



REPUBLIC OF KENYA



**KENYA LAW**  
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**Insight Management Consultants Limited v Silungi (Appeal E066 of 2025)  
[2025] KEELRC 2553 (KLR) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2553 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E066 OF 2025  
M MBARŪ, J  
SEPTEMBER 25, 2025**

**BETWEEN  
INSIGHT MANAGEMENT CONSULTANTS LIMITED ..... APPELLANT  
AND  
PHILEMON SIMIYU SILUNGI ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. G. Sogomo delivered  
on 21 March 2025 in Mombasa, CMELRC No. E506 of 2023)*

**JUDGMENT**

1. The appeal arises from the judgment delivered on 21 March 2025 in Mombasa CMELRC No. E506 of 2023. The appellant is seeking that the judgment be set aside and substituted with an order dismissing the claim with costs.
2. The facts relevant to the judgment and appeal are that a claim was filed by the respondent, alleging that the appellant employed him as a machine operator from 1 August 2016 to 2 May 2022. He claimed that he worked continuously and was stationed at Diamond Industries Changamwe within Mombasa County. On 2 May 2022, the supervisor informed the respondent that there was no work and his terminal dues would be paid. He claimed that the appellant conducted an unlawful redundancy which was unfair and contrary to sections 40, 41, 43, and 45 of the *Employment Act* (the Act). At the time, the respondent was earning a daily wage of Ksh. 650, which was below the prescribed wage of Ksh. 739.05 for a machine operator under the Wage Orders, 2018. He therefore claimed the following;
  - a. Wage arrears for 6 days Ksh.827.75 Ksh.4,966.50
  - b. Notice pay KSh. 827.75 x 26 Ksh.21,521.50
  - c. Payment in lieu of annual leave for 113.75 days KSh. 94,156.56
  - d. Severance pay for 6 years (2016 to 2022) Ksh. 74,498.50



- e. Underpayments;  
May 2018 to April 2022 – 1705 days x 739.05 – 650) Ksh.151, 830.25
  - f. Damages for unlawful redundancy 827.75 x 26 x 12 months Ksh.258,285
  - g. Certificate of service.
3. In response, the appellant denied the claims and that the respondent was on seasonal/daily work. He reported at the gate and was picked and assigned duties. He was paid a daily wage for any duties allocated to him. These were paid weekly through M-Pesa to his telephone number, which he disclosed upon admission to the third-party premises, Diamond Industries Limited. The respondent was paid on a piece rate, upon deduction of NSSF and NHIF, based on the weekly disbursements. Employment terminated with each day, and hence he was not entitled to leave and was allowed to source employment elsewhere.
4. The learned magistrate heard the parties and delivered judgment and held that there was unfair termination of employment through redundancy and hence awarded the following;
- a. Unpaid days Ksh.4, 434.30.
  - b. Notice pay ksh.15, 383, 45.
  - c. Unpaid leave Ksh.61, 021.02.
  - d. Severance Ksh.38, 458.62.
  - e. 5 months' compensation, KSh. 76,917.25.
  - f. Certificate of service.
  - g. Costs.
5. Aggrieved, the appellant filed the appeal on the grounds of appeal that;
- 1. The learned trial magistrate erred in law and fact in finding that there existed an employment relationship between the appellant and the respondent without sufficient evidence to support such a conclusion.
  - 2. The learned magistrate erred in law and fact in disregarding the appellant's evidence and documentation showing that the respondent was a daily piece-rate worker who was not in continuous employment and who was last in the appellant's employment on 17 January 2022.
  - 3. The learned magistrate misapplied the provisions of the [Employment Act](#), particularly section 40(1), in holding that the respondent was unlawfully declared redundant without any factual basis, whereas the respondent alleges termination on 2 May 2022, the appellant's payment records exhibit that he was working and was paid on 17 January 2022.
  - 4. The learned magistrate erred in law and fact in awarding the respondent severance pay, compensation for unfair termination, and other terminal dues based on the Wage Order 2018. Further, the judgment was marred by internal inconsistencies, as the magistrate acknowledged that the underpayment claimant could not stand under the 2018 Wage Order, specifically noting that the prescribed minimum daily wage of Ksh. 739.05 for a machine attendant multiplied by 26 working days yields a monthly wage exceeding the statutory minimum of Ksh. 15,383, which was higher than the respondent's daily wage of Ksh. 653 as at 17 January



2022. Despite these findings, the court erroneously proceeded to award other monetary compensation based on the same 2018 Wage Orders.

5. The learned magistrate erred in failing to consider the respondent's inconsistent work schedule and lack of continuous service in assessing entitlement to annual leave and severance pay.
6. The entire judgment and resulting decree are against the weight of the evidence and the law.
6. The appellant submitted that the respondent was not an employee but a daily worker or piece-rate employee, paid a daily wage upon allocation of work. The records produced demonstrate that he was last allocated work on 17 January 2022, earning a wage of Ksh. 653. he was at liberty to source for work anywhere, and from 17 January 2022, he filed suit on 4 September 2023.
7. The appellant produced the payroll for 2022, which was not challenged. The respondent only worked until 17 January 2022. He was not an employee as defined under section 2 of the Act. In the case of *Martin Juma Kundu v Kemu Salt Packers Production Limited* [2016] eKLR, the court held that a common law employee is one whom the company requires, and who is available to work when work is available. The respondent's employment was sporadic and not continuous or consistent. He cannot claim protection under section 37 of the act since there was no continuous employment.
8. The M-Pesa statements produced demonstrate erratic payments of wages, which are not denied. The respondent declined to produce his M-Pesa statement for analysis, which would have corroborated the appellant's case that he was not in continuous service as alleged. The payrolls submitted demonstrate that from 2017 to 2022, he did not consistently work for a month. In January 2022, he worked for 8 days.
9. The appellant submitted NSSF and NHIF dues whenever the respondent was at work; he confirmed in evidence that there were no payments that stopped in 2021.
10. In 2021, the respondent's work attendance was interrogated and showed that;
  - In January 2021, he worked for 2 days;
  - In February, he worked for 9 days;
  - In March, he worked for 10 days;
  - In September, he worked for 10 days
  - In October, he worked for 10 days;
  - In December 2021, he worked for 9 days.
11. In the year 2020, there was no continuous work attendance. The respondent was free to attend work whenever he was picked up at the gate.
12. The claim for unfair termination of employment did not arise, as the claimant was on a piece-rate work arrangement and was paid a daily wage. In the case of *William Baisl & 3 others v Colour Print Limited* [2019] eKLR, the court held that casual employees are not protected under section 40 of the Acts. Such an employee is only entitled to the daily wage and no more, as held in *Nelson Onyango Othoo v Wilham Kenya Limited* [2012] eKLR.
13. The trial court's awards are not justified. The evidence submitted and the causal workers' records were not considered on the merits, and the appeal should be allowed with costs.
14. The respondent submitted that under section 9 of the *Employment Act* (the Act), the employer who is a party to the employment contract has the legal duty to issue a written contract. Under section



- 10(7) of the Act, the employer has the duty to produce such a written contract in court as held in Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Muture [2021] eKLR. The nature of the respondent's employment was based on records. The respondent testified that they did not have a written contract for the period of their employment with the appellant. The appellant failed to discharge its burden of proof under the law to challenge the claims made.
15. The respondent submitted that Elijah Mogire testified in support of the appellant and admitted that no contract was issued setting the terms as casual or piece-rate employment. He acknowledged that there were no records indicating that Diamond Industries required manpower on a casual or piece-rate basis.
  16. The respondent testified that he was employed as a machine operator from 1 August 2016 to 2 May 2022. There was continuous and uninterrupted employment as evidenced by the NSSF statements. He was paid a daily wage of KSh. 653. In the case of Krystalline Salt Limited v Kwekwe Mwakele & 67 others [2017] eKLR, the court held that in a piece rate work or arrangement, the emphasis is on the amount of work and not the time expected in doing it. Under section 74 of the act, the appellant did not produce the records of piece rate work. In Nduku v Osteria Group (Kenya) Limited, Cause No. E002 of 2022, the court held that the duty to produce work records vests in the employer.
  17. The respondent was thus protected under section 37 of the Act. He acquired rights and benefits under the Act.
  18. Upon the reduction of work, a redundancy arose as defined under section 40 of the Act. The respondent was entitled to the terminal dues thereof. With the unfair termination of employment, the provisions of sections 43 and 45 of the Act apply to the respondent and the claims made were justified. He is entitled to damages and compensation for the period worked, wage arrears, notice pay, payment in lieu of taking annual leave and severance pay.
  19. This is a first appeal. The court must analyse the record, review the findings and make its conclusions.
  20. The respondent's case was that the appellant employed him from 1 August 2016 to 2 May 2022 as a machine operator. He had no written contract and was paid a daily wage of Ksh. 650. His supervisor said there was no work and hence employment was terminated unfairly through redundancy.
  21. The appellant's case is that no employment relationship existed. The respondent was engaged when work was available and paid a daily wage of Ksh. 653. The appellant produced various work records to demonstrate the days worked, which did not form a monthly or continuous work attendance.
  22. Based on the work records produced by the appellant, an employment relationship existed.
  23. An employer is allowed to engage the employee on oral or written terms. The employer is further permitted to employ an employee on a fixed-term contract, on a piece-rate basis, or as dictated by the availability of work. However, where there is no written agreement on the nature of employment and the employee continues to attend work, the nature of it does not end each day; the employee becomes protected under Section 37 of the *Employment Act* (the Act).
  24. Where the appellant deemed the respondent to be a piece-rate employee, this intention was not reduced to writing. The respondent's casual engagement with the appellant for work on various days throughout the month resulted in the respondent being protected under the Act.
  25. In the case of Kenyatta University v Thomas & 25 others [2025] KECA 1014 (KLR), the court held that a casual employee is paid a daily wage. Work must commence and conclude within the day. Work done is not inherently required to be completed within the day. When the subject employee returns daily and performs similar duties, they are protected by rights and benefits under the Act. The court held;



26. But there is a further layer of privilege that subsection 3 of section 37 of the Act offers. Where, like here, the employee has worked for two months or more from the date of employment as a casual employee, he shall be entitled to such terms and conditions of service that an employee would be entitled to under the Act. This would include payment of service pay upon termination where the employee is not a member of the National Social Security Fund, a registered pension or provident fund, or a gratuity or service pay scheme established under a collective agreement (section 35(5) and (6) of the Act).
27. This position is confirmed in *Juma & 5 others v Mada Holdings t/a Baobab Sea Lodge Kilifi Limited* [2025] KECA 817 (KLR) and *County Government of Bomet v Kenya County Government Workers Union & another* [2025] KECA 1311 (KLR), that an employee who attends work for one employer for work that is not likely to be completed in a day is protected under section 37 of the Act.
28. In this case, the records filed by the appellant demonstrate that the respondent attended work as follows;
  - In January 2021, he worked for 2 days;
  - In February, he worked for 9 days;
  - In March, he worked for 10 days;
  - In September, he worked for 10 days
  - In October, he worked for 10 days;
  - In December 2021, he worked for 9 days.
27. He was paid weekly and not daily. The tabulation of the wages based on the daily wage does not negate his rights under the Act.
28. Termination of employment was due to non-availability of work. This is not challenged.
29. Indeed, the employer is allowed to terminate employment due to operational reasons or when there is no work available. This right is secured under section 40 of the Act. However, the employer must issue notice to the employee and pay the dues outlined under section 40(1) of the Act.
30. The learned magistrate analysed the facts and made accurate findings to the extent that this was an unfair redundancy with the payment of the statutory dues under section 40 of the Act. In the case of *Cargill Kenya Limited v Mwaka & 3 others* [2021] KECA 115 (KLR) and the case of *Keen Kleeners Limited v Kenya Plantation and Agricultural Workers' Union* [2021] KECA 352 (KLR), upon a redundancy, the employer may opt to issue notice or make payment in lieu of notice under section 40(1) (f) of the Act.
31. Upon a redundancy, the employee is entitled to pay for days worked and hence the award of unpaid days Ksh. 4,434.30 is justified.
32. Notice pay is due based on the Wage Orders for a general worker, since there was no written agreement that the respondent was a machine operator. The last wage paid on 30 April 2021 was Ksh. 653 is the correct wage. This wage is inclusive of the due house allowances as prescribed under the Wage Orders. Notice pay is due at KSh. 19,590.
33. From 1 August 2016 to 2 May 2021, the respondent worked for 5 complete years. Under Section 40(1) of the Act, severance pay is due for 15 days for every year of service.  $Ksh. 653 \times 15 \times 5 = Ksh.48, 975$ .
34. As this is a claim for unfair redundancy, the payment of severance pay addresses the matter. The award in severance provides compensation for the respondent.



35. Accordingly, the judgment in Mombasa CMELRC No. E506 of 2023 is reviewed with the following awards;
- a. Severance pay Ksh. 48, 975.
  - b. Notice pay Ksh 19,590,
  - c. Pay for days worked Ksh 4, 434.30.
  - d. Certificate of service.
  - e. Costs for the trial court as awarded.
  - f. For the appeal, each party to bear its costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

