

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

APPEAL NO. E019 OF 2025

JUSTUS MAMBO MUIA
APPELLANT

VERSUS

DANIEL GHEBRESELASIE T/A D.T. TRANSPORTERS
RESPONDENT

[Being an appeal from the judgment of Hon. Emily Mwamuye delivered on 23 January 2024 in Mombasa CMELRC No. E038 of 2024]

JUDGMENT

The appeal arises from the judgment delivered on 23 January 2024 in Mombasa CMELRC No. E038 of 2024. The grounds of appeal are three:

1. That the learned magistrate erred in law and fact by holding that the appellant did not adduce any documentary evidence or call a witness to prove that the appellant worked continuously for a number of working days amounting in aggregate to more than one month, in total disregard of M-Pesa statements that the appellant filed.
2. The learned magistrate erred in law and fact by holding that the respondent's employment did not convert to a regular term contract of service under the Employment Act when the appellant worked continuously for more than 6 months.
3. The learned magistrate erred in law and fact by holding that the appellant was a casual employee when he worked for the respondent for more than one year.

The appellant is seeking that his claim be allowed and the judgment of the trial court be reviewed with costs.

Both parties attended and agreed to file written submissions. Only the appellant complied.

The facts leading to the claim are that the appellant was employed by the respondent as a heavy commercial truck driver from 23 April 2021 and worked until 15 December 2023, when his employment was unfairly terminated. He was allowed to work from Monday to Saturday but would occasionally be called to work on Sundays. The wage paid was Ksh. 20,000 per month through his M-Pesa account. By 15 December 2023, the wage had increased to Ksh. 25,000 per month, which was an underpayment. The working conditions were poor, and the appellant was called to work on his rest days. He had no written contract or issued a payment statement.

The appellant claimed that in December 2023, the respondent assigned him the duty of long-distance travel. The assigned vehicle was faulty and not roadworthy, making it unsafe to use. The respondent decided to keep the vehicle in the garage without communicating with the appellant. He realized that he had been constructively dismissed and, on 15 December 2023, resigned because he had not received communication regarding his duties. This resulted in an unfair termination of employment, and he claimed the following dues;

- a) Notice pay Ksh. 39,447.30
- b) Underpayments Ksh. 357,503.08
- c) Underpaid house allowance once Ksh. 156,810.76
- d) Unpaid leave Ksh. 17,944.71
- e) Service pay Ksh. 50,257.65
- f) Compensation Ksh. 411,624.

In reply, the respondent denied the claims and stated that the appellant was employed as a casual worker, as evidenced by his M-Pesa statements. Money was paid per assigned duties. The money paid included expenses and upkeep. There was no employer-employee relationship to warrant the claim for constructive dismissal as alleged. The employment commenced as casual and ended upon payment for the task. The claims made are without merit and should be dismissed with costs.

The learned magistrate heard the parties and held that the appellant failed to produce evidence of continuous employment by the respondent to be protected under section 37 of the Employment Act (the Act). The personnel were therefore casual employees and were paid for the work they did. The claims made were dismissed.

The appeal submitted that the trial court failed to consider the M-Pesa statement he had filed, which confirms that he was in continuous service with the respondent from 23 April 2021 to 15 December 2023, when he was forced to resign due to intolerable working conditions. In the case of **Rashid Mazuri Ramadhani & 10 others v Doshi & Company (Hardware) Limited & another [2018] eKLR**, the court held that where the employer admitted to the employment of an employee on a casual basis, such employment having gone beyond the one day required for a casual employee, the employee became protected under section 37 of the Act.

Determination

This is a first appeal. The court is required to review the record, reassess the findings and make its conclusion. However, take into account that the trial court had the chance to see and hear the witnesses.

The appellant asserts that he was employed as a heavy commercial truck driver, while the respondent denied such employment and that he was a casual paid upon completion of a task. However, under sections 10(6) and (7) of the Act, the employer has a duty to file work records once a claim is filed. Such work records, for all employees, including those hired as casuals, would provide the court with an accurate picture of the appellant's employment status, if he was employed on a casual basis and paid upon completing a task.

In the absence of any work records, the court must believe the employee as held in **Abigael Jepkosgei Yator & another v China Hanan International Co. Ltd [2018] KEELRC 2541 (KLR)**.

The requirement to maintain work records and produce them in court once a claim has been filed is emphasised in the cases of **Gilbert Kasumali Kithi versus Nyali Beach Holiday Resort [2015] eKLR** and **Henry Ochido versus NGO Co-ordination**

Board [2015] eKLR. Holding back the work record only confirms that the employer engaged in unfair labour practices.

The appellant filed M-Pesa statements, which the respondent has admitted. A random check on the payments demonstrates different payments in a month, ranging from Ksh. 10,000 to Ksh. 33,000. In a given month, the appellant would receive several payments. The assertion by the respondent that the appellant was employed and paid for work done is not supported by any evidence.

Under section 9 of the Act, the employer is under a duty to issue a written contract as outlined under section 10 of the Act. The employer has the prerogative to issue a piece-rate contract under section 18 of the Act.

In the absence of any written contract specifying out the terms and conditions of employment, the appellant, having been engaged by the respondent continuously for periods beyond 24 hours or a day or paid daily, became protected under section 37 of the Act.

Section 37(1) of the Act is in two parts;

37. Conversion of casual employment to a term contract

(1) Notwithstanding any provisions of this Act, where a casual employee—

(a) works for a period or a number of continuous working days, which amount in the aggregate to the equivalent of not less than one month; or

(b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days, amounting in the aggregate to the equivalent of three months or more,

The contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.

One part allows for the conversion of employment when the employee is continuously engaged for 30 consecutive days. The other part involves work that is not likely to be completed within a day or a specified number of working days.

There is no contract of employment. The casual nature of the appellant's engagement by the respondent placed him under the protection of section 37 of the Act. He became an employee with rights and benefits under the Act.

In evidence, the applicant's case was that in December 2023, his allocated vehicle had mechanical problems, and the respondent directed him to keep it in the garage. On 15 December 2023, he tendered his resignation due to a lack of communication regarding his employment. He considered this to be constructive dismissal due to unfair and unfavorable working conditions.

Indeed, the appellant admits that his allocated vehicle was faulty. The respondent took it to the garage for repairs. This is what a diligent and responsible employer should do. Repair a defective vehicle before allowing its employee to put it on the road.

This cannot be a reasonable basis for claiming under constructive dismissal. The appellant's resignation on these grounds led to the frustration of his employment. He cannot turn around and accuse the respondent of constructive dismissal over a matter that ordinarily should be addressed as the respondent did. Remove a faulty vehicle from his garage for repairs.

Notice pay and compensation are not due.

Without the employment contract, the appellant, having failed to address this lapse while in employment, cannot claim to be a heavy commercial truck driver. He can only be covered under the minimum terms and conditions of employment as outlined in the Wage Orders published by the Minister.

A general worker in 2023 had a basic wage of KSh. 15,201.65 plus a house allowance of Ksh. 2,281.25 and the total gross wage Ksh. 17,481.85. The appellant was paid Ksh. 25,000. From the M-Pesa records, he received more payments in a month than the Ksh. 25,000 claimed.

There was no underpayment of wages, and the wage was Ksh. 25,000 per month was above the minimum, so he cannot claim house allowances beyond what was paid in a month.

The claim for leave days not taken is due. There are no work records to confirm that the appellant was allowed the benefit of taking annual leave from April 2021 to December 2023. The claim for payment of Ksh. 17,944 is reasonable.

Leave pay awarded at ksh.17, 944.

On the claim for service pay, there are no records for statutory remittances for the appellant. This is contrary to sections 17 and 19 of the Act. Under section 35(5) of the Act, the claim for service pay for each full year served is fair and reasonable. The tabulation of the service pay is the last wage paid of Ksh. 25, 000 for 15 days for each year worked. From April 2021 to December 2023, the appellant worked for two full years at Ksh. 25,000/15 x 2 = Ksh. 25,000 in service pay.

Regarding the costs analysed above, each party is to bear its own costs.

Accordingly, judgment of the lower court in Mombasa CMELRC No. E038 of 2024 is hereby reviewed in the following terms;

- a) Leave pay Ksh. 17, 944.**
- b) Service pay KSh. 25, 000.**
- c) Each party to bear its costs.**

Delivered in open court at Mombasa, this 16th day of October 2025.

M. MBARŪ
JUDGE

In the presence of:

Court Assistant: Japhet

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