBARÚ, J
JUNE 30, 2025**

BETWEEN

UNIVERSE FREIGHT SERVICES LIMITED APPELLANT

AND

JOHANA THIONG'O RESPONDENT

*(Being an appeal from the judgment of Hon. L. Sindani delivered
on 4 July 2024 in Mombasa CMELRC No. E462 of 2020)*

JUDGMENT

1. The appeal arises from the judgment delivered on 4 July 2024 in Mombasa CMELRC No. E462 of 2020. The appellant, aggrieved by the judgment, is seeking that it be set aside and the claim dismissed with costs.
2. The background of the appeal is a claim filed by the respondent. He claimed the appellant employed him as a truck driver, KCE 389l. He worked until November 2020 at a wage of Ksh.23 000 per month. His case was that in November 2020, the respondent was on a return trip from delivering goods to Uganda when he was accused of transporting goods without authority. Upon arrival in Mombasa, the officer, Benson Ngumo, demanded an amount of Ksh. 23 000 for the costs of transporting the goods to Uganda. The owner of the goods confirmed that the respondent had been paid via Mpesa, and the message was forwarded to the respondent. However, the appellant accused the respondent of transporting the goods without payment and terminated his employment without due process or payment of terminal dues. He claimed the following:
 - a. 12 months' compensation Ksh.276,000,
 - b. Salary for October 2020 Ksh.23,000,
 - c. Notice pay Ksh.23,000,



- d. 21 leave days Ksh.17,250,
 - e. Severance pay Ksh.25,000,
 - f. Costs of the suit.
3. In reply, the appellant admitted that the respondent was a driver. He was prohibited from carrying unauthorized goods and passengers and from pocketing money. He was caught doing so in November 2020, which led to the termination of his employment. The respondent had been sent from Kampala, Uganda, to Mombasa, and the truck was supposed to return empty. There was no authority to carry any cargo. The appellant has an operational office in Kampala and could not demand payment, as alleged by the respondent; no client had goods for transport from Uganda to Mombasa as claimed. The respondent arranged to load the vehicle without authority from the office and negotiated with the cargo owner. The appellant has a clerk at the border between Uganda and Kenya to assist drivers in crossing trucks with goods upon obtaining the necessary customs documents. The respondent, fully aware of the clerk at the border, made his arrangements to get the required customs documents to enable him to cross the border. He had no delivery note for cargo from the appellant. The truck developed mechanical problems at the Port of Mombasa, and the appellant learnt that the truck was loaded with cargo when the respondent requested a mechanic. The unauthorized cargo would not have been discovered had the truck not developed mechanical problems, and the respondent refused to reveal the cargo owner, forcing the appellant to report the matter to the police under OB No.12/30/10/2020. Upon investigation, the police discovered that the truck had carried empty gas cylinders without authority from the appellant and that he had been paid Ksh. 90,000. Therefore, the appellant denied the claims.
4. The appellant made a counterclaim on the grounds that the unauthorized cargo carried by the respondent exceeded the legal consignment and truck load, resulting in damage to the truck's gearbox upon arrival in Mombasa. The respondent failed to comply with the employer's lawful orders, leading to loss and damage. The appellant incurred Ksh. 000 in repairs and Ksh. 000 on labour. The respondent delayed reporting back to Mombasa by three days, causing the appellant to claim \$60 (Ksh. 000) for storage charges amounting to Ksh. 29,700 due to the delay. The claim included unutilised mileage benefits of Ksh. 16,000, which were not justified. The counterclaim is for,
- a. Truck repairs Ksh.150,000,
 - b. Loss of 3 days ksh.66,000,
 - c. Storage charges Ksh.29,700,
 - d. Payments of mileage benefits Ksh.16, 000.
4. The learned magistrate delivered judgment and held that the appellant, the employer, failed to follow the due process outlined in section 41 of the *Employment Act*, which resulted in the unfair termination of employment. The magistrate then made the following awards:
- a. Notice pay Ksh.23,000,
 - b. 5 months' compensation ksh.178,250,
 - c. Costs and interests on the awards.
 - d. Counterclaim dismissed.



5. Aggrieved by the judgment, the appellant appealed on the grounds that the trial court erred in both law and fact by concluding that there was an unfair termination of employment, claiming that the respondent had received several warnings before the dismissal. Although invited, the respondent failed to attend the disciplinary hearing, rendering the compensation award unjustified. The court did not consider the respondent's poor work record when evaluating the claims, nor did it consider that he had used the allocated vehicle for unjust enrichment, which resulted in damage to the vehicle. This damage was counterclaimed, but the claim was dismissed.

Determination

6. As this is a first appeal, the court must consider the evidence presented before the trial court, evaluate it, and draw its conclusions, bearing 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.
7. The appeal is that the respondent was employed as a truck driver delivering cargo to various destinations. In this case, he had been sent to Kampala, Uganda, and was supposed to return to Mombasa with an empty truck; however, he carried unauthorised cargo, which only came to the attention of the appellant after the truck developed mechanical problems at the Port of Mombasa. Upon discovering the unauthorised cargo, the matter was reported to the police under OB No.12/30/10/2020. The respondent was then compelled to disclose the details of the cargo and the fact that he had been paid.
8. The respondent asserted that he was undertaking his duties as required. He ferried goods, and the owner paid the appellant through M-Pesa. He got a copy of the payment. This resulted in unfair termination of employment.
9. Under sections 41(1) and 44 of the *Employment Act* (the Act), termination of employment for misconduct or gross misconduct is permissible. If the employee breaches the employment terms and conditions by carrying unauthorised cargo, which the employer considers gross misconduct, termination of employment through summary dismissal is permissible. However, the employee is protected under section 41(2) of the Act.
10. The employee should be given notice and allowed to defend himself. In this case, the appellant did not address the mandatory provisions of section 41 of the Act as established by the trial court. Despite reporting the matter to the police under OB No.12/30/10/2020, adherence to the due process outlined in section 41 was mandatory.
11. Where the respondent was invited to the disciplinary hearing and failed to attend, the appellant, as the employer, had the legal duty to terminate employment and issue the requisite notice of summary dismissal. Such notice should be copied to the Labour Officer under Section 18(5) (b) of the Act. See *Ayub Kombe Ziro v Umoja Rubber Products Limited* [2022] KEELRC 141 (KLR) and the case of *Nyali Academy Service Limited t/a The Mombasa Academy v Muli* [2023] KEELRC 2041 (KLR).
12. This led to an unjust termination of employment, warranting the award of notice pay and compensation. The determination of compensation is at the trial court's discretion, and unless this discretion is exercised improperly, the appellate court should refrain from altering it.
13. The appeal is that the respondent had warnings and a poor work record. These records are not filed.
14. On the counterclaim, the appeal is that the trial court wrongly dismissed it.



15. Indeed, aside from the lapse in due process regarding the termination of employment, the respondent engaged in gross misconduct. He transported cargo that was established to be unauthorized. By undertaking such unauthorised acts, the truck assigned to him developed mechanical problems, resulting in loss and damage to the appellant.
16. Under section 44(4) (c) and (g) of the Act,
 - (c) An employee willfully neglects to perform any work which it was his Duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;
...
 - (g) An employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.
17. Where an employee engages in acts detrimental to the employer, under section 19(1)(b) of the Act, the permissible deductions from an employee's pay include damages resulting from losses incurred due to the employee's willful default.
 - (b) A reasonable amount for any damage done to, or loss of, any property lawfully in the possession or custody of the employer occasioned by the willful default of the employee;
18. In his reply to the Amended Response, the respondent argued that the appellant had failed to address the counterclaim under Order 7, Rule 6 of the Civil Procedure Rules. However, in employment claims, the provisions of section 19 supersede any subsidiary legislation and rules.
19. To the extent of the damage incurred by the appellant due to the harm caused to its motor vehicle by the respondent's gross misconduct, such loss is recoverable from him under the law.
20. The appellant claimed costs for repairing the vehicle, amounting to Ksh. 150,000, incurred losses for not using the vehicle for three days while the respondent undertook the unauthorised acts totalling Ksh. 66,000, and faced storage charges of Ksh. 29,700. In this context, the respondent received mileage benefits of Ksh. 000.
21. These losses are recoverable from the respondent.
22. Regarding the costs claimed by both parties, as analysed above, the claim for unfair termination was upheld, the counterclaim was justified, and each party should bear its costs. The awards shall be paid according to whichever is higher.
23. Accordingly, the Judgment in Mombasa CMELRC No. E462 of 2020 is hereby reviewed in the following terms;
 - a. Employment terminated unfairly,
 - b. Notice pay Ksh.23,000,
 - c. 5 months' compensation ksh.178,250,
24. The counterclaim is allowed in the following terms;
 - a. Truck repairs Ksh.150,000,
 - b. Loss of 3 days ksh.66,000,



- c. Storage charges Ksh.29,700,
 - d. Payments of mileage benefits Ksh.16, 000.
25. The awards are to be paid whichever is higher.
26. 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

..... and

