



**Radar Hardware Limited v Mutune (Appeal E010 of 2025)
[2025] KEELRC 2311 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2311 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E010 OF 2025**

**M MBARŪ, J
JULY 31, 2025**

BETWEEN

RADAR HARDWARE LIMITED APPELLANT

AND

FRANCIS MUO MUTUNE RESPONDENT

*(Being an appeal from the judgment of Hon. G. Sogomo delivered
on 31 January 2025 in Mombasa CMELRC No. E345 of 2023)*

JUDGMENT

1. The appeal arises from the judgment delivered on 31 January 2025 in Mombasa CMELRC No. E345 of 2023. Aggrieved, the appeal is that the trial court erred in holding that the appellant unfairly terminated the respondent's employment. The award of 12 months' compensation was unjustified and lacked a legal basis. Notice pay was not due as there were justified reasons for the termination of employment. The judgment should be set aside.
2. The appeal arises from a claim filed by the respondent against the appellant on the basis that the respondent was employed in February 2012 as a heavy commercial truck driver at a wage of Ksh. 20,000 per month without the due house allowance. He worked until 20 October 2022, when, upon returning from an assignment, the appellant sent him on compulsory leave. On 19 November 2022, he was issued with a notice of summary dismissal. There was no notice or reasons given for the termination of employment. He claimed that there was unfair termination of employment without payment of terminal dues, hence he claimed the following:
 - a. Underpayments Ksh.74,630.40
 - b. Unpaid house allowance Ksh.169,473.94
 - c. Accrued annual leave for 3 years ksh.67,789.56



- d. 12 months damages Ksh.387,369
 - e. Certificate of costs.
3. In response, the appellant denied the claim and that the respondent was earning a wage of Ksh.35,000 per month as a driver by December 2022. He had accrued leave days, and on 18 November 2022, he was advised to take leave and return within 21 days. He returned on 21 November 2022 but complained that he had taken too many days off. Upon resuming duty on 21 November 2022, the respondent was advised to take additional leave until 16 December 2022; however, he refused to sign the leave forms and left the premises on 19 November 2022. He never returned. He could not be traced to carry out any internal disciplinary proceedings due to absconding, and the appellant has yet to establish a disciplinary committee over the matter; furthermore, there was no termination of employment as alleged. The claims are without merit.
4. The parties attended and agreed to address the appeal by written submissions.
Only the appellant complied.

Determination

5. The record analysed and the written submissions by the appellant analysed, the main issues for determination in the appeal are whether there was unfair termination of employment and whether the remedies of compensation and notice pay were justified.
6. The appellant's case is that the respondent was a heavy commercial truck driver and had accrued leave days. On 22 October 2022, the appellant was granted 21 leave days to resume work on 17 November 2022. Upon return, the appellant directed the respondent to take more leave days to exhaust the pending days and to resume on 16 December 2022. However, the respondent refused to sign and accept the leave extension and left his employment. Efforts to trace him to respond to the disciplinary process were futile. There was no termination of employment.
7. Under section 44 of the *Employment Act* (the Act), an employee who abandons work, absents himself or fails to attend as directed by the employer commits gross misconduct. The sanction is summary dismissal. However, where the employee fails to attend as directed by the employer, the employer has the duty to summon the employee to respond to such inaction and non-attendance. Where the employee continues to be absent, the employer is under a legal duty to issue notice of summary dismissal under Section 44 of the Act and further, notify the labour officer under section 18(5)(b):
- (b) by dismissal, the employer shall, within seven days, deliver to a labour officer in the district in which the employee was working a written report specifying the circumstances leading to, and the reasons for, the dismissal and stating the period of notice and the amount of wages in lieu thereof to which the employee would, but for the dismissal, have been entitled; and the report shall specify the amount of any wages and other allowance earned by him since the date of the employee's dismissal.
8. The employer is required to terminate the employment relationship under the law.
9. In the case of *Mehta Electricals Limited v Rumbika* [2025] KEELRC 1239 (KLR); *Foremost Limited v Mwakulomba* [2023] KEELRC 1916 (KLR); and the case of *Ayub Kombe Ziro v Umoja Rubber Products Limited* [2022] eKLR, the courts have held that the employer cannot lawfully plead that the employment relationship subsisted upon the duty abandonment and could not reach the employee. The employer must be proactive and apply sections 44 and 18(5) of the Act to protect itself.



10. In this case, the learned magistrate, although for different reasons, analysed the claim and established that there was unfair termination of employment. The employee does not terminate his employment. The employer must lawfully ensure a formal termination of employment where the employee fails to abide by lawful directions and instructions.
11. On the claims made, the learned magistrate awarded notice pay and maximum compensation. Despite analysing the evidence and finding that there was unfair termination of employment, the trial court did not justify the reasons for the maximum compensation of 12 months. This is a requirement as held in *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] KECA 65 (KLR) and the case of *Kenya Power and Lighting Company Limited v Lydia Chepkosgei Mutai* [2019] KECA 753 (KLR). The courts have held that although there is discretion to award compensation under section 49 of the Act, such discretion should be exercised judiciously and with proper justification.
12. This position was addressed in *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR, that in considering whether a maximum award of 12 months' gross salary compensation was justifiable, the court held that:

The trial judge did not at all attempt to justify or explain why the respondent was entitled to the maximum award. Yes, the trial Judge may have been exercising discretion in making the award. However, such exercise should not be capricious or whimsical. It should be exercised on some sound judicial principles. We would have expected the Judge to exercise such discretion based on the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe that the trial Judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations, which act then invites our intervention...
13. Accordingly, without the requisite justification, this court is allowed to interfere with this discretion and award 12-month award. The respondent was allowed to take his annual leave as required under section 28 of the Act. He had more days pending, and hence, the appellant, as required under the law, directed him to extend his leave days. The respondent declined to continue his employment and instead opted to file suit.
14. Save for the lapse in the due process of addressing the abandonment of employment, the appellant had made great effort to comply with the Act. To punish the appellant with an award of 12 months would be to reward gross misconduct on the part of the respondent. An award of one month's compensation is hereby found justified.

Notice pay is due in one month.
A certificate of service is due.
15. Regarding the claims for underpayment and house allowance, the trial court conducted a correct analysis and found that there was payment of a wage commensurate with the minimum wage plus the due house allowance. The wage of Ksh. 30,266 is inclusive of the due house allowance.
16. Regarding costs, as analysed above, each party should bear its costs for the appeal and trial proceedings.
17. Accordingly, the appeal is with merit; the judgment in Mombasa CMELRC No. E345 of 2023 is reviewed with the following awards;
 - a. Employment terminated unfairly;
 - b. Compensation Ksh.30,266;



- c. Notice pay Ksh.30,266;
- d. Each party bears its costs of the appeal and trial court.

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

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

.....and

