



**Ainu Shamsi Hauliers Limited v Msagha (Appeal E054 of 2025)
[2025] KEELRC 2310 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2310 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E054 OF 2025**

**M MBARŪ, J
JULY 31, 2025**

BETWEEN

AINU SHAMSI HAULIERS LIMITED APPELLANT

AND

EMMANUEL MSAGHA RESPONDENT

*(Being an appeal from the judgment of Hon. C. K. Kithinji delivered
on 20 March 2025 in Mombasa CMELRC No. E400 of 2021)*

JUDGMENT

1. The appeal arises from the judgment delivered on 20 March 2025 in *Mombasa CMELRC No. 400 of 2021*. The appellant is aggrieved by the finding that there was unfair termination of employment and the award of 12 months' compensation at Ksh. 403,000. The conduct of the respondent was not considered, and the fact that he was violent led to the termination of employment.
2. The facts of the case are that the appellant employed the respondent as a mechanic from 2018 at a wage of Ksh. 31,000 per month. The respondent filed his claim on the basis that, through a notice dated 31 October 2020, the appellant terminated his employment because he had delayed the delivery and loading of trucks and engaged in shoddy work on the trucks. He claimed that his employment was terminated without due process and hence requested notice pay of Ksh. 31,000 and 12 months' compensation.
3. In reply, the appellant's case was that the respondent was earning Ksh. 30,800 per month and not as alleged. He was issued with a warning letter and invited to a disciplinary hearing immediately. Still, he declined to attend, leading to summary dismissal on 30 September 2020 for being absent from work or leave for 30 days. He was given an opportunity for a hearing but failed to attend, and the summary dismissal was justified.



4. In the judgment, the learned magistrate held that there was no due process, the respondent was denied a hearing, and hence the termination of employment was unlawful and unfair. The claim was allowed as pleaded with costs and interests.

The appeal challenges the findings and awards of 12 months.

5. The appellant submitted that the finding that there was unfair termination of employment was not justified since the respondent was invited to a disciplinary hearing, but he absconded from duty. A notice was issued, requiring the respondent to attend a disciplinary hearing immediately, but he failed to report for duty. Under section 44 of the *Employment Act* (the Act, the employer is allowed to summarily dismiss the employee who is absent from work without authority. In *Bamburi Cement Limited v William Kilonzo* (2016) eKLR, the court held that where the employer suspects the employee to have committed acts of gross misconduct, summary dismissal is justified. In this case, the award of 12 months was excessive, and notice pay was not warranted.
6. The respondent submitted that under section 47(5) of the *Act*, the employee has the burden to prove unfair termination of employment, which he discharged. Under section 43 of the Act, the employer must justify the reasons for termination of employment, which the appellant failed to prove. In the case of *Kenfreight (EA) Limited v Bnson K. Nguti* [2016] eKLR, the court held that where employment is terminated unfairly, the employee is entitled to compensation. In this case, the trial court made proper findings, and the appeal should be dismissed with costs.

Determination

7. This is a first appeal. The court must review the record, reassess the findings, and make its conclusions. However, it should take into account that the learned magistrate had the opportunity to hear the witnesses.
8. The appellant's case is that the respondent was invited to a disciplinary hearing but failed to attend and proceeded to absent himself from work, leading to summary dismissal on 30 September 2020. The respondent's case is that through a notice dated 31 October 2020, the appellant accused him of delay in the delivery and loading of trucks and that he had done shoddy work. The notice also invited him to a disciplinary hearing, but there was no date, place or time indicated. This rendered it impossible for him to attend. In December 2020, the appellant terminated his employment.
9. In his evidence, the respondent maintained that his employment was terminated in December 2020 without notice or a hearing.
10. The appellant called the director, Abdifatah Abdi, who testified that the respondent failed to attend work for 30 days. He was called for a disciplinary hearing, but he failed to participate, leading to summary dismissal.
11. The appellant filed the notice dated 30 September 2020 on summary dismissal. The letter is overwritten on the dates. This manipulation of the record is not addressed.
12. Where the director testified that the respondent was involved in a disciplinary hearing in December 2020, it is not possible that the notice of summary dismissal is dated 30 September 2020.
13. Even in a case where the respondent is alleged to have failed to attend work for 30 days, there is no notice to the Labour Office as required under Section 18(5)(b) of the *Act*, as held in *Mary Help The Sick Mission Hospital & another v Ngung'u* [2025] KEELRC 1938 (KLR) and the case of *Kibisu v Bird* [2025] KEELRC 1249 (KLR). Where the employer alleges that the employee was absent from duty



without permission, the employer must demonstrate what efforts were taken to hold the employee accountable. Where the employee cannot be traced, a notice must be issued to the labour officer.

14. In this case, the learned magistrate analysed the facts, particularly the conflicting records and dates. Where employment is alleged to have been terminated in December 2020, the notice of summary dismissal is dated 30 September 2020.
15. The manipulation of records can only translate to one fact. The appellant prepared the records upon a predetermination of the fact of unfair termination of employment.
16. The findings that there was unfair and unlawful termination of employment are justified.
17. On the award of compensation, the trial court allowed the claim for 12 months. There is no justification for the award of the highest available remedy at 12 months. In the case of *Roadtainers (Msa) Ltd v Munuue* [2025] KECA 1302 (KLR), the court held that the maximum award available under section 49 of the *Act*, for 12 months, must be justified. Reasons for the highest award must be stated.
18. In the case of *Watuku v Industrial & Commercial Development Corporation* [2025] KECA 768 (KLR) and the case of *Nation Media Group Limited v Munene* [2025] KECA 114 (KLR), the court held that;

... an award of the maximum 12 months' pay must be based on sound judicial principles. In *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR, this Court categorically stated that the trial Judge must justify or explain why a claimant is entitled to the maximum award; that the exercise of discretion must not be capricious or whimsical.
19. In this case, there is no justification for the maximum award of compensation at 12 months. There is no rationale given for the 12-month award.
20. The respondent worked for the appellant from 2018 until 2020. He was denied a fair chance to make his representations before the termination of his employment. He testified that he is now working in jua kali. An award of 2 months' compensation is hereby deemed justified under the given circumstances.
21. Due to a lack of proper procedure, notice pay is payable for one month gross at Ksh. 31,321.
22. On costs and interests awarded, Section 12(4) of the *Employment and Labour Relations Court Act* makes it discretionary to award costs. However, reasons for the award of costs must be stated. In this case, the award of costs plus interest is not stated. Being successful in the claim due to a lack of due process, the respondent is entitled to his costs before the trial court only.
23. The appeal is allowed to the extent that judgment in Mombasa CMELRC No. E400 of 2021 is reviewed with an award of 3 months' gross salary at Ksh. 31,321 x 2 = Ksh. 62,642; notice pay Ksh. 31,321; costs of proceedings before the trial court. For the appeal, each party shall bear its costs.

DELIVERED IN OPEN COURT AT MOMBASA, THIS 31ST DAY OF JULY 2025

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

