



**Atola v Thika Cloth Mills Limited (Appeal E263 of 2023)
[2025] KEELRC 2697 (KLR) (3 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2697 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E263 OF 2023
NJ ABUODHA, J
OCTOBER 3, 2025**

BETWEEN

ALEX NDOMBI ATOLA APPELLANT

AND

THIKA CLOTH MILLS LIMITED RESPONDENT

*(Being an appeal arising from the Judgment of Honourable O. Wanyaga (SRM)
delivered in Thika, MC. ELRC No. E015 of 2021 on 29th November, 2023)*

JUDGMENT

1. Through the Memorandum of Appeal dated 18th December, 2023, the Appellant appeals against the whole of the Judgment of Honourable O. Wanyaga (SRM) delivered on 29th November, 2023.
2. The Appeal was based on the grounds that:
 - i. The learned trial Magistrate erred in law and in facts by exercising his judicial discretion capriciously, whimsically and unknown legal principles.
 - ii. The learned trial Magistrate misdirected himself, failed to give due consideration to the legal principles applicable to when an employee is considered to be permanently employed (which is after six months of probation) and thus arrived at a wrong conclusion.
 - iii. The learned trial Magistrate erred and misdirected himself by failing to find and appreciate that the Appellant was a permanent- employee and not a contractual employee having worked for the Respondent for a period 6 continuous years.



- iv. The learned trial Magistrate erred in law and facts by failing to find that the Appellant was entitled to all the benefits that accrued to a permanent employee having served the Respondent continuously from 12th February, 2014 to 31st March, 2020 when he was unlawfully terminated from his employment.
- v. The learned trial Magistrate erred in law and facts by failing to find that the Respondent terminated the Appellant's services without justifiable cause either than his old age and Corona Virus outbreak in Kenya.
- vi. The learned trial Magistrate erred in law and facts by failing to find that the Respondent did give Appellant three months' notice of his intended termination as per the provisions of the Collective Bargaining Agreement.
- vii. The learned trial Magistrate erred in law and facts and failed to appreciate that the Appellant was entitled to overtime payment at the rate of 1.5 for the three hours he used to work overtime on Saturdays.
- viii. The learned trial Magistrate erred in law and facts and misdirected himself by finding that the Appellant ought to have claimed his unpaid leave days and overtime payment at the end of the contract when in reality he was a permanent employee who had served the Respondent for more than 6 continuous years.
- ix. The learned trial Magistrate erred in law and facts by failing to appreciate that the Respondent did not follow the redundancy procedure laid down under the employment laws and hence the Appellant's termination was not done within the law.
- x. The learned trial Magistrate erred in law and facts by failing to appreciate that the Appellant was rendered redundant due to significant drop in sales and cashflow hence the rules of redundancy as laid down in the *Employment Act* should have been applied by the Respondent.
- xi. The learned trial Magistrate erred in law and facts by failing to appreciate that there was no evidence that was tendered before Court to show that there was significant drop in sales and cashflow in the Respondent company to warrant the Appellant's termination.
- xii. The learned trial Magistrate erred in law and facts by finding that the Claimant was entitled to an award of Kshs. 380,726/= plus costs on 28th April, 2023 then going round and dismissing the suit on 29th November, 2023.
- xiii. The learned trial Magistrate erred in law and facts by finding that an employee who has served an employer for more than 6 continuous years is a casual employee who is not entitled to claim terminal benefits that accrues to a permanent employee.
- xiv. The learned trial Magistrate erred in law and facts and misdirected himself by dismissing the Appellant's Claim without considering his evidence and filed pleadings on whether he was lawfully terminated from his employment.



- xv. The learned trial Magistrate erred in law and facts by disregarding the Appellant's evidence, pleadings filed in Court, submissions and judicial authorities cited.
 - xvi. The learned trial Magistrate erred in law and facts by considering extraneous issues that were neither pleaded, canvassed or proven by the Respondent during the hearing of the suit.
 - xvii. The learned trial Magistrate failed to appreciate that the prejudice occasioned to the Appellant by dismissing the suit herein without taking into account the former's evidence could not be cured by an award of costs.
 - xviii. The learned trial Magistrate erred in law and misdirected himself by failing to exercise judicial authority on known legal principles and judiciously thus rendering a biased, unfair, unjust and inconsistent decision/Judgment.
3. The Appellant prayed that the Appeal be allowed with costs of the lower court and this appeal and the judgment and orders issued on 29th November,2023 be set aside and be substituted with an order allowing the Claimant's claim dated 19th April,2021.
4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant's Advocates Okello Ochogo Advocates LLP filed written submissions dated 19th June, 2025. Counsel submitted on the role of the first appellate court while relying on the case of Jackson Kaio Kivuva v Penina Wanjiru Muchene(2019) eKLR. Counsel submitted that the Appellant worked for the Respondent from 12th February,2014 to 31st March,2020 for a period of 6 years and 2 weeks when the Appellant's employment was terminated due to Covid-19.
6. On the issue of whether the appeal was merited counsel on grounds 1,2,3,4,5,6,9,10 & 11 submitted that the trial court erred and ignored critical evidence adduced by parties, the Appellant's submissions and judicial authority cited and arrived at a wrong conclusion by dismissing the Appellant's claim.
7. Counsel further submitted that the Appellant was terminated on 31st March,2020 without any justifiable cause. That the Appellant was entitled to three months' salary in lieu of notice in line with CBA produced by the Appellant. That he was issued with a notice of termination of his contract on 27th March,2020 informing him of the termination of his contract in the next five days for reasons that he was old and there was an outbreak of Covid-19.
8. Counsel further submitted that the Respondent's actions were surprising as the Appellant had attained the age of retirement in 2013 and he was recalled back to work by the Respondent in 2014 due to his exemplary performance and he was still fit to perform his duties. Counsel submitted that the Respondent never met the obligations set out under section 40 of the *Employment Act* while declaring him redundant.
9. Ms Ochogo further submitted that the conditions in the above section were mandatory and the Respondent could not cherry-pick and apply the same while relying on the case of Sagoo v Thika Cloth Mills Limited (2023) KEELRC 2697(KLR). That no notice was given to Labour Office, no evidence of selection criteria, there were still older employees than the Appellant at the Respondent's employ who were not declared redundant, he was not paid severance pay and the Respondent never computed the Appellant's terminal dues.



10. Counsel further submitted that the notice dated 16th April,2020 produced by the Respondent in trial was never served upon the Appellant as he had already been terminated. Counsel relied on section 36 of the [Employment Act](#) on requirement of notice period.
11. On grounds 7 and 8 counsel submitted that the trial court should have considered that the Appellant never went on leave for 6 years he worked for the Respondent. That he was never allowed to go on leave as he was referred to as casual employee.
12. It was Ms. Ochogo's argument that the Appellant was not employed as a casual employee as he transitioned to term employee under section 37 of the [Employment Act](#) hence he was entitled to all benefits attendant to a permanent employee which fact the Respondent admitted in their final submissions.
13. Counsel submitted that the employer should keep employee records under section 10(6) and should have produced leave documents if the Appellant went on leave. The appellant was therefore entitled payment in lieu of leave since it fell under the realm of continuing injury under section 90 of the [Employment Act](#). The Appellant filed the primary suit in 2021 before the lapse of 12 months following his termination in line with section 90 of the Act as pertains to continuing injury.
14. Counsel relied on the case of *The German School Society & Another v Ohany & Another* (Civil Appeal 325 & 342 of 2018 (Consolidated) (2023) KECA 894(KLR) on the claims which form part of continuing injury. That in the same vein the Appellant was entitled to the unpaid overtime claimed as the Appellant worked out for 48 hours spread out in six days instead of 45 hours which was never compensated by the Respondent. Counsel relied on among others the case of *Evans Katiezo Aligulah vs Eldomatt Wholesalers and Supermarket Ltd* (20160 eKLR on the issue of overtime.
15. Counsel submitted that the Appellant was entitled to service gratuity as per section 35(5) of the [Employment Act](#) and that the CBA at paragraph 22(c) also provided that a retired employee would be entitled to six months salary after 6 to 10 years of service.
16. On grounds 12,13,14,15,16.17 and18 counsel submitted that the Appellant demonstrated that he was unlawfully and unjustifiably dismissed. That the trial court arrived at a wrong conclusion by basing its decision outside evidence presented by parties, facts of the case and applicable legal principles. That the court curiously awarded Kshs 380,726/= plus costs on 28th April,2023 then went round and dismissed the suit on 29th November,2023.
17. On the issue of whether the Appellant was entitled to reliefs sought counsel submitted that the Appellant was entitled to the reliefs sought.

Respondent's Submissions

18. The Respondent did not file its submission despite being notified of the same as at the time of writing this judgment and the time for filing of the same had clearly lapsed.

Determination

19. The court has considered this appeal, the record of appeal and submissions filed by the Appellant herein and observes that the principles which guide the court in an appeal from a trial court are now



well settled. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that;

“[A]n 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 allowances in this respect”

20. In this case, the judgment of the trial court was that the Claimant’s suit was dismissed with half costs at lower scale to the Respondent. The court also held that the Appellant was terminated within the law having been given one month’s pay in lieu of notice when the contract provided for seven days’ notice and that the Appellant was on a casual contract of one-month and was issued with monthly contracts each being independent of each other.
21. In order to determine the appeal, the Court has come up with three main issues;
 - i. Whether the trial magistrate erred by finding that Appellant was on casual contract of one-month contracts each hence not entitled to protections under the *Employment Act*.
 - ii. Whether the trial magistrate erred in finding that the Appellant was fairly terminated
 - iii. Whether the trial Magistrate erred in not awarding the Appellant his terminal dues.

Whether the trial magistrate erred by finding that Appellant was on casual contract of one-month contracts each hence not entitled to protections under the *Employment Act*.

22. It was not in dispute that the Appellant was employed by the Respondent from 1979 to 2013 when he retired and paid his dues then the Respondent recalled him in 2014 on one-month contracts renewed each month up to March 2020. The last contract of February 2020 was for 15 days from 12th February to 27th February, 2020 which then was renewed for another month. Whereas the Respondent alleged that the Appellant’s services were not continuous as he was engaged in various one-month term contracts the Appellant alleged that he was continuously engaged by the Respondent for the 6 years hence he was converted to term employee by virtue of section 37 of the *Employment Act*.
23. The court notes that the Appellant was on one-month fixed term contracts where he was paid at the end of each contract. A perusal of his payslips shows he was paid pending leave, house allowance and overtime at the end of each month. The fact that the Respondent issued a termination letter dated 31st March, 2020 stipulating that the Appellant’s contract of employment from 12th February, 2014 to 27th March, 2020 had been terminated did not really mean the Appellant was a permanent employee. A fixed term contract employee does not have a guarantee of a renewal and the fact that the term contracts have been renewed severally does not constitute them to be regular and open ended employee by virtue of section 37 of the Act. In the case of *Krystalline Salt Limited vs Kwekwe Mwakele & 67 Others* [2017] eKLR, the court defined the different engagements as follows:-

“The *Employment Act* recognizes four main types of contracts of service: contract for an unspecified period of time, for a specified period of time, for a specific task (piece work) and for casual employment.....The decision to elect which form of employment to go for, either as an employee or employer will depend on a number of factors, but the dominant consideration is, for the employee, the earnings and other physical conditions of employment, and on the other hand, savings for the employer.”



24. This means that the Act appreciates fixed term contracts. In the case of East Africa Sea Food Limited v Mwazito (Appeal E013 of 2020) [2023] KEELRC 1257 (KLR) (20 April 2023) (Judgment) the court had this to say:-

Whether to issue a fixed term contract or not is regulated under the provisions of Section 10(3)(c) of the Act. An employer is allowed the prerogative to employ an employee under a fixed term contract with a start and end date. the self-executing contract is lawful and valid in employment and labour relations.

25. An analytical reading of the above section implies that for a conversion under section 37 to occur, the employee must first have been employed as a casual worker for him to be converted to permanent worker. The Appellant was on fixed term contracts with start and end dates. The same could not be converted to permanent contracts under section 37.

26. The court does not agree with the Appellant that his short-fixed term contracts assumed permanency. He had been engaged as such all the years and never raised any issue with the nature of the engagement with the Respondent. The court therefore finds and holds that the Respondent was on short fixed term contracts and section 37 could not convert a fixed term contract into an open ended contract.

Whether the trial magistrate erred in finding that the Appellant was fairly terminated.

27. The Appellant alleged that he was terminated on 27th March, 2020 due to old age on the threats of COVID-19. The Appellant alleged that he was declared redundant without the conditions set for redundancy being followed. The last contract signed of February 2020 stipulated that the contract would be terminated by giving or paying in lieu of notice of seven days.

28. In this case the Appellant was paid 30 days salary in lieu of notice which was more than the contractual terms. This court therefore agrees with the trial court that the termination was legal and done fairly.

Whether the trial court erred in not awarding the terminal dues claimed by the Appellant.

29. The court having found that the Appellant was engaged on short-fixed term contracts and that he was terminated procedurally goes to analyse any statutory terminal dues which are awardable whether there was unfair termination or not.

30. On the prayers for leave pay and overtime, as noted earlier in the Appellant's payslips he used to be paid his basic salary together with any overtime and leave entitlements. In addition, each contract was separate and independent of another and if anything was not paid it could only be claimed at the end of each contract.

31. On the issue of service gratuity, the Appellant appreciated he was employed on casual terms and since he was employed on short contracts where he was paid his dues at the end of each contract then he was not entitled to any service pay. In any event he was paid his dues when he retired from the Respondent.

32. In the upshot the appeal is found without merit and is hereby dismissed with each party bearing their own costs of this appeal. In the interest of justice and the nature of relationship between parties the court overturns the order on costs at trial court that the Respondent be awarded half the costs at lower scale and order that each party bears their costs at the trial court and this appeal.

33. It is so ordered.

DATED AT NAIROBI THIS 3RD DAY OF OCTOBER 2025

DELIVERED VIRTUALLY THIS 3RD DAY OF OCTOBER 2025



ABUODHA NELSON JORUM
PRESIDING JUDGE-APPEALS DIVISION

