Sana Industries Limited v Odera & 2 others (Appeal E245 of 2024)
[2025] KEELRC 2638 (KLR) (26 September 2025) (Judgment)

Neutral citation: [2025] KEELRC 2638 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E245 OF 2024

NJ ABUODHA, J

SEPTEMBER 26, 2025

BETWEEN

SANA INDUSTRIES LIMITED ..... APPELLANT

AND

MASELA ADOYO ODERA & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. Noelle Kyaka (DR) delivered on 26th July, 2024 at Ruiru Law Courts in MCRLRC NO. 012 of 2024)

JUDGMENT

1. This Appeal is consolidated with Appeal Nos. 246 and 247. This judgment therefore decides these other Appeals. Through the Memorandum of Appeal dated 26th August, 2024 the Appellants appeal against the judgment and decree of Hon. Noelle Kyaka (DR) delivered on 26th July, 2024 at Ruiru Law Courts in MELRC NO. 012, 13 and 17 of 2024, on grounds inter alia.

    a. That the court erred in fact and in law in awarding severance pay despite no evidence being furnished to prove that the Respondent was declared redundant.

    b. That the court erred in finding that the Respondent's employment had converted to permanent despite evidence showing that the Respondent never worked continuously.

    c. That the court erred in finding that the Respondent's employment was unlawfully terminated despite the Appellant having demonstrated that it made all reasonable effort to submit the Respondent to the disciplinary process after the Respondent absconded duty.

    d. That the Honourable trial magistrate erred in failing to find that the Respondent absconded duty which then entitled the Appellant to terminate his employment.

e. That the learned trial magistrate erred in failing to give a reasoned justification of how she arrived at 9 months' salary as damages for unfair termination.

f. That the learned trial magistrate erred in fact and in law by awarding Kshs.141,440 as unpaid leave contrary to established principles that unpaid leave can only be awarded up to a maximum of 3 years.

g. That the learned trial magistrate erred in awarding severance pay despite having made a finding that the Respondent was never declared redundant.

h. That the learned trial magistrate erred in using Kshs.17,680/- as a basis for computing wages despite the evidence presented showing that the Respondent never earning any such amount and despite the Appellant contention that it paid a minimum daily wage of KshsT52/- per day making the total monthly wage Kshs.16,900/-.

i. That the learned trial magistrate erred in fact and in law in awarding an amorphous figure as unpaid leave without any systematic calculations. The same ought to be computed as follows: (16,900 x 21/28) x 3 Years - 38,025/-.

2. The appellant therefore prayed that the entire the judgment and decree of Hon. Noelle Kyaka (DR) delivered on 26th July, 2024 at Ruiru Law Courts in MELRC NO. 012, 13 and 17 of 2024 be set aside and in its place the claim be dismissed. The appellant further sought the costs of the appeal.

3. The Appeal was disposed of by written submissions.

Appellant's Submissions

4. The Appellant's Advocate Mr. Mugo submitted among others that the appellant pleaded that the respondent was employed on casual basis working on diverse dates depending on the availability of work and paid the respondent Kshs. 652/- per day payable fortnightly and that the respondent never earned Kshs. 8,040. This position was corroborated by the respondent's bank statement wherein the sums banked in the respondent's account would fluctuate. Sometimes there were no remittances at all. Counsel in this regard referred the court to section 2 of the *Employment Act* on the definition of a casual employee.

5. Counsel further submitted that the respondent's contract could not have converted to permanent employee by virtue of section 37 of the Act due to the piece rate nature of the respondents' work. According to counsel, the respondents never worked for an aggregate period of one month and that the respondents' were paid a daily wage of Kshs. 652/- which converted to Kshs. 16,900/- and to 15,186/- after deduction of NSSF, NHIF and union dues however in no month did the claimant earn such an amount. In support of the submission, counsel relied on the case of Rashid Odhiambo Allogoh & 245 Others vs. Haco Industries Ltd [2015] eKLR. Counsel therefore submitted that the nature of the work for which the respondents were hired could only allow for intermittent performance depending on the availability of work therefore to deem that as continuous employment would be tantamount to interfering with freedom of contract.

6. On the issue whether the trial magistrate erred in finding that the respondents were unfairly terminated, counsel submitted that the respondents were casual employees and their engagements were terminable at the end of the day without notice. However the respondents absconded work and the appellant issued notice to show cause ensuring the rights of the respondents were protected by giving them a chance to defend themselves but they chose not to comply with the same. The respondents denied receiving the notices but never reported their termination to the Labour Office where the notices were

delivered after efforts to locate them proved futile. Section 47 of the *Employment Act* required an employee to report complaint of unfair termination of employment to the Labour Office.

7. Counsel emphasized that the appellant did everything to comply with the requirements of section 45 of the *Employment Act* and tabled sufficient evidence including attendance sheets to show that the respondents absconded duties hence there was no unfair termination. In this regard counsel relied on the case of Ann Njoroge vs. Topez Petroleum Ltd [2013]eKLR. On the awards, counsel submitted that the same was based on wrong monthly salary. The respondents never produced any evidence in support of the salaries claimed. The appellant however sufficiently showed that the respondents were earning Kshs. 652/- per day which would be paid weekly depending on the number of days worked. Further, the respondents were awarded severance pay on account of redundancy yet the respondents were unable to explain how the other employees reported to work and sign against their names on the day they were allegedly terminated on account of redundancy. According to Counsel, section 40 of the Act details the redundancy process yet the respondents never produced any evidence of such.

8. On the issue of leave, counsel submitted that the trial magistrate erred in awarding leave for eight years since this was beyond the three years as provided under section 90 of the Act. Counsel in this regard relied on the case of G4S Security Services (K) Ltd v. Joseph Kamau & 468 Others [2018] eKLR. The award of leave therefore ought to have been limited to three years preceding the alleged termination.

Respondent's Submission.

9. Mr. Munyungu, Counsel for the respondent on the other hand submitted among others that the appellant never provided any evidence to show that the respondents were not continuously employed for more than one month from August, 2015 to April, 2022; February, 2016 to March, 2023 and August, 2015 to January, 2023 respectively. Counsel further submitted that section 10(6) of the Act required an employer to keep written particulars provided thereunder for a period of 5 years after termination of employment and in any proceedings where an employers fails to produce the particulars described under subsection 1 the burden of proving or disproving an alleged term of employment shall be on the employer. It was therefore incumbent upon the appellant to prove that the respondents were casual employees. The appellant failed to discharge this burden by failing to maintain records of the respondents' employment and produce the same in court.

10. Mr. Munyungu further submitted that section 37 of the *Employment Act* automatically graduated the respondents from casual to regular employment by operation of law as they worked continuously for more than one year. Counsel in this respect relied on the case of Nanyuki Water & Sewage Company Ltd v. Benson Mwiti Ntiritu & 4 Others [2018]eKLR. On the issue whether the respondents were unfairly terminated, counsel submitted that, the trial court after hearing the viva voce evidence rightly came to the conclusion that there was no evidence that the claimants received the letters alleged by the appellant prior to termination even though the same were adduced in evidence. Counsel further submitted that the appellant's witness Agnes Kagwaria testified that even though the letters were sent, she was not aware if the respondents received them. On the question whether there was substantive fairness, Counsel submitted that the respondents in their claim and witness stated that on or about 15th April, 2022, 2nd March, 2023 and 16th January, 2023 respectively, they reported to work but were informed to go back since the appellant was reducing the workforce and that they would later be called back but this was never done. The respondents further stated that they were never issued with notices of termination or afforded an opportunity to be heard prior to termination as envisaged under section 41 and 43 of the Act. The respondents never received the alleged letters.

11. Regarding procedure fairness, Counsel submitted that allegation by the appellant that the respondents were subjected to disciplinary process was false and malicious and was intended to mislead the court.

According to Counsel, the appellant's witness Ms. Agnes Kagwaria, the alleged letters did not bear the respondents' signature or the stamp or signature of the Labour Officer. In this regard counsel relied on the case of Postal Cooperation of Kenya vs. Andrew K. Tanui [2019]eKLR. Counsel submitted that in this case the appellant alleged that they were unable to serve the respondents with the show cause letters as they had no way of communicating with them yet section 10(2) required an employer to keep employees details including residence and permanent address. It was Counsel's contention that the respondents provided the information at the time of employment. In this regard counsel relied on the case of Kimeu vs. Excel Chemicals Ltd [20221] KEELRC 1694 (KLR) and Mary Chemweno Kiptui vs. Kenya Pipeline Company [2014] eKLR.

12. On the issue of quantum, Counsel submitted that the court had discretion in awarding compensation. The respondents were dismissed in most inhumane manner after long period of dedicated service on unsubstantiated allegation. Concerning severance pay, counsel submitted that section 40 of the Act provides for payment of severance pay to an employee declared redundant. On the issue of unpaid leave, Counsel submitted that section 28 of the Act provided that an employee is entitled to leave after every 12 months of consecutive service. The appellant did not produce leave records to counter the claim for leave by the respondents the claim therefore succeeded and the trial court allowed it.

Determination

13. The court has considered the grounds in the Memorandum of Appeal, the Record of Appeal and submissions filed by both counsel herein and reiterate that the principles which guide this court in an appeal from a trial court are now more or less settled. In Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR the Court of Appeal stated that:-

> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

14. The trial Court (Hon. Kyang'a), had the benefit of listening to evidence and observing the demeanour of witnesses and came to the decision the subject of the present appeal. The Court acknowledges that an appeal to this court from a trial by the magistrate's court is by way of retrial. However, in exercising this jurisdiction, the court must guard against acting whimsically and replacing its view of the judgment it could have reached if it tried the matter in the first instance with the finding of the trial court. The decision of the trial court need not be perfect but provided it is in line with the operative law and a reasonable deduction of the evidence presented before it, this court will not interfere simply because as an appellate court it is clothed with jurisdiction to revaluate the evidence and come up with its own findings.

15. The Court has reviewed and considered the judgment of the trial court vis-à-vis the evidence presented before it. At page 7 of the judgment of the trial court, that court after delving into the definition of a casual employee as per the Act and the circumstances under which it arises, observed that the appellant never provided any evidence to show that the respondents were not regular employees but casuals and therefore concluded that they were regular employees. The finding was sound and well reasoned. The Court finds no reason to disturb the same. On the issue of other heads of claim in the statement of claim, the trial ably considered the obligations of an employer as provided under section 10, to keep particulars of an employee and came to the conclusion that the appellant omitted to do so besides section 74 of the Act places the obligation to keep employment records of employees. The findings over these heads of claim were therefore justified.

16. On the issue of redundancy, the respondents did not sufficiently demonstrate that they were declared redundant. No evidence was adduced to the effect that their termination was on account of the appellant's organizational changes rendering their positions superfluous besides, although not sufficiently proved, the appellant alleged that the respondents were terminated on account of absconding duties. The award of severance pay on account of redundancy was therefore unsubstantiated and is hereby set aside.

17. Save for the finding on redundancy pay which is hereby set aside, the court finds no reason to set aside the findings of the trial court which are hereby upheld.

18. The appeal being partially successful, either party shall bear their own costs.

19. It is so ordered.

DATED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2025

DELIVERED VIRTUALLY THIS 26TH DAY OF SEPTEMBER, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION