

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

APPEAL NO. E329 OF 2024

RICHARD MUSAVA NDUSI.....

APPELLANT

VERSUS

ERIC OCHIENG.....
RESPONDENT

(Being an appeal from the Judgment and decree of Hon Nelly W. Karuiki sitting at Milimani Commercial Chief Magistrate's Court delivered on 25th October, 2024 in ELRC No E1888 of 2021)

JUDGMENT

1. Through the Memorandum of Appeal filed on 21st November, 2024 the Appellant appeals against the Judgment of Hon Nelly W. Karuiki sitting at Milimani Commercial Chief Magistrate's Court delivered on 25th October, 2024 in ELRC No E1888 of 2021.
2. The Appeal was based on the grounds, among others that:
 - a) **THAT** the Learned Magistrate erred in law and in fact by failing to consider the Statement of Claim, the primary evidence and submissions of the Appellant in support of his Claim and/or the submissions of the learned counsel for the Appellant by finding in favour of the Respondent.

b) **THAT** the Learned Magistrate erred in law and in fact by finding that the Claimant had been employed on casual basis.

c) **THAT** the Learned Magistrate erred in law and in fact by finding that the Respondent had a valid reason to terminate the Appellant from his employment.

d) **THAT** the Learned Magistrate erred in law and in fact in failing to find that the due procedure was not followed by the Respondent while terminating the Appellant.

e) **THAT** the Learned Magistrate was extremely biased against the Appellant and disregarded the submissions made by the Appellant inter alia that:

i) That the Respondent equaled before the Court that he would remit the Claimant's salary for one month.

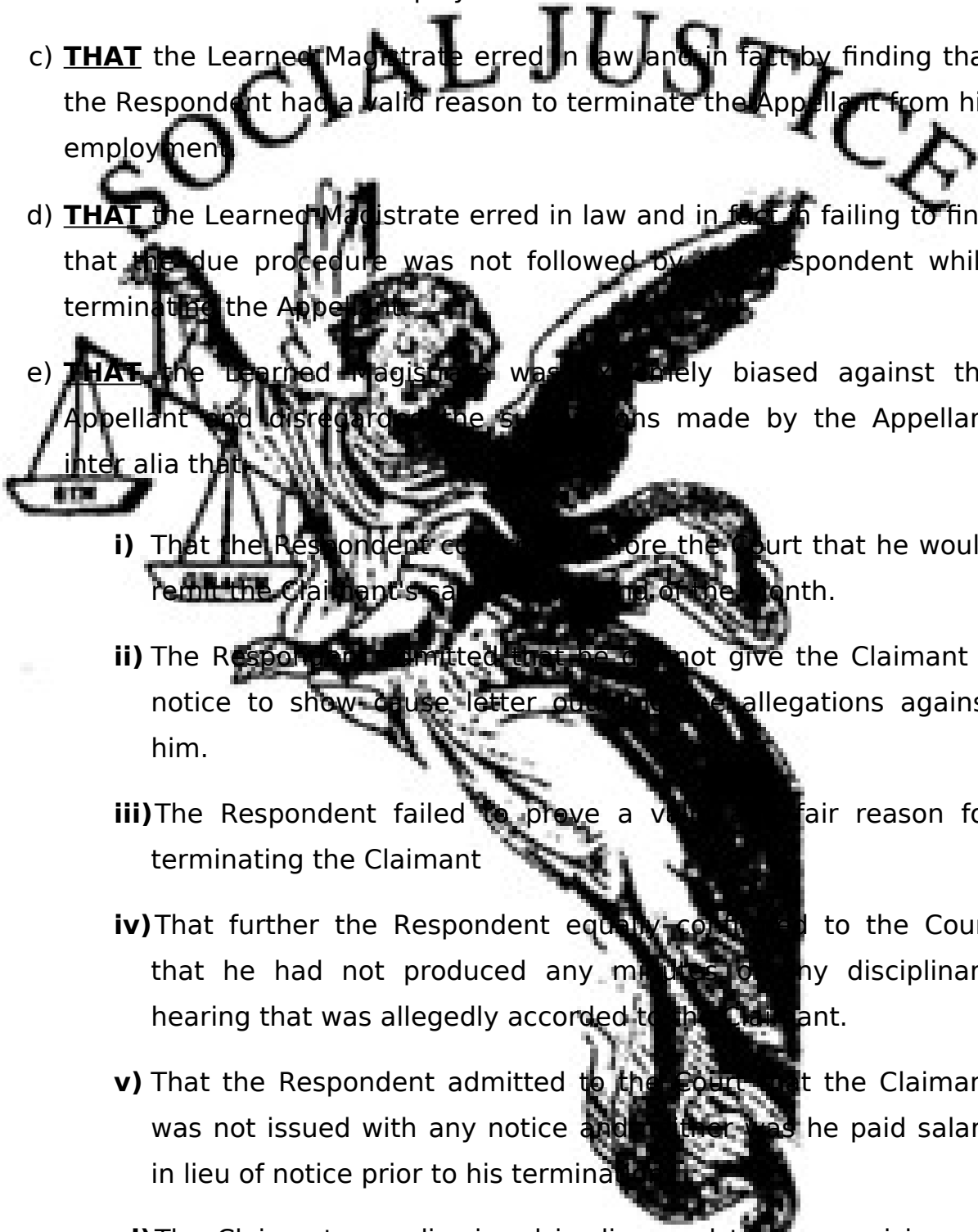
ii) The Respondent admitted that he did not give the Claimant a notice to show cause letter due to the allegations against him.

iii) The Respondent failed to prove a valid fair reason for terminating the Claimant.

iv) That further the Respondent equaled to the Court that he had not produced any minutes for any disciplinary hearing that was allegedly accorded to the Claimant.

v) That the Respondent admitted to the Court that the Claimant was not issued with any notice and further he paid salary in lieu of notice prior to his termination.

vi) The Claimant was dismissed in disregard to the provisions of Sections 41 and 45 of the Employment Act, 2007 which renders the termination process unfair and thus unlawful.



3. The Appellant therefore prayed that the judgment of the trial court be set aside and in place thereof allow the appeal and grant orders sought in the statement of claim before the lower court. The appellant further sought to be awarded costs.

It is proposed that to ask this honourable court for orders that:

a) This Appeal be allowed.

b) That this Honourable Court set aside the entire judgment delivered on 25th October 2021 in the Mithani Commercial Chief Magistrate's Court in CM No. 100 of 2021 and be substituted with the orders sought in the statement of Claim dated 4th November 2021 filed in the trial court inter alia:

- i) A declaration that the appellant suffered unfair, wrongful and unlawful dismissal from employment.
- ii) One month's salary in lieu of notice of Kshs.10,000.00
- iii) Compensation for Unutilized leave days
Kshs. **25,384.62**
- iv) Public Holidays worked Kshs. **2,131.85**
- v) Underpayment (October 2017 – September 2021)
Kshs.
208,974.75
- vi) Housing Allowance (October 2017 – September 2021)
Kshs.95,013.28
- vii) Compensation for wrongful, unfair and unlawful

dismissal of employment calculated as twelve months' gross salary being Kshs. **162,874.80** which is calculated as 12×13572.90

vii) Service Pay for the number of years worked since October 2017 to September 2021 (3 years $\times 13572.90 \times 1/2$) Kshs.20,359.35.

ix) Cost of the Claim before the trial court and interest.

x) Interest on (ix) (viii) above from the date of filing the suit until payment in accordance with court's rate.

c) Cost of this Appeal to be borne by the respondent.

4. The Appeal was disposed of on the written submissions.

APPELLANT'S SUBMISSIONS

5. The Appellant's Advocate Ms. Kyeva submitted among others that the trial court applied wrong legal principles and erred in both law and fact in holding that the appellant was a casual labourer and not a regular employee. According to counsel the trial court wrongly relied on the appellant's Mpesa statements for the months of September, 2021, June 2020 and December, 2018 yet the appellant testified that he did not have money to pay for the Mpesa statement for the entire period worked and that DW1 acknowledged that the

appellant was engaged as a shamba boy for the second time after the respondent's father died in July, 2007 and he further stated that he used to pay the appellant at the end of the month.

6. Counsel further submitted that the respondent did not produce any evidence such as attendance sheet to vouch the claim that the appellant worked for only three days a week. Ms Ryeva further submitted that section 10(7) of the Employment Act provided that in any proceedings if the employer fails to produce any such contact or written particulars of employment, the burden of proving or disproving an alleged term of employment is on the employer.

7. Regarding the contention that the appellant was a casual employee, Counsel relied on section 2 and 3 of the Act and the case of **Empire Feeds Ltd v. King** (EELRC 1501 (KLR)) and submitted that in cross-examination the respondent admitted that he would remit the appellant's salary at the end of the month but maintained the appellant was a casual labourer yet he did not produce any evidence

to show any day the appellant did not report to work. In this respect counsel relied on the case of **Francis Ndirangu Wachira v. Betty Wairimu [2019]eKLR** and the case of **Nanyuki Water & Sewerage Company Ltd vs. Benson Mwiti Ntiru & 4 Others [2018]eKLR**. Counsel further submitted that the presumption taken by the trial court that the payment of salary for the appellant for the month was a convenience was a mistake and prejudicial to the appellant as no evidence was produced to support the allegation that the appellant was a casual labourer.

8. On the question of whether the respondent had a valid reason to dismiss the appellant, counsel submitted that it was not disputed that the appellant was discharged from employment over allegations that he did not adhere to respondent's instructions and allowed the flower pots to be taken out of his premises. However, the appellant informed the trial court that he had never been issued with any instructions and that he never informed the respondents that the pots had been taken because the respondent and the pot maker were business partners and were well known to each

other. For this reason counsel submitted that the respondent failed to prove that he had valid reasons to dismiss the appellant hence the termination was unfair.

9. On the issue of procedural fairness during the termination of service, counsel submitted that section 41 of the Act required that even if there was a valid reason for termination, it must be done using fair procedure. In this regard Counsel relied on the case of **National Bank of Kenya vs Samuel Ngunjiri Mwangi [2019] eKLR** and further submitted that there was no indication that the respondent undertook any process akin to the one contemplated under section 41 of the Act. The respondent admitted that he never issued any show cause letter to the appellant and no disciplinary hearing was conducted as contemplated under section 41 of the Act. The trial court therefore erred in finding that the appellant had been granted an opportunity to explain himself before the dismissal.

10. Regarding the issue whether the appellant was entitled to the reliefs sought in the claim, counsel submitted that

having established that the appellant was a regular employee and not a casual worker and the respondent having failed to justify the reasons for terminating the appellant's service, he was entitled to the reliefs sought in the claim.

RESPONDENT'S SUBMISSIONS

11. The respondent's Counsel Mr. [redacted] on the other hand submitted that the learned Judge was right in holding that the appellant was employed on a casual basis. Counsel in this submission relied on section 2 of the Employment Act and the case of **Francis Njoroge** (already cited by the appellant). According counsel, evidence established that the appellant worked for the respondent three days a week and that he was at liberty to take up casual work from other residents in the compound which was inconsistent with full time employment. Counsel further submitted that the monthly payment was done for convenience rather than a confirmation for full time employment. In this respect counsel also relied on the **Nanyuki Water & Sewerage Company** case above. According to counsel, the appellant

failed to provide evidence that he was in continuous employment for the relevant period. The trial magistrate therefore correctly reached the conclusion that the appellant was a casual employee. Counsel citing the case of **Mark William Trevor Price & Caroline Elsa Anne Sturdy vs. John Greaves Hilder** [1984] KECA 100 (KLR), urged this court to be reluctant in interfering with the findings of a trial court unless the same were wrong.

12. Regarding the question whether the respondent had a valid reason to terminate the appellant's service, counsel submitted that the trial court correctly found that the respondent had a valid reason to do so since satisfied the requirements of section 43(1) of the Act. Counsel further submitted that evidence established that the appellant had been instructed not to allow the flowerpots to be removed from the compound yet the appellant allowed unauthorized individuals to enter the compound and remove the pots. The appellant was observed assisting these individuals to load the pots onto a lorry. These actions, counsel submitted, constituted willful disobedience which warranted summary

dismissal. In this respect counsel relied on the case of **CMC Aviation Ltd vs. Mohammed Noor [2015]KECA 775 (KLR)**. Concerning the question whether the respondent followed a fair procedure while terminating the claimant's service, counsel submitted that the respondent was questioned about the missing pots and was accorded an opportunity to explain his actions. He simply stated that *"the men came and picked up the pots"* which failed to address why he allowed this to happen contrary to instructions.

13. On the issue whether the respondent was entitled to the reliefs sought in the claimant's claim. Ower submitted that learned trial Magistrate correctly found that respondent was not entitled to the claims sought in the state of the claim.

DETERMINATION

14. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its own findings and conclusions as was held in **Abok James Odera t/a A.J Odera**

& Associates v John Patrick Machira t/a Machira & Co.

Advocates [2013] eKLR where it was stated thus:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

15. The trial Court (Hon. Nelly W. Kirop) had the benefit of listening to the evidence and observing the demeanour of witnesses and came to the finding on the subject of the present appeal. This Court acknowledges the fact that an appeal to it from a trial by the magistrates is by way of retrial. However, in exercising his jurisdiction, the court must guard against acting whimsically and repudiating 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 reevaluate the evidence and come up with its own findings.

16. The Court has reviewed and considered the judgment of the trial court vis-à-vis the evidence presented before the trial court. The judgment of the trial court was that the Claimant's suit was dismissed for lack of merit. The Court particularly found that the appellant was a casual employee and that the respondent has a valid and justifiable reason for terminating the appellant's contract and in so doing, the respondent followed a legal process. The trial court further found that the appellant was not entitled to the reliefs sought in the claim.

17. From the evidence and submission, it emerges that the respondent sent the appellant full month's salary for December, 2018, June, 2020 and September, 2020. The respondent reasoned such payment as convenient rather than daily payments intended for casual employees. Further the respondent acknowledged that the appellant was engaged as a shamba boy for the second time after the respondent's father died in July, 2007.

18. Section 2 of the Employment Act defines a casual employee as follows:

"casual employee" means a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time..."

19. It was not disputed that the appellant had worked for the respondent for quite sometime and that the relationship was conceded by the respondent to have continued when he hired the appellant after the respondent's mother died. The circumstances under which the respondent hired the appellant were not laid bare by the respondent before court apart from the assertion by the respondent that the appellant was a casual employee. Section 10(7) of the Employment Act provides that:

" If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an agreed term of employment stipulated in the contract shall be on the employer."

This section coupled with the fact that there was no evidence placed before the trial court to show that the appellant was a casual employee and considering that the appellant had a longer relationship with the respondent and that he used to pay the respondent monthly in circumstances he described as "convenient", removed the appellant from the ambit of a casual employee within the meaning of section 2 of the Act.

Further, section 37(1) of the Act provides:

“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 the contract of service.

From the foregoing it was erroneous for the trial court to reach the conclusion that the appellant was a casual employee.

20. Regarding reasons for termination, the appellant was terminated for allowing unauthorised persons to carry away pots from the respondent's premises contrary to express instruction never to allow any unauthorised persons to enter the respondent's premises. No evidence was ever tabled before the court to vouch for the claim that the appellant was so instructed. However taking into account the essential nature of the appellant's work which was to take care and watch over the appellant's premises, he was under implied obligation not to allow any unauthorised access or removal of anything from the respondent's premises. He conceded that some people came to

collect the pots from the respondent's premises but he did not contact the respondent to confirm if they were authorised to do so. He simply assumed that these people were known to the respondent and were his business partners hence authorised to carry away the pots. This was wrong and constituted a valid reason for disciplining the employee. The dismissal may in the view of the Court be disproportionate to the offence committed but that is not for me to decide at this point.

21. Concerning procedure for termination, the respondent did not provide any evidence to demonstrate that he subjected the appellant any procedural unfairness perhaps because he wrongly considered him as a casual employee whose contract ended at the end of the day. It is a requirement of the law that even where an employer has justifiable reasons for terminating an employee, he ought to accord such employee some measure of procedural fairness as contemplated under section 41. The procedure need not conform in all respects to a formal process but it ought to be able to demonstrate that the employee was heard or accorded an opportunity to be heard before termination or dismissal from service. In this regard this

Court finds and holds that the appellant was unfairly terminated through an unfair procedure.

22. In conclusion this court finds and holds as follows:

i. The trial court erred in finding that the appellant was a casual employee; that finding is therefore set aside and substituted with a finding that the appellant by dint of section 37(b) of the Employment Act became a regular employee.

ii. The respondent had a valid reason for terminating the appellant's service and also did so through an unfair procedure. The finding of the trial court that the termination of the appellant was not for both reason and process is therefore set aside to that extent.

iii. The respondent never adduced any evidence that the appellant was registered with NSSF or other pension scheme.

23. Other heads of claims not awarded are deemed disallowed as there was no evidence adduced before the trial court in support thereof.

24. In view of the above findings and considering that the appellant was an unskilled employee and could obtain any other unskilled work elsewhere and taking into account the fact that the respondent had reasonable grounds for terminating the appellant's service save for the process and the fact that he has had a long relationship with the respondent, the Court will award him as follows:

- i) Two months' salary as compensation for unfair termination at the rate of Kshs. 13,572.92 which works out to Kshs. 27,145.84 (Wages Order 2021).
- ii) One months' salary in lieu of notice Kshs. 13,572.92.
- iii) Underpayments for the period worked- Kshs. 208,974.75 (Operative Wage Orders for the period worked)
- iv) House allowance Kshs. 95,013.28
- v) Service Pay Kshs. 20,359

Total 365,066.14

25. The appeal being partially successful, each party shall bear their own costs.

26. It is so ordered.

Dated at Nairobi this 24th day of October, 2025

Delivered virtually this 24th day of October, 2025

Abuodha Nelson Jorum

Presiding Judge, Appeal Division

