

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

**CAUSE NO.40 of 2015**

- 1. JOHN WANGOMBE KINYEKI**
- 2. SAMUEL CHONDO MZALA**
- 3. BONIFACE NAFULA\_KHAYAKA**
- 4. REVY MATI MALIKANZI**
- 5. KIMONYO KILIKU**
- 6. THOMAS OTIENO\_MWANGO**
- 7. FIDELIS MATI**
- 8. ELLY ALOO OLOO**
- 9. PIUS NDWIGA**
- 10. ABDALLA MWAJASI**
- 11. DOMINICK OCHINO ONG'OMBE**
- 12. ZACHARIA TOWETT**
- 13. MESHACK MWANZOKA**
- 14. MOHAMED OMAR**
- 15. DANIEL KIOKO KITONYI**
- 16. FREDRICK MAWEU MUTAVI**
- 17. PATRICK K. MWIKYA**
- 18. PETER MUNYONYO ONYANGO**
- 19. TWALIB MWAMZANDI**
- 20. RAPHAEL KURIA**
- 21. KENNEDY OPICHE**
- 22. PHILISTER JELAGAT (suing as the Administrator of the Estate of ROBERT LELEY)**
- 23. MOHAMED Y. ABDULLE**
- 24. SIMEON KIPLANGAT TOWETT**
- 25. GEORGE MAHERO**
- 26. STANLEY KABURIA MARETE**

27. WASHINGTON OTWOMA
28. MOSE KIPRONO KURGAT
29. DANIEL KATEE
30. MARTIN MWANYIKA
31. ALI KASSIM SETI
32. DENNIS ANGWENYI
33. WILLIAM OTIT
34. PETER ADEMBESA WETUKA
35. OSURO ATUKE
36. FRANCIS MOLE OLE\_KANOKO
37. BUGU NASSORO
38. JARED NYAMATO
39. KENNETH WANDERA
40. STEPHEN GATOGO
41. KHALIFA MANENO
42. OWALA ISAYA GURA
43. NASSORO MASHOBO
44. AUSTIM WANYAMA
45. MARTIN YATOR
46. SHOSI MOHAMED SHEKUE
47. LUKA KANDA BOWEN
48. AMOS ODERO
49. MWADZAME TINGA MWARUWA
50. JAMES M.\_MUNYALO
51. SAMSON NYALILEY
52. WILLIAM LEBO
- 53 PAUL CHIRCHIR
- 54 RONNIE MWADIME
55. SHEKUE KAHALE
- 56 ISAAC APPOLO OGOLA
57. MKUTANO KALAMA
58. ALI HAMISI MWAMANENO
59. BISMARCK MUSYOKA MITAU
60. RAMADHAN MDAKA

61. PAUL OGAI  
62. MUINDI TIKIKO MUSOMBA  
63. BERNARD C. BULINDA  
64. FRANCIS M. KIEMA  
65. JOHN MWIZI  
66. YUSUF AHMED  
67. PETER GITAU  
68. GENGE OMONDI  
69. NELSON RIMBA  
70. MAURICE OBONDO  
71. JOSEPH MULIMU ASHIBAKA  
72. JOEL KING'OLA MUVITI  
73. AMOS MUSAVI  
74. JOHN MARITIM  
75. ARDENER OGUTU  
76. DOMINIC WAMBUA KASOO  
77. PETER OKOLLAH MAK'SEWE  
78. CHARLES KIPKOECH KOTUT  
79. GIDEON BARAKA  
80. SAID MWAROPIA  
81. MWINYI BWAJUMA FAKI  
82. KHAMISI JUMA OMAR  
83. ERIC AMUMA  
84. KORI KALIST  
85. WILLIAM M. KABIU  
86. STANLEY MAIYO  
87. ONESMUS OLILO  
88. MBWANA BANDA  
89. MOSES KIMUTAI KIRUI.....CLAIMANTS

VERSUS

1. KENYA PORTS AUTHORITY  
2. THE MANAGING DIRECTOR,

**RULING**

The judgment herein was delivered on 31 October 2024. Parties were directed to table the award and costs and report to the court for adoption. There has been no agreement on the three main issues;

- a) Whether the compensation of 3 months is subject to PAYE and the rate;
- b) Whether the interests should be subject to income tax and the rate;
- c) Whether the interest amounts attract 5% withholding tax.

The claimant submitted that on the award of 3 months' compensation, both parties agreed that the basis of calculation should be the salary earned in January 2012. The PAYE due was deducted, and subjecting it to PAYE at this point would be a double deduction.

The award of compensation related to wrongful actions of the respondent should be a restorative payment rather than income, which should not be subject to PAYE.

The remedies for wrongful dismissal and unfair termination are different and separate. Under the Act, upon the finding of unfair termination of employment, section 49 requires the assessment and award of various reliefs, including wages of up to 12 months. Such payment is not subject to further income tax.

The claim was not based on wrongful termination of employment. The respondent should not blame the claimants for summary dismissal, which is found unfair.

Under sections 20 and 21 of the Act, the allowed deductions from an employee's salary should be lawful and include statutory deductions. In this case, the claimants have worked for their pay, and the award should be paid in full if justified. In **Ibrahim Manyara v Registered Trustees of Agricultural Society of Kenya (ASK) [2012] eKLR**, the court held that the Income Tax stipulates what is chargeable under section 3. Income from employment is therefore excluded under the Income Tax Act. In **AM Bahaji & Company Limited v Kenya Ports Authority [2020] eKLR**, the court held that court decrees are not to be subjected to deductions.

The claimants submitted that there should be no deduction for withholding tax at 5% on the interests which arise from damages awarded by the court. There is no provision under the Act or the Income Tax Act requiring such a deduction.

The respondents submitted that the award of 3 months' compensation is subject to statutory deductions, including PAYE. Section 5 of the Income Tax Act requires any gains from an

employee's income, including salary, wages, leave pay or fees, to be paid less PAYE. The 3 months awarded to the claimants are subject to a deduction. The 1<sup>st</sup> respondent is under a statutory obligation under section 37 of the Income Tax Act to withhold PAYE and remit to KRA.

Section 49 of the Act gives guidelines on the court award, and the employer has a statutory duty to deduct statutory dues and remit accordingly.

In the case of **Felicity June Kuria v Egerton University [2024] eKLR**, the court held that a decree of the court founded on employment benefits amounts to taxable income under the Income Tax Act. Section 19 of the Act requires the employer to deduct income tax from the employee and remit it to the tax authority.

The respondent submitted that the interest in the decretal sum should be subject to income tax. Under section 2 of the Income Tax Act, interest is defined as payable in any manner in respect of a loan, deposit, debt, claim or other rights or obligations.

The interest in an award of the court represents a penalty interest payable to the employee. Under the Income Tax Act, section 35(3) (b), interests attract a withholding tax of 15%. In **Michael Muimi Kimanzi v Jamsons Industries Limited & another [2016] eKLR**, the court held that section 33(3) of the Income Tax Act, where interests have accrued, should be subject to withholding tax. This being a compensation suit, the same attracts interest at the rate of 15%. The application of a 5% withholding tax rate does not apply in this case. The interests awarded by the court attract a withholding tax at 15%.

The respondent submitted that they engaged an audit firm and, based on their expert advice, the award of the court should be paid less PAYE as it relates to employment, and the interest rates should be based on withholding tax at a 15% rate.

#### Determination

The judgment delivered on 31 October 2024 included the following awards:

- a) Damages at 3 months' salary for each claimant.**
- b) Costs at 50%.**

The claimants assert that under section 49 of the Act, there is a distinction between reliefs for wrongful termination of employment and summary dismissal. Although the Act is not elegantly drafted, the core of section 49 of the Act is to address the remedies that the court may award, in singular form or multiple. Upon the finding that there was unjustified termination of employment either by summary dismissal or termination of employment under

sections 44 and 45 of the Act, *may recommend to the employer to pay to the employee any or all of the following-*

Unlike the award of damages under section 12 of the Employment and Labour Relations Act, in this case, there was an award of compensation under section 49 of the Act.

The award of 3 months' compensation to the claimants is subject to section 49(2) of the Employment Act (the Act). All dues paid to the employees, including claimants, are subject to statutory deductions, including PAYE.

The claimants assert that the wage applicable is the one paid in January 2012. That wage was subjected to PAYE, and to make a new PAYE would be double taxation.

The award of the court relates to the employee's last earned wage. The last day on the shop floor.

The award of compensation hence accrues as of 31 October 2024 and not earlier. There has been no previous payment of the 3 months award, save that the rate to apply is the last wage earned by the employee, whether still in service, retired or has exited the shop floor. The rate to use in making the necessary statutory deduction, including PAYE, is based on the last wage paid to the claimant.

Section 49(1) (c) of the Act requires;

***(c) The equivalent of a number of months' wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.***

Whereas under section 49(2) of the Act requires;

***(2) Any payments made by the employer under this section shall be subject To statutory deductions.***

The sequence of payments upon the court judgment is for the employer to apply the last gross monthly wage of the employee, which should then be subjected to statutory deductions.

On the question of withholding tax on the interest rates to apply, the case is that the awards herein were compensatory and accrued interests on the damages are removed from the Income Tax Act.

On its part, the respondent asserts that the due interests payable to the claimant should be subject to the Income Tax Act, which allows for a 15% withholding tax.

However, the award of compensation herein was without any interest. Section 12(4) of the Employment and Labour Relations Court Act requires the court to award compensation or damages, but the award of costs plus interest is discretionary. In this case, costs were awarded at 50% without interest. The requirement that a successful suit should automatically attract costs is a commercial element removed from the court proceedings. This is remotely addressed under Rule 70 of the Employment and Labour Relations Court (Procedure) Rules to provide that;

***(4) In proceedings under this Act, the Court may, subject to the rules, make Such orders as to costs as the Court considers just.***

And; Rule 70(5) provides;

***(5) Where a suit involves a liquidated amount that is claimed and specified at the time of filing a statement of claim and the Court orders that the amount claimed or part of the amount to be paid to the claimant, it may, in addition to that order, direct that interests be paid on the liquidated amount awarded at court's rates.***

The award of costs or interests is discretionary and must be specified in the orders of the court.

The contestations of what interest rates are to apply should not be in issue given the awards herein.

The consent Order dated 31 May 2024 on the payments of surcharged amounts was made by agreement that;

*The 1<sup>st</sup> respondent herein shall refund to each of the claimants the amounts surcharged by the 1<sup>st</sup> respondent plus interest thereon at 12% computed from the date of the surcharge to 31 May 2024.*

As outlined above, any dues payable to the employee, including allowances, are subject to statutory deductions; section 49(2) of the Act applies.

**Parties to proceed with the tabulation of the 3 months compensation awarded based on section 49(1) and (2) of the Employment Act. The awards shall be subject to statutory deductions based on the last wage earned, given the judgment delivered on 31 October 2024;**

**The costs due shall be at 50% and shall be assessed by the taxing master.**

Delivered in open court at Mombasa this 8 day of August 2025.

M. MBARŨ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and .....