



**Kenga Equatorial Hotels Limited t/a Mombasa Continental Resort v Wanjiru  
(Appeal E023 of 2025) [2025] KEELRC 2321 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2321 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E023 OF 2025**

**M MBARŪ, J  
JULY 31, 2025**

**BETWEEN**

**KENGA EQUATORIAL HOTELS LIMITED T/A MOMBASA CONTINENTAL  
RESORT ..... APPELLANT**

**AND**

**ANTHONY MAINA WANJIRU ..... RESPONDENT**

*(Being an appeal from judgment delivered on 29 January 2025  
by Hon. J. B. Kalo in Mombasa CMELRC No. 634 of 2017)*

**JUDGMENT**

1. The appeal arises from the judgment delivered on 29 January 2025 in Mombasa CMELRC No. 634 of 2017. The appellant is seeking that the award of Ksh. 194,268, plus interest and costs, be set aside and the suit dismissed with costs.
2. The appeal is that the learned magistrate erred in law and fact in awarding the respondent one month's notice pay and 8 months' compensation for unfair termination of employment. The award of unremitted NSSF deductions was not justified, and, being an employment claim, costs and interests are discretionary.
3. The basis of the appeal was a claim filed by the respondent on the grounds that the appellant employed him as an account assistant on 5 August 2011 through a temporary contract at a gross salary of Ksh. 25,000 per month. In March 2012 he was appointed as the night auditor in an acting capacity on an allowance of Ksh.8, 975. In September 2012 the gross salary was increased to 27,000. Through notice dated 19 July 2014, the respondent resigned from his employment effective 19 August 2014. Under the CBA between the Union and Kenya Hotelkeepers and Caterers Association, the agreement was that upon acting for 3 months, the respondent should have been confirmed in the substantive position of night auditor. However, he worked in an acting capacity from June 2012 to August 2014 a period of



- 27 months. The respondent was suspended from duty following audit queries; there was no pay or reasons given.
4. The respondent claimed that before his resignation, he had not taken annual leave for 2013/2014 and was not paid his terminal dues and claimed the following:
    - a. Leave pay for 2013/2014 Ksh.41,476,
    - b. Gross pay for 3 months of June to August 2014, Ksh. 75,096.18
    - c. Acting allowance for 12 days in June 2014, Ksh. 4,142.21
    - d. Night allowance for 12 days Ksh.3,173.08
    - e. Service charge for 2 months Ksh.8,653.85
    - f. Salary arrears for the position of night auditor from June 2012 to August 2014 for 27 months Ksh. 65,250.09
    - g. Costs and interests.
  5. In reply, the appellant's case was that the respondent was on a three-month contract that expired on 5 November 2011. He was not employed as a night auditor, as alleged, and there is no evidence to support such a claim. The respondent remained the accounts assistant under his written contract. He was not entitled to an acting allowance of Ksh.8, 975 as alleged. The letter of appointment, dated 2 August 2013, was clear about the position of engagement as an account assistant, and there was no basis for engaging him in an acting capacity as a night auditor. A fixed-term contract was in place for the stated position. The respondent took a break between engagements until 8 October 2013, when he was employed permanently, as indicated in a letter dated 2 August 2013. The respondent resigned from his employment on 19 August 2017, and the claims made are not justified. Being under a fixed-term contract from 8 August 2013, he could only claim annual leave within the 12 months under section 28 of the Employment Act. For the period under suspension, he was not entitled to leave days, and such claims are time-barred.
  6. The trial court heard the parties and delivered judgment and held that there was unfair termination of employment and unfair remittance to the NSSF and hence awarded notice pay, 8 months compensation and unremitted NSSF dues with costs and interests.
  7. On the appeal, the appellant submitted that the awards of notice pay, 8 months compensation and unremitted NSSF dues were not justified. There respondent resigned from his employment and served notice. This is not contested and hence the finding of unfair termination had not been pleaded or justified. Equally notice pay was not due upon the respondent's notice to terminate his employment. The compulsory leave arose from COVID-19 restrictions and the pandemic's effects on the sector. The appellant called evidence to this effect.
  8. Unremitted dues to the NSSF are not due to the employee but the statutory body. The employee cannot accrue this.
  9. The respondent submitted that under clause 17 of the CBA between KUDHEIHA and the Union of Hotelkeepers and Caterers Association, upon acting for 3 months, he was supposed to be confirmed to the substantive position. The continued acting for 27 months should be paid for as claimed. Non-payment violated section 5[5] of the Employment Act [the Act]. Following his suspension for an unspecified period through a letter dated 12 June 2014, without pay, such pay is due.



10. The respondent submitted that the appeal is without merit and he is entitled to his full claims. He did not take annual leave for 2013/2014, and the salary for June to August 19, 2014, was not paid. This was contrary to the CBA between the union and the appellant.
11. The benefit of service charge was a benefit under the CBA, together with acting allowance and nightshift allowance, which are due with costs and interests.

### **Determination**

12. This is a first appeal. The court is required to review the entire record, reassess the findings, and make its conclusions. However, it should take into account that the trial court had the opportunity to hear the witnesses in court.
13. The appeal is premised on the awards of compensation, notice pay, unremitted NSSF dues, costs and interests. The appellant's case is that the respondent resigned from his employment, and hence the awards are not justified. The respondent asserts that he worked diligently and is entitled to the claims for annual leave, unpaid salaries, allowances, night allowances, service charges, and salary arrears for the acting position of night auditor, together with costs and interest.
14. Before addressing these issues, one aspect of the claim was missed. The basis of the claim by the respondent was his benefits under the CBA between KUDHEIHA and the Union of Hotelkeepers and Caterers Association. Under the CBA, he claimed the benefits of acting allowance, night allowance, service charge and salary arrears while on suspension.
15. A claim premised on a CBA is defined as a trade dispute under section 2 of the [Labour Relations Act](#). In assigning the magistrates' court jurisdiction to hear employment matters under [Legal Notice No. 6024 of 2018](#), the mandate to listen to employment disputes excludes trade disputes from the trial court.
16. The respondent filed his payment statements to support his claim. He was covered under the union and was paying agency fees to KUDHEIHA. He was a beneficiary of the CBA. The respondent and his employment were regulated under the [Labour Relations Act](#); his case should have been filed with the court.
17. The trial court is restricted to hearing employment disputes only.
18. The Notice is that;  

“Disputes arising from contracts of employment [excluding trade disputes under the [Labour Relations Act](#), 2007] where employees' gross monthly pay does not exceed Kshs. 80,000/= as commenced and continued in accordance with the Employment and Labour Relations Court [Procedure] Rules 2016.
19. Under section 2 of the [Labour Relations Act](#), a trade dispute is defined to include:  

“trade dispute” means a dispute or difference, or an apprehended dispute or difference, between employers and employees, between employers and trade unions, or between an employers' organisation and employees or trade unions, concerning any employment matter, and includes disputes regarding the dismissal, suspension or redundancy of employees, allocation of work or the recognition of a trade union;
20. In *Onyango v Ken Knit Kenya Limited* [2024] KEELRC 1569 [KLR] and *Kenga Equatorial Hotels t/a Mombasa Continental Resort v Chege* [2025] KEELRC 162 [KLR], the courts have emphasised that [Legal Notice No.6024 of 2018](#) conferred jurisdiction upon the magistrates concerning employment



disputes only. The court retains original jurisdiction over all employment and labour relations disputes, including trade disputes.

21. The court has original jurisdiction in this case. The trial court proceeded without jurisdiction.
22. On the appeal the respondent pleaded under paragraph 13 of the Memorandum of Claim that, through a notice dated 19 July 2014, he had resigned from his employment with the appellant, effective 19 August 2014. He thus gave a one-month notice. He did not plead unlawful or unfair termination of employment. The award of notice pay and compensation must be premised under a claim for unfair termination of employment under section 45 of the Act, and based on which, the award of notice and compensation under sections 35 and 49 of the Act can be assessed as held in *Kenya Ports Authority & another v Joseph Makau Munyao & 4 others* [2019] KECA 498 [KLR].
23. Upon the resignation, the award of notice pay and compensation does not arise. These were awarded in error.
24. On the claim for annual leave for 2013/2014, under section 28[4] of the Act, leave can only accrue for 18 months unless the employer has approved to accumulate leave days. However, accrued leave forms a claim of the nature of a continuing injury and once earned should be claimed within 12 months from the date of cessation as held in *The German School Society & another v Ohany & another* [2023] KECA 894 [KLR].
25. The respondent filed his claim on 3 August 2017, for a benefit that allegedly accrued in 2013/2014. As submitted by the appellant, under section 90 of the Act, this claim is time-barred.
26. On the claim for gross pay for June, July, up to 19 August 2014, under section 18 of the Act, for whatever reasons that justify termination of employment, including a resignation, for work done, the due pay is due. Whether the respondent was on suspension or not, for the period his employment subsisted, his due salary should be paid. This claim was justified for Ksh.75, 096.15.
27. On the claims for acting allowance, night allowance, and service charge, these accruing monthly ought to be claimed within the provisions of section 90 of the Act. The appellant contested the acting position of the respondent. Indeed, the evidence submitted by the respondent was his contract dated 2 August 2013 and nothing more. The alleged acting position is not in writing and there is no letter of review of the position of employment as required under section 10[5] of the Act as held in *Margaret Wanja Muthui v Ministry of Transport, Infrastructure, Housing and Urban Development & 2 others* [2019] KEELRC 2161 [KLR] and the case of *Nyatigi v Kwale International Sugar Company Limited* [2024] KEELRC 950 [KLR].
28. The respondent could not claim under an employment position that he was not appointed to. An acting allowance accrue with a formal appointment by the employer.
29. On this basis, the claim for salary arrears for the alleged acting position does not arise.
30. On the award of costs and interests, unlike commercial disputes or matters regulated under the *Civil Procedure Act* and the Rules thereto, in employment disputes, the regulatory framework on costs is section 12[4] of the *Employment and Labour Relations Court Act* and Rule 70 of the Employment and Labour Relations Court [Procedure] Rules. The award of costs is discretionary and must be awarded based on reasons. Costs do not follow the cause. A justification must be stated.
31. Upon analyzing the appeal, the trial court lacked jurisdiction, except for the due unpaid salaries for work done at KSh. 75,096.15. The appeal is meritorious, and each party shall bear its costs for the appeal and the lower court proceedings.



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

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

