



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS**  
**COURT OF KENYA AT KISUMU**  
**APPEAL NO. E058 OF 2024**

CHEMELIL                      SUGAR                      COMPANY                      LTD.

.....**APPELLANT**

**VERSUS**

ELIJAH                      ONYANGO                      ONDIEK.....

.....**RESPONDENT**

*(Being an appeal from the judgment of Hon. Amos Kiprop Makoross (PM) delivered on 17<sup>th</sup> September 2024 in Tamu PMCELRC No. E002 of 2023)*

**BETWEEN**

ELIJAH                      ONYANGO                      ONDIEK.

.....**CLAIMANT**

**VERSUS**

CHEMELIL                      SUGAR                      COMPANY                      LTD.....

.....**RESPONDENT**

## **JUDGMENT**

1. In the judgment delivered on 17<sup>th</sup> September 2024, the Trial Magistrate held that the Respondent's termination of employment was unfair, asserting that his contract did not end by effluxion of time as alleged by the Appellant. It was his finding that although the Respondent had previously been engaged on fixed-term contracts, he had in effect acquired permanent employment status, as there was evidence of continued payment of salary even during months when no contract subsisted. The Learned Magistrate further held that the fixed-term contracts were a ruse to circumvent section 37 of the Employment Act, given the long and continuous nature of the Respondent's engagement and the provisions of the Collective Bargaining Agreement (CBA) which reflected the parties' intention to convert the employment into a permanent one. Consequently, he entered judgment in favour of the Respondent in the following terms:

- a. Kshs. 29,998/- being 1 months' pay in lieu of notice.
- b. Kshs. 302,328/- being salary arrears.
- c. Kshs. 161,989/- being unpaid house allowance.

- d. Kshs. 9,000/- as leave allowance.
- e. Costs of the suit
- f. Interest on all the items above at court rates from the date of judgment till payment in full.

2. Aggrieved by the judgment, the Appellant lodged the present appeal contending that the Trial Magistrate erred both in law and fact by:

- a. Wholly adopting the Respondent's submissions and ignoring its submissions.
- b. Holding that the Respondent was a regular employee and not a fixed term employee despite the fact that he was employed on contract basis.
- c. Holding that the Respondent's services were terminated yet his employment ended upon expiry of his contract.
- d. Holding that the Respondent is entitled to a monthly salary of Kshs. 29,998/- as per the CBA and not Kshs. 21,600/- as per the contract of employment.
- e. Holding that the Respondent was entitled to house allowance and leave allowance despite the fact that his

salary was consolidated, pursuant to the contract of employment.

f. Reaching the decision whimsically and capriciously, based on emotional plea.

3. On the basis of these grounds, the Appellant urged this Court to allow the appeal, set aside the Subordinate Court's judgment, and dismiss the Respondent's claim in its entirety. It also sought costs of the appeal and of the suit before the Trial Court, together with any other relief deemed just and appropriate.

4. Pursuant to directions that the appeal be disposed of by way of written submissions, both parties duly filed their submissions.

#### Appellant's Submissions

5. The Appellant proposed to argue grounds 2 and 3 separately, grounds 4 and 5 together, and grounds 1 and 6 together. On ground 2, the Appellant submitted that the Respondent was employed under fixed-term contracts, drawing the Court's attention to the contracts produced before the trial court as

CEXH 1(a-d) and REXH 1-4. It asserted that the Learned Magistrate erred in holding that the employment had been converted to a regular one in the absence of evidence by the Respondent that he was engaged on terms other than on a fixed term basis.

6. With respect to ground 3, the Appellant submitted that the Respondent's employment terminated by effluxion of time. It highlighted the testimony of RW1 and the documentary evidence showing that the Respondent's last contract, expired on 30<sup>th</sup> November 2022. The Appellant asserted that no evidence was tendered to prove renewal or existence of any contract beyond that date.

7. On grounds 4 and 5, the Appellant submitted that the applicable salary was Kshs. 21,600/- per month, as stipulated in the Respondent's contract of employment, not Kshs. 34,344/- per month as provided in the CBA and held by the Trial Magistrate. It asserted that by signing the fixed term contract, the Respondent waived his entitlement under the CBA and could not rely on its terms. Moreover, the Appellant further asserted that the salary of Kshs. 34,344/- could not

be awarded as it was not pleaded. As to the claim for house allowance the Appellant maintained that the Respondent's salary was consolidated. Reference was made to employment contracts produced as exhibits CEXH 1(a-d) and REXH 1-4.

8. Regarding grounds 1 and 6, the Appellant submitted that the Trial Magistrate arrived at an erroneous decision due to his failure to consider: the express terms of the Respondent's contracts; the fact that his employment ended upon expiry of his last contract; that his salary was consolidated; and that he had waived his CBA rights by entering into the employment contracts. The Appellant also faulted the Learned Magistrate for disregarding its evidence that the Respondent had not cleared with the organization as required under the Human Resource Manual (REXH 4), which was a prerequisite to payment of dues. Consequently, it urged the Court to allow the appeal set aside the Trial Court's judgment and award it costs of both the appeal and the trial court.

#### Respondent's Submissions

9. In opposition to the appeal the Respondent identified the following issues for determination:

- a. Whether the Trial Court erred in holding that he was a regular employee and not a fixed term employee on contractual basis;
- b. Whether the Trial Court erred in holding that his services were terminated by effluxion of contractual time;
- c. Whether he was entitled to the terminal dues and reliefs granted by the Trial Court;
- d. Whether the Trial Court grossly misdirected itself by failing to consider the Appellant's submissions and on emotional whim considered the Respondent's submissions; and
- e. Whether the Trial Court erred in law or fact in its judgment.

10. On the first issue, the Respondent submitted that the Trial Court correctly found that he was a permanent employee. He relied on his continuous service from 2019 to 2022 and the regular monthly payments governed by the CBA. He cited section 37 of the Employment Act, which provides that

where a casual employee works continuously for one month or more, or performs work not reasonably expected to be completed within three months, the employment converts to a regular term contract. The Respondent also relied on **Thomas De La Rue v David Opondo Omutelema [2013]eKLR** which held:

*“Ordinarily those terms and conditions of service (in the CBA) are better and more favourable to the employee than the terms in individual contracts of employment or the minimum conditions set in statutes. The terms of the collective agreement are incorporated into the contract of employment of every employee covered by that agreement and a collective agreement is binding upon all parties including all unionisable employees employed by the employer.”*

11. Further reliance was placed on the decision in **Kenyatta University v Maina (Civil Appeal 261 of 2020) [2020] KECA 1201(KLR)** where the Court of Appeal agreed with the superior court that Petitioner’s numerous years of cumulative service converted his employment from casual to

permanent and pensionable under section 37(1) of the Employment Act.

12. On the second issue, he submitted that having been found to be a permanent employee, the Trial Court rightly held that his termination was unlawful. He contended that he was neither issued with a notice nor subjected to a disciplinary process as required under sections 41, 43, and 45 of the Employment Act. He cited the case of **Chogo v Nairobi Hospital [2025] KEELRC 1890 (KLR)**, which emphasized the employer's obligation to ensure both substantive and procedural fairness in termination. He also referred to the CBA, which mandates issuance of notice before termination.

13. On the third issue concerning entitlement to terminal dues, the Respondent submitted that the Appellant did not dispute the calculations but only objected on the nature of the contract. He maintained that he was rightly awarded dues in accordance with the CBA. On the allegation that the Learned Magistrate relied wholly on his submissions or was emotionally influenced, the Respondent submitted that the

Trial Court considered both parties' submissions but merely disagreed with the Appellant's interpretation. He cited the decision in the case of **Kenya Power and Lighting Co. Ltd v Vincent Mabeya [2021] eKLR**, which affirmed that a judicial officer is not obliged to agree with every argument advanced by parties but only to consider them. Moreover, as to the allegation of emotional influence, the Respondent submitted that it was baseless, as the judgment was reasoned, supported by evidence, and grounded on law. Regarding the issue of clearance as a prerequisite for payment of dues, the Respondent asserted that internal policy could not override statutory and contractual rights under the Employment Act or the CBA. He added that there was no evidence he had been required to clear and failed to do so.

14. As to whether the Learned Magistrate erred in his findings, the Respondent maintained that the judgment was sound and well reasoned. He relied on the case of **Mburu & 6 others v Kirubi [2023] KEHC 3599 (KLR)**, which held that an appellate court will only interfere with a trial court's

findings if the decision was based on no evidence, on a misapprehension of evidence, or on wrong principles. On the strength of the foregoing submissions, the Respondent urged the Court to dismiss the appeal, uphold the judgment of the Trial Court, and award him costs of the appeal.

### Disposition

15. This being a first appeal, I am enjoined to evaluate and examine the record before the Magistrates' Court and the evidence presented before it in order to arrive at my own conclusion. This principle of law was enunciated in the celebrated case of **Selle v Associated Motor Boat Co. Ltd [1968] EA 123** where the Court of Appeal outlined the duties of a first appellate court as follows:

*"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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."*

[Emphasis supplied]

16. Having properly warned myself that I neither saw nor heard the Appellant nor the Respondent testify in trial, I have come to the following determination. I have duly evaluated the evidence they presented in the Trial Court, and which evidence and documents in support thereof, are before this Court.

17. The Appellant has denied the Respondent was entitled to the remedies he obtained in the Trial Court asserting the Learned Magistrate misapprehended the law and was swayed by emotions. The decision of the Learned Magistrate made on 17<sup>th</sup> September 2024 is well reasoned, properly weighted and has considered both sides. The Learned Magistrate noted the Appellant submitted that it was bound by the terms of the written contract and not the CBA and that the Respondent had been employed on fixed term

contract and that his service terminated by effluxion of time. The Appellant further submitted that the Respondent was not entitled to house allowance and that he was not underpaid.

18. The other submission was that the Respondent did not clear as required by the HR Policy Manual of the Appellant and therefore he was not entitled to gratuity. The Learned Magistrate then went on to consider the evidence each party brought forth and made findings in respect of each aspect. He was not persuaded the Appellant was correct in applying the contract as opposed to the CBA.

19. The Learned Magistrate applied his mind correctly to the provisions of the law regarding a casual employee and how casual employment is converted in terms of section 35(1)(c) of the Employment Act. There was no misdirection in the manner the Learned Magistrate applied his mind to the law and the fact of the case before him. The Learned Magistrate held that the contracts issued were mere smokescreens probably intended to circumvent the provisions of section 37 of the Employment Act. The Learned Magistrate held that the clause 29 of the CBA was clear that it was to be applied in

accordance with section 37 of the Employment Act or as amended. He held at paragraph 25 of the decision as follows:

*25. Indeed, looking at the Collective Bargaining Agreement negotiated between the Claimant's union and the Respondent, it is clear to see the parties had every intention from the word go.*

20. There was no emotional aspect to this determination. It is simply the law. Under the Labour Relations Act, a trade union and an employer as parties in collective bargaining can negotiate terms on a CBA and those terms are applicable to both employees who are members of the union and those who are not. As can be seen in sections 57 and 59 of the Labour Relations Act which provide *inter alia* that the collective bargaining agreement is binding for the period of the agreement and covers all unionisable employees. It to be implemented and is enforceable. The CBA therefore applied to the Respondent and he was entitled to the salary and benefits under the CBA. It is clear the correct appreciation of the law was made by the Learned Magistrate on this score and he cannot be faulted. He properly awarded the Respondent the sums he was entitled to under the CBA. The

failure to incorporate the terms of the CBA in the contract as per section 59(3) of the Labour Relations Act did not vitiate the CBA nor remove the Respondent from application of the agreement.

21. The Learned Magistrate then awarded one month's salary as compensation after he had applied his mind to the parameters required under section 49(1) prior to making this determination. I will not disturb his findings made in respect to compensation which though on the lower side was well reasoned and not capricious or one calling for interference on appeal. The Learned Magistrate held the Respondent received erratic salary and proceeding to analyse the evidence of the defence witness held the Respondent was entitled to a salary that was higher than what was paid. The Trial Court analysed the issue of underpayments and made determination on the sums underpaid after analysing payslips and the bank statements availed in evidence. The Learned Magistrate agreed the certificate of service and gratuity would be payable after the Respondent cleared with the Appellant. Once again there was no misdirection on this

score and I therefore cannot overturn the determination by the Learned Magistrate in this regard.

22. The Learned Magistrate analysed the issue of house allowance ascertaining that the CBA made provision for housing and those who were not housed would be entitled to a house allowance. Yet again there was no misdirection in the analysis or findings of the Trial Court.

23. The foregoing is ample to show that there was no error made by the Learned Magistrate. The Appeal herein must fail on all grounds as it does not raise any plausible ground for the discharge or variation of the decision, judgment and decree issued by the Learned Magistrate on 17<sup>th</sup> September 2024.

24. The final result is that this Appeal is dismissed with costs to the Respondent and the decision of the Learned Magistrate affirmed on all grounds including the award of costs and interest in the lower court.

Orders accordingly.

**Dated and delivered at Kisumu this 11<sup>th</sup> day of**

**November 2025**

**Nzioki wa Makau, MCI Arb.  
JUDGE**

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