

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI**

**APPEAL NUMBER E105 OF 2025**

**SANA INDUSTRIES LIMITED.....APPELLANT**

**-VERSUS**

**BETH WARIGIA MACHARIA.....RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the Hon. D. Orago (SRM)  
delivered on 18<sup>th</sup> March 2025 in Ruiru MCELRC Cause No. E024 of 2024)*

**CORAM**

***Before Lady Justice J.W. Keli***

***C/A Otieno***

**JUDGMENT**

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. D. Orago (SRM) delivered on 18<sup>th</sup> March 2025 in Ruiru MCELRC Cause No. E024 of 2024 between the parties filed a Memorandum of Appeal dated the 1<sup>st</sup> of April 2025 seeking the following orders: -

**a) This Honourable court allows this appeal.**

**b) The judgement of Hon. Diana Orago delivered on 18<sup>th</sup> March 2024 be wholly set aside and in its place, the claim be dismissed.**

**c) The costs of the Appeal as well as costs of the lower court to be awarded to the Appellant**

### **GROUNDS OF THE APPEAL**

2. The Honourable Magistrate erred in fact and in law in finding that the Respondent's employment had converted to permanent despite evidence showing that the Respondent never worked continuously.
3. The Honourable Magistrate erred in fact and in law 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.
4. The Honourable Magistrate erred in failing to find that the Respondent absconded duty which then entitled the Appellant to terminate his employment.
5. The Honourable Magistrate erred in awarding excessive damages when the Respondent in fact absconded duty, hence abetting her own dismissal from employment.

6. The Honourable Magistrate erred in failing to give a reasoned justification of how she arrived at 12 months' salary as damages for unfair termination.
7. The Honourable Magistrate erred in fact and in law by awarding Kshs. 121,940/- as unpaid leave contrary to established principles that unpaid leave can only be awarded up to a maximum of 3 years.
8. The Honourable Magistrate erred in awarding one month salary in lieu of notice despite evidence showing that the claimant had absconded duty.
9. The Honourable 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:  $(13,400 \times 21/28) \times 3 \text{ Years} = 30,150/-$
10. The Honourable Magistrate erred in fact and in law by failing to consider the Appellant's evidence presented in court.

#### **BACKGROUND TO THE APPEAL**

11. The Respondent filed a suit against the Appellant vide a memorandum of claim dated 27<sup>th</sup> February 2024 seeking the following orders: -
  - a. A declaration that the Respondent's summary dismissal of the Claimants from employment was unlawful and unfair.

- b. A declaration that the Claimant is entitled to payment of terminal dues and damages.
- c. An order for the Respondent to pay the Claimants their terminal benefits and compensatory damages plus interest thereon and Certificate of Service for each Claimant.
- d. A payment of Kenya shillings three million eight hundred and thirty-three thousand one hundred and forty eight (Kshs. 3,833,148/-).
- e. Costs of this suit plus interest thereon.
- f. Any other relief that the court will find fit.

(pages 3-5 of Appellant's ROA dated 3<sup>rd</sup> July 2025).

- 14. The Respondent filed the Verifying Affidavit sworn by JOYCE WANGARI MUNDIA on 27<sup>th</sup> February 2024 with the Respondent's Consent, as well as her list of witnesses, witness statement, and list of documents together with the bundle of documents attached, all of even date (pages 6-223 of ROA).
- 15. The claim was opposed by the Appellant who entered appearance and filed a memorandum of response dated 15<sup>th</sup> April 2024 (pages 227-232 of ROA). They also filed a list of witnesses dated 15<sup>th</sup> April 2024, witness statement of AGNES KAGWIRIA of even date, and list of documents of even date with the bundle of documents attached (pages 233-263 of ROA).
- 16. To counter the Appellant's case, the Respondent filed a Reply to memorandum of response, dated 8<sup>th</sup> May 2024 (pages 224-226 of ROA).

17. The Respondent's case was heard on the 11<sup>th</sup> of February, 2025 with the Respondent testifying as PW1. She relied on her filed witness statement as her evidence in chief, produced the documents attached to her list of documents, and was cross-examined by counsel for the Appellant Mr. Eredi (pages 283-284 of ROA).
18. The Appellant's case was heard on the same day with the Appellant calling one witness, Agnes Kagwiria (DW1) to testify on its behalf. She relied on her filed witness statement as her evidence in chief, and produced the Respondent's documents. She was cross-examined by counsel for the claimant Ms. Wangari (pages 285-286 of ROA).
19. The parties took directions on filing of written submissions after the hearing. The parties complied.
20. The Trial Magistrate Court delivered its judgment on the 18<sup>th</sup> of March 2025 partially allowing the Claimant/Respondent's claim to the tune of Kshs. 421,502/- comprising of 12 months' salary as compensation for unfair termination, one month's salary in lieu of notice, service pay, unpaid leave and February salary. It also ordered that the Claimant/Respondent be issued with a Certificate of Service (judgment at pages 288-294 of ROA).

### **DETERMINATION**

21. The appeal was canvassed by way of written submissions. Both parties complied.

### **Issues for determination**

22. In their submissions dated 30<sup>th</sup> July 2025, the Appellant identified the following issues for determination, namely:-

- i. Whether the trial Magistrate erred in finding that the Respondent's employment converted from casual to permanent;
- ii. Whether the trial Magistrate erred in finding that the Respondent was unfairly terminated from employment;
- iii. Whether the trial Magistrate erred in ignoring uncontroverted evidence that the Claimant's employment was terminated on account of absconding duty;
- iv. Whether the trial Magistrate erred in awarding one month's salary in lieu of notice and Kshs. 160,800.00 being 12 months' compensation without reasonable justification;
- v. Whether the trial Magistrate erred in awarding service pay;
- vi. Whether the trial Magistrate erred in awarding Kshs. 121,940.00 being unpaid leave for 13 years rather than 38 months leave as envisaged in Section 28 (2).

23. Conversely, the Respondent identified the following similar issues in his submissions dated 18<sup>th</sup> August 2025.

- i. Whether a valid appeal is placed before the court;
- ii. Whether the Respondent proved a contract of service exists and whether any casual employment is evident;
- iii. Whether the contract of service was unfairly or unlawfully terminated;

- iv. Whether there is uncontroverted evidence that the Respondent absconded duty;
- v. Whether the trial court erred in the exercise of its discretion to award 12 months' salary as compensation for unfair or unlawful dismissal;
- vi. Whether an award of service pay is merited;
- vii. Whether an award of house allowance is due;
- viii. Whether an award of earned but untaken leave is time-barred.

24. In response to the Respondent's submissions, the Appellant filed rejoinder submissions dated 8<sup>th</sup> September 2025 and identified the following issues for determination:

- i. Whether the Record of Appeal should be struck out for failure to include documentary evidence filed by the Respondent;
- ii. Whether the court should grant the Respondent the sum of Kshs. 1,465,278.17 as stated in the Respondent's submissions.

25. The court having perused the submission by the parties, was of the considered opinion the issues placed before the court for consideration in the appeal were as follows-

- a) *Whether there was a valid appeal before the court***
- b) *Whether the trial Magistrate erred in finding that the Respondent's employment converted from casual to permanent;***
- c) *Whether the trial Magistrate erred in finding that the Respondent was unfairly terminated from employment;***

*d) Whether the trial court erred in relief granted.*

**Whether there was a valid appeal before the court.**

**The Appellant's submissions**

26. The Respondent contends that the Record of Appeal is incurably defective for failure to include certain documentary evidence, and urges that it should be struck out. With respect, this assertion is misplaced. The omission of the said documents was a genuine mistake on the part of the Appellant, and it has since been remedied by the Respondent, who has already filed the missing documents. Further, no prejudice has been occasioned to the Respondent, and it would therefore be manifestly unjust to strike out the appeal on this basis. Rule 16 of the Employment and Labour Relations Court (Procedure) Rules, 2024 provides: "An appellant may, with the leave of the Court, file and serve a supplementary memorandum of appeal or a supplementary record of appeal." This provision expressly allows an appellant to cure omissions in a record of appeal by filing a supplementary record with the leave of the Court. The law, therefore, anticipates and accommodates procedural oversights without rendering the appeal fatally defective. Similarly, Rule 19 of the same Rules gives the Respondent an equal right to file a supplementary record of appeal if they consider the original record defective or incomplete. It states: "If the respondent considers the record of appeal to be defective or insufficient, the respondent may lodge copies of a supplementary record of appeal containing any additional documents and shall promptly serve the same on the appellant and any other respondents." Accordingly, if the Respondent genuinely believed

that the omission prejudiced their case, they were at liberty to file a supplementary record to ensure the record was complete. The Respondent's decision to instead seek striking out, despite having already filed the document, demonstrates that no prejudice has been occasioned. The law is settled that the omission of documents in a Record of Appeal does not necessarily render the appeal fatally defective. The Supreme Court in *Nuri v Kombe & 2 Others* [2019] KESC 42 (KLR) faced a similar question where proceedings were omitted. The Court stated: "It therefore emerges that failure to include the 'record of proceedings of the court of Appeal' in the Record of Appeal does not automatically render the appeal filed before this Court fatal. For if the law contemplates that such an omitted document may be filed later, the same law cannot be said to rejoiner a Record of Appeal with that omission outrightly fatal. However, we hasten to add that where a required document lacks in the Record of Appeal, devoid of a sufficient explanation for the omission, is a ground for the striking out of that Record of Appeal." The Appellant has provided a sufficient explanation for the omission, and the defect can be cured through the filing of a Supplementary Record of Appeal. Article 159(2)(d) of the Constitution requires this Court to administer justice without undue regard to procedural technicalities. The decision in *Kilonzo David t/a Silver Bullet Bus Company v Kyalo Kiliku & Another* [2018] eKLR is particularly instructive. The Court held that even though omission of a decree was a serious error, it would be "too draconian" to strike out the appeal where the omission was inadvertent, and the defect could be cured by a supplementary filing. Here, the Respondent has already filed the missing documents. The parties are therefore properly equipped to argue the appeal, and striking it out would elevate form over substance, contrary to the spirit of the Constitution.

### **The Respondent's submissions**

27. The Record of Appeal placed before this Honourable Court is incompetent by virtue that it is an incomplete record of the proceedings. There is a missing documentary evidence, tendered by the 2nd Claimant/Respondent. A medical report from Ruiru Level 4 hospital dated 19/02/2024 relating to a 59.5 months old baby named Alice Ngina, the Respondent's daughter. During proceedings, as seen at page 284 of the Record of Appeal, the Appellant challenged the veracity of this document by stating that it is not a medical report of a child as it appeared to state the person who was sick on 19/02/2024 was 59 and a half years old. The Respondent averred that the medical report does not relate to a 59.5-year-old person, but it refers to a child who is close to 5 years. She stated during re-examination that when children are taken to hospital age is recorded in months. The Court, on a balance of probability made a finding that the Respondent's averments were more plausible, than the supposed averment by the Appellant. She had to take her child to hospital on 19/02/2024, and she asked for permission as opposed to an employer, who admits to having bank details of an employee but has none of their contacts for 13 years of consistent service and pay. This document informed the Trial Court when it made its decision in favour of the Respondent. We humbly submit that its exclusion is not by chance as in the Claimants list of documents (page 12 of the Record of Appeal) outlines the report as part of the Respondents documentary evidence. It is proof that she was truly attending to a sick family member on the day seen on the Register as absent. We humbly submit, that due to such missing document, an error discovered after close of pleadings and the case, we have taken liberty by filing a copy of the same under a supplementary record of appeal/list of documents. We pray that orders of costs do issue

against the Appellant, as a result of a Respondent incurring costs to rectify a record of appeal, as under rule 16 of Employment and Labour Relations Court (Procedure) Rules, 2024 only an Appellant can do rectify the negligence resulting in an incomplete record. Additionally, we humbly submit, that in the alternative of admitting this supplementary record of appeal/list of documents, the Appeal should be disallowed and struck out with costs or the Trial Court File be called up. As it stands now, due to the error on the Record of Appeal, the Court does not have before it a complete record of the pleadings (claimant's list of documents), and documentary evidence, that informed the decision now placed on appeal before it; contrary to Rule 15 of the Employment and Labour Relations Court (Procedure) Rules, 2024. We are guided by the case of: - Ready Consultancy Co. Ltd v Charo & another [2024] KEELRC 166 (KLR): - "5. There is no evidence before this Court for its review, re-evaluation and consideration, this being a first appeal. As stated in Mursal -vs Manese [2022] eKLR: - "A first Appellate Court is mandated to re-evaluate the evidence presented before the trial Court as well as the judgment and to arrive at its own independent judgment on whether or not to allow the appeal. A first Appellate Court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and to make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in Selle & Another -vs- Associated Motor Boat Co. Ltd & Another [1968] E.A. 123 And In Peters -vs- Sunday Post Ltd [1958] E.A. page 424." "Echoing on the aforesaid conventional duty of a first Appellate Court, Rule 8(4) of the Employment and Labour Relations Court (Procedure) Rules 2016 provides as follows: - "A memorandum of appeal shall be accompanied by a copy of the proceedings, all documentary evidence relied on and a copy of the judgment from the proceedings of the matter being appealed against. Provided that where

copies of proceedings, are not filed with the memorandum of appeal, the Appellant shall file such copies as soon as possible, and within a reasonable time.” In any first appeal, proceedings of the trial Court are so pivotal such that the merits or otherwise of the appeal cannot be considered or determined without them. In the absence of the trial Court’s proceedings, there is absolutely nothing on record for this Court, being a first appellate Court, to review, to re-evaluate and to consider in determining the merits or otherwise of the appeal herein. The appeal is hollow and incompetent and must, therefore, fail.”

### **Decision**

28. It is true that the record of appeal by the appellant missed out on the documents filed by the claimant in the lower court in the supplementary list of documents dated 18<sup>th</sup> August 2024. The supplementary record was filed by the respondent. The documents were the claimant’s medical report and NSSF statements. Rule 16 of the Employment and Labour Relations Court (Procedure) Rules, 2024 provides: “An appellant may, with the leave of the Court, file and serve a supplementary memorandum of appeal or a supplementary record of appeal.” This did not happen but the respondent has filed. The action was consistent with the provision of Rule 19 of the court to wit- ‘If the respondent considers the record of appeal to be defective or insufficient, the respondent may lodge copies of a supplementary record of appeal containing any additional documents and shall promptly serve the same on the appellant and any other respondents.’ The court finds no need to dwell on the issue any further as the omitted documents are before the court as at the time of writing the judgment and the same are deemed as part of the record. The Supreme Court in Nuri v Kombe & 2 Others [2019] KESC 42 (KLR) faced a similar question where proceedings were omitted. The Court stated:

*“It therefore emerges that failure to include the ‘record of proceedings of the court of Appeal” in the Record of Appeal does not automatically render the appeal filed before this Court fatal. For if the law contemplates that such an omitted document may be filed later, the same law cannot be said to rejoiner a Record of Appeal with that omission outrightly fatal. However we hasten to add that where a required document lacks in the Record of Appeal, devoid of a sufficient explanation for the omission, is a ground for the striking out of that Record of Appeal.”* The Respondent filed the omitted documents pursuant to Rule 19 (1) of the Employment and Labour Relations Court Rules to wit- ‘If a respondent is of the opinion that the record of appeal is defective or insufficient for the purposes of the respondent’s case, the respondent may lodge copies of a supplementary record of appeal containing copies of any further documents or any additional parts of documents which are, in the respondent’s opinion, required for the proper determination of the appeal.’”

**Whether the trial Magistrate erred in finding that the Respondent’s employment converted from casual to permanent;**

**The Appellant’s submissions**

29. The Appellant submits that the Respondent was engaged on casual terms, working intermittently and paid at Ksh. 652/- daily wage, which was remitted every fortnight. This is corroborated by the Respondent’s own bank statements. (Record of Appeal page 13-166). The claimant further admits during cross examination that she earned a daily wage which was paid only for days worked. (see page 284 of the Record of appeal for typed proceedings). The

engagement falls under the statutory definition of “casual employment” under Section 2 of the Employment Act. In *Rashid Odhiambo Allogoh & 245 others v Haco Industries Ltd* [2015] eKLR, the court emphasized that Section 37(1) should not be misinterpreted to convert casual employees into permanent ones merely due to non-daily payment or duration. Further, in *Simeiyu Martin Mumachi & 3 Others v Steel Makers Ltd*, the burden of proof was placed on the employee to prove continuity. Here, the Respondent failed to do so. Thus, the learned magistrate erred in deeming the Respondent’s employment permanent. We therefore submit that the trial magistrate erred in finding the Respondent’s employment converted to permanent and pensionable as there was no proof of working on a continuous basis, a fact expressly admitted by the Claimant in cross-examination.

### **The Respondent’s submissions**

30. The Respondent proved a contract of service existed between her and the Appellant. This is under Section 8 of the Employment Act which recognizes both oral and written contracts of service. She produced Bank Statements (Record of Appeal page 14-167) showing consistent payment of wages after every 30 days in installments or tranches every 15 days for 13 years by the Appellant. The Appellant admitted the bank statements (page 229 of the Record of Appeal) and referred to it in its Memorandum of Response. However, it attempted to mislead the trial court by stating that the bank statements show that payments were not consistent or uniform in a year, they varied in every fortnight of pay. The statements, however, clearly show payments by the Appellant being made every 15 days. The Appellant’s own Defence (pp.227–242) shows the Respondent was not an independent contractor but worked under the Appellant’s control regarding hours of work, duties, work station, and delivery of services—

control that the Appellant relies on to justify dismissal for alleged absenteeism. Due to the facts outlined above It is clear, we humbly submit that the finding of a contract of service, governed by the Employment Act, as seen in Section 3 (1) is justified. It was evident that a written or oral contract of service in exchange for wages existed, and these wages were uniform, and were paid on a monthly basis (intervals of 30 days). We also submit that the trial court's decision is correct; that the contract of service is on permanent and pensionable terms or in the alternative, it was casual employment converted to permanent and pensionable terms. Section 2 of the Employment Act a casual employee is one whose engagement provides for payment at the end of the day and is engaged for less than 24 hours a day. The contrary of this provision was evident throughout the proceedings and pleadings. The aforementioned bank statements showed wages were never paid at the end of the day or after a fortnight, it was agreed they were paid at the end of the month, and such payment would be made in tranches. The rate of wages in these tranches never varied in any month in a calendar year. It is proof that the Respondent was always present, for 13 years, and she did perform the work assigned without complaint from the Appellant, disciplinary processes, or any breaks in the form of leave or absenteeism of such intensity so as to affect her pay. It is admitted that the Respondent's work in the piping department was essential to the Appellants daily operations and ongoing business. Her job resulted in the daily creation of the hair products the Appellant produces, and still makes today. Her labour was needed every day, hence the allegation of absenteeism as a ground justifying dismissal and attendance registers. Therefore, it was clear, which finding has not been controverted, that her responsibilities were not a onetime piecework, but a service with a job description as "piper" and with tasks to be performed every working day. These services are still required by the Appellant to fulfill its

object and kept or are intended to keep the company as a going concern in perpetuity. The Appellant did not discharge its burden of proof showing, by a contradictory record from the Bank Statements and Respondent's testimony; that the Respondent was not engaged in continuous working days exceeding 6 months under Section 37 (3) of the Employment Act. It tendered no attendance register disputing the fact that the Respondent worked for a continuous number of days exceeding a month. It tendered no record showing that the job description of a piper, or the tasks she performed at its company could come to an end after 3 months of her employment. We humbly submit that the Respondent's employment was converted to permanent and pensionable prior to the registration of the C.B.A. on 10/10/2013. Additionally, the collective bargaining agreement which we believe she is a beneficiary of after its registration and the admission by the Appellant on deductions to the trade union during its re-examination, has no end date. 1.18. Conversion of casual employment to term contract under the Employment Acts, one whose terms are imputed to provide for wages being paid monthly is seen under Section 37 of the Act and the case of Nanyuki Water and Sewerage Company Limited v Benson Mwiti Ntiritu & 4 Others (2018). In this case the main bone of contention was whether Section 37 of the Employment Act created permanent and pensionable contracts of service, or it was simply the intention of Parliament to provide for the issuance of a 28-day termination notice under Section 35 to casual workers benefiting from the conversion. The Employment and Labour Relations Court ruled that it was both; a converted contract would be deemed permanent, and a 28- day termination notice must be issued to her. Under Section 9 of the Employment Act the employer is obligated to draw a written contract and provide particulars, especially if the work has no foreseeable end date and has subsisted and been provided for more than 3 months. We humbly submit that this is

because, even if a term contract is deemed to emanate from conversion, there can be no assumption of the end date, as conversion does not result in a written contract, an employer has to write one and specify it and the employee has to agree to the same. The Court in its ratio decidendi in favour of a permanent contract held that: -“The defence, and the reply to the amended claim, which the appellant filed simply amounted to a denial that the respondents or any of them was its employee and put them to strict proof. With respect, that defence was an idle one. Among the documents put forward by the respondents were the appellant's own muster rolls, apparently obtained by the respondents without the appellant's consent. Instead of rejecting that evidence altogether, the appellant's concern in cross examining the respondents was confined to demonstrating that the number of days worked by each respondent over the years were not as claimed by them. Indeed, the appellant filed as part of the defence, a summarized form of the muster rolls showing the number of days each respondent had worked for several years. That was a clear admission that the appellant had at least engaged the respondents in its employment. It would have served the appellant better if it went ahead and submitted to cross examination in order to give clarity to the terms of engagement with the respondents but, in its wisdom or lack of it, it did not testify orally. Section 10 of the Act requires the contract of service to have certain prescribed particulars including the job description of the employee. Section 10 (7) 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 alleged term of employment stipulated in the contract shall be on the employer. There was a clear burden of proof on the appellant which it did not discharge. The manouvre adopted by the appellant in declining to testify served only to give credence to the respondents' version of events, and we

do not blame the trial court for its summary conclusion that the respondents were engaged as casual employees and that they had worked for a period of continuous days equivalent in aggregate to not less than a month and the job they performed could not reasonably be completed in less than three months or more. Consequently, we find and hold, as the trial court did, that the contracts of service of the respondents assumed permanency and were "deemed to be ones where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service" in terms of section 37." Whether the contract of service was unfairly and unlawfully terminated. We humbly submit that the Appellant conceded that a contract of service existed. Stating that wages were paid at a rate of Kshs. 652.00 per day, and that they were cumulatively paid after a fortnight. It averred that the Respondent never worked consistently and would perform tasks on an "as/when needed" basis. This is seen in the Appellant's Defence (page 229, paragraph 4, and line 10 & 11 of the Record of Appeal) in Response to the Appellant's memorandum of claim (page 3-5 of the Record of Appeal), and her submissions (page 264-269). Contending against the Respondent's allegation that she was not a casual worker or that conversion under Section 37 of the Employment Act occurred, which said employment was terminated unlawfully and unfairly; without notice, or proof of the grounds for dismissal. It avers that due process was followed, this is seen in its defence (page 229, paragraph 6, line 17- 41 & page 230, paragraph 1-13), and submissions (page 270-277). We submit that the Trial Court correctly issued a declaration that the Respondent's employment contract was unfairly and unlawfully terminated by the Appellant. We reiterate that under Section 43 of the Employment Act an employer in a claim arising out of termination is obligated to prove the reason for such termination. If it cannot prove a valid reason, with the reasonable and genuine belief of its existence being manifest, such

termination is unfair. Secondly, under Section 45 of the Employment Act a termination from employment is unfair if the employer fails to prove that the reason for termination is valid (exists), it is a fair reason (reasonable or justifiable), and that the procedure was fair – particularly relevant in summary dismissal. In this case, we submit that as seen under Section 47 (5) of the Employment Act, the Respondent proved that unfair and unlawful/wrongful termination occurred, however, the Appellant failed to prove the grounds for termination or due process. We submit that the Trial Court took note that it was admitted that the contract existed and was terminated on or about 19/02/2024. It was evident that notice was never delivered or acknowledged as received personally by the Respondent. Wages stopped arbitrarily (as seen in bank statements) and it was uncontroverted that the Respondent was not allowed in the work station. The Trial Court then had to assess whether there was evidence that the Appellant/employer issued notice under Section 35 (1) (c) due to conversion under Section 37 of the Employment Act, and if it had proved its genuine belief that a valid reason exists, coupled with the valid reason, to terminate the services of the Respondent after or through due process. Honourable learned Senior Resident Magistrate Ms. Diana Orago referred to the letters alleged by the employer/Appellant as having been delivered to the Respondent. She took note that the Appellants witness, Ms. Agnes – Human Resource Officer testified that she delivered letters to the shop steward, repeatedly, but she never followed up on whether they were received by the Respondent. She therefore found that the due process was not followed. It is clear that the employee/Respondent was not given notice of any complaint of absenteeism or termination as mandated by law. There was no proof that she appointed a proxy to take delivery on her behalf, or that the trade union or labour offices did.

It was not proved by the employer/Appellant before the trial court, or any forum/hearing prior

to termination, that a genuine belief of any valid reason for dismissal existed, nor was there any indication that due process was availed to the Respondent. In concurring with this decision, we humbly submit that under Section 41 of the Employment Act read together with Section 26 of the same; it is a minimum term of a contract of service that a notice of the grounds for termination or summary dismissal be delivered to the employee, in a language they understand, before/together with a fellow employee or shop steward of their choice. The employee is entitled to make representations with regard to the grounds notified and the employer is obligated to consider the same. This is a minimum term of a contract of service, and is to be interpreted literally, while ensuring the rights it enforces are not limited in any way by interpretation, or by an internal memo, policy or written contract. That the delivery of any termination notice, or notification to a shop steward on the sole volition of an employer was not issuing notice to the employee, as the Appellant suggests. To prevent any unconscionable or unfair burden on an employer in the event an employee absconds or is absent without a justifiable reason from the workstation, this Court has placed an obligation on the employer to show that they exercised reasonable efforts to contact the employee and it could not deliver the notification, or the subsequent notice of termination. This is seen in the case of Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School [2015] eKLR where the employer accused the employee of absconding. The Claimant, a teacher, stated that he received a text message from the Head Teacher of the school informing him he has lost his job. The Claimant avers he requested for a termination letter but the Head Teacher said it was not policy to issue a letter. In rebuttal the Respondent stated the employee absconded from work at the start of the academic year. The Head Teacher as its witness stated that he did send the message, but that he also enquired for the

academic certificates of the employee on call in the start of the year, and next he heard from him was by the suit that had been filed. The Court held that for an employee to be said to have absconded, or absented themselves from work such absence must be proved by the employer. The employer in a case of absence must demonstrate it made attempts to reach the employee. It specified post, email, phone calls, colleagues, neighbors or family. It states that:

- “18. Desertion can only take place where an employee leaves employment with the intention of not returning or formulating such intention not to return after leaving. Such intention may be demonstrated by showing absence of communication from the employee, duration of absence, impact of the absence and nature of employee’s duties. 19. The employer must also demonstrate that it made attempts to reach out to the employee to establish his whereabouts, making reasonable inquiries as to the absence (post, email, phone calls, colleagues, neighbors or family members), issuance of ultimatums to the employee to resume duty and the like. Each case will depend on its peculiar circumstances. And a hearing may be necessary. But that is enough observation for now.” As seen on page 286 of the Record of Appeal, the certified copies of the proceedings, the Appellants narration is implausible. The adjudicating officer clarifies on this issue, “why allow someone who has refused to give contact details to work?”, “for 13 years?”. Where was the record of this contact form given and placed before the trial court, where is an impartial employee testifying to the same as a policy? Additionally, where is the document or law that places an obligation and ascribes authority on a shop steward to receive, or deliver notices on behalf of an employee? Can an employer’s unilateral internal memo, one bearing no approval from directors or shareholders, alter a registered collective bargaining agreement or a converted oral casual employment contract?

(Proof of this registered C.B.A. is seen in Kenya Union of Hair & Beauty Salon Workers v Sana Industries Co. Limited [2018] KEELRC 49 (KLR).)

### **Decision**

31. The appellant contended that the respondents were casual employees as he was paid daily wage. The respondent stated she was employed on 1<sup>st</sup> December 2011 as hand piper till her dismissal on 19<sup>th</sup> February 2024 with last salary of Kshs. 13400. (see pages 3 and 4 of ROA, the claim). In response, the appellant denied the pleaded wages and asserted that the claimant was employed as casual and paid Kshs. 625 daily wage for the number of days worked every fortnight. (pages 227-239). The claimant filed reply to the response and reiterated the total paid salary fortnightly. In terms of evidence the claimant filed bank statement and the court noted she first entry was of 15<sup>th</sup> September 2014 for Kshs, 2657 , next 30<sup>th</sup> September 2014 Kshs, 4897 next 15<sup>th</sup> October 2014 Kshs, 4897, 31<sup>st</sup> October 2014, 14<sup>th</sup> November 2015 Kshs. 3997, 28<sup>th</sup> November 2014 Kshs. 4447 with last entry of Kshs. 7050 on 16<sup>th</sup> January 2024. During cross-examination DW1 who was the HR officer said she did not have the claimant's contacts and that the claimant was served with the show cause letter through the shop steward. She had no evidence that the claimant was served. The trial court found that the claimant, having been engaged for more than 10 years, was a contract term employee under section 37 of the Employment Act.

32. A casual is defined under section 2 of the Employment Act 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;" The

claimant worked continuously for more than 10 years. Section 37 of the Employment Act provides for conversion of engagement from casual to contract term as follows- '37. Conversion of causal employment to 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.' The court finds that the Respondent, having been engaged continuously for more than 3 months, her engagement converted to contractual employment and she was entitled to all statutory benefits of an employee paid monthly wages (section 37 of the Employment Act cited above).

**Whether the trial Magistrate erred in finding that the Respondent was unfairly terminated from employment;**

**The Appellant's submissions**

33. Whether the trial magistrate erred in finding that the respondent was unfairly terminated from employment? - Being a casual employee, the Respondent's contract could be terminated at day's end per Section 35(1)(a) of the Employment Act. It was the Appellant's position that the Respondent absconded duty on 19th February 2024. This notwithstanding, the Respondent elected to follow up with the employee once she absconded for a

continuous period of 7 days. The Claimant expressly admitted both in examination in chief and in cross examination that while she had sought for permission to be absent for one day, she failed to return on account that her child was unwell. (see page 283 and 284 of the record of appeal) She further confirmed explicitly that she did not sign attendance registers, irrefutable proof of absence/absconding duty. While this is very understandable and is a fact the employer would consider to be a sufficient to extend her leave of absence, she never notified the employer and neither did she formally apply for leave. It is therefore unjust for the court to punish an employee on the basis of absence where the employee failed to communicate. As a matter of fact, the Respondent went over and above in trying to afford the Claimant an opportunity to reclaim her job by serving her with a return to work notice dated 6th March, 2024 requesting the claimant to resume work. (see page 253 of the record of appeal) Once the claimant failed to respond to the same, series of disciplinary procedures was commenced, including a show cause letter (pg 252) disciplinary hearing notice, (pg 254) and finally when she failed to attend, a summary dismissal letter was issued. (pg 255) The Respondent never responded to the said notices, and neither did she report the issue to labour office as required under Section 47 of the Employment Act.

34. Whether the learned trial magistrate erred in ignoring uncontroverted evidence that the claimant's employment was terminated on account of absconding duty- In *Walter Anuro v Teachers Service Commission* [2013] eKLR, the court outlined the dual requirement of substantive and procedural fairness. The Appellant adhered to both. The Respondent had a duty to engage, but instead absconded duty, a ground for dismissal under Section 44(4)(a) and (c). In *Itira v Riley Services Limited* [2023] KEELRC 428 (KLR), it was held that

where an employer relies on absconding to terminate employment, it must demonstrate efforts made to ask the employee to return to work. The return to work notice suffices. In *Ann Njoroge vs Topez Petroleum Ltd. (2013) eKLR*, it was held that absconding duty is a serious offence and could result in summary dismissal. The evidence led by the Appellant was to the effect that the Claimant absconded duty. She was then required to return to work before being asked to show cause and hence summarily dismissed. However, the learned trial magistrate in answer of her issue no 3 (page 292 of the record of appeal) finds that the Claimant's termination was both substantively and procedurally unfair. This is in express disregard of the testimony given by the Respondent herself, both in examination in chief and in cross examination that she failed to report to work even after her off days were over. The learned trial magistrate equally erred in dismissing the Respondent's disciplinary letters as failing to amount to procedural fairness despite the law only requiring the employer to demonstrate effort made to trace the claimant on account of abscondence.

### **Respondent's submissions**

35. Whether the contract of service was unfairly and unlawfully terminated-We humbly submit that the Appellant conceded that a contract of service existed. Stating that wages were paid at a rate of Kshs. 652.00 per day, and that they were cumulatively paid after a fortnight. It averred that the Respondent never worked consistently and would perform tasks on an "as/when needed" basis. This is seen in the Appellant's Defence (page 229, paragraph 4, and line 10 & 11 of the Record of Appeal) in Response to the Appellant's memorandum of claim (page 3-5 of the Record of Appeal), and her submissions (page 264-269). Contending against the Respondent's allegation that she was not a casual worker or that conversion

under Section 37 of the Employment Act occurred, which said employment was terminated unlawfully and unfairly; without notice, or proof of the grounds for dismissal. It avers that due process was followed, this is seen in its defence (page 229, paragraph 6, line 17- 41 & page 230, paragraph 1-13), and submissions (page 270-277). We submit that the Trial Court correctly issued a declaration that the Respondent's employment contract was unfairly and unlawfully terminated by the Appellant. We reiterate that under Section 43 of the Employment Act an employer in a claim arising out of termination is obligated to prove the reason for such termination. If it cannot prove a valid reason, with the reasonable and genuine belief of its existence being manifest, such termination is unfair. Secondly, under Section 45 of the Employment Act a termination from employment is unfair if the employer fails to prove that the reason for termination is valid (exists), it is a fair reason (reasonable or justifiable), and that the procedure was fair – particularly relevant in summary dismissal. In this case, we submit that as seen under Section 47 (5) of the Employment Act, the Respondent proved that unfair and unlawful/wrongful termination occurred, however, the Appellant failed to prove the grounds for termination or due process. We submit that the Trial Court took note that it was admitted that the contract existed and was terminated on or about 19/02/2024. It was evident that notice was never delivered or acknowledged as received personally by the Respondent. Wages stopped arbitrarily (as seen in bank statements) and it was uncontroverted that the Respondent was not allowed in the work station. The Trial Court then had to assess whether there was evidence that the Appellant/employer issued notice under Section 35 (1) (c) due to conversion under Section 37 of the Employment Act, and if it had proved its genuine belief that a valid reason exists, coupled with the valid reason, to terminate the services of the Respondent after or through

due process. Honourable learned Senior Resident Magistrate Ms. Diana Orago referred to the letters alleged by the employer/Appellant as having been delivered to the Respondent. She took note that the Appellants witness, Ms. Agnes – Human Resource Officer testified that she delivered letters to the shop steward, repeatedly, but she never followed up on whether they were received by the Respondent. She therefore found that the due process was not followed. It is clear that the employee/Respondent was not given notice of any complaint of absenteeism or termination as mandated by law. There was no proof that she appointed a proxy to take delivery on her behalf, or that the trade union or labour offices did. It was not proved by the employer/Appellant before the trial court, or any forum/hearing prior to termination, that a genuine belief of any valid reason for dismissal existed, nor was there any indication that due process was availed to the Respondent. In concurring with this decision, we humbly submit that under Section 41 of the Employment Act read together with Section 26 of the same; it is a minimum term of a contract of service that a notice of the grounds for termination or summary dismissal be delivered to the employee, in a language they understand, before/together with a fellow employee or shop steward of their choice. The employee is entitled to make representations with regard to the grounds notified and the employer is obligated to consider the same. This is a minimum term of a contract of service, and is to be interpreted literally, while ensuring the rights it enforces are not limited in any way by interpretation, or by an internal memo, policy or written contract. That the delivery of any termination notice, or notification to a shop steward on the sole volition of an employer was not issuing notice to the employee, as the Appellant suggests. To prevent any unconscionable or unfair burden on an employer in the event an employee absconds or is absent without a justifiable reason from the workstation,

this Court has placed an obligation on the employer to show that they exercised reasonable efforts to contact the employee and it could not deliver the notification, or the subsequent notice of termination. This is seen in the case of Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School [2015] eKLR where the employer accused the employee of absconding. The Claimant, a teacher, stated that he received a text message from the Head Teacher of the school informing him he has lost his job. The Claimant avers he requested for a termination letter but the Head Teacher said it was not policy to issue a letter. In rebuttal the Respondent stated the employee absconded from work at the start of the academic year. The Head Teacher as its witness stated that he did send the message, but that he also enquired for the academic certificates of the employee on call in the start of the year, and next he heard from him was by the suit that had been filed. The Court held that for an employee to be said to have absconded, or absented themselves from work such absence must be proved by the employer. The employer in a case of absence must demonstrate it made attempts to reach the employee. It specified post, email, phone calls, colleagues, neighbors or family. It states that: - “18. Desertion can only take place where an employee leaves employment with the intention of not returning or formulating such intention not to return after leaving. Such intention may be demonstrated by showing absence of communication from the employee, duration of absence, impact of the absence and nature of employee’s duties. The employer must also demonstrate that it made attempts to reach out to the employee to establish his whereabouts, making reasonable inquiries as to the absence (post, email, phone calls, colleagues, neighbors or family members), issuance of ultimatums to the employee to resume duty and the like. Each case will depend on its peculiar circumstances. And a hearing may be necessary. But that is enough observation for

now.” As seen on page 286 of the Record of Appeal, the certified copies of the proceedings, the Appellants narration is implausible. The adjudicating officer clarifies on this issue, “why allow someone who has refused to give contact details to work?”, “for 13 years?”. Where was the record of this contact form given and placed before the trial court, where is an impartial employee testifying to the same as a policy? Additionally, where is the document or law that places an obligation and ascribes authority on a shop steward to receive, or deliver notices on behalf of an employee? Can an employer’s unilateral internal memo, one bearing no approval from directors or shareholders, alter a registered collective bargaining agreement or a converted oral casual employment contract? (Proof of this registered C.B.A. is seen in Kenya Union of Hair & Beauty Salon Workers v Sana Industries Co. Limited [2018] KEELRC 49 (KLR).) We humbly submit, due to the facts above, the Appellant did not discharge its burden of proof with regard to a genuine and valid reason for dismissal, together with due process. It failed to prove a valid reason to terminate the permanent and pensionable employment relationship that existed, through conversion, before the C.B.A, and after the registered C.B.A. It failed to prove it afforded due process. In that it failed to prove that the notifications and termination notices produced by it (page 252-255 Record of Appeal) were received by the Respondent. It failed to prove that the alleged delivery to the shop steward, the alleged Lucas Bala, was tantamount to delivery of the notice to Respondent. It failed to show any follow up with the alleged proxy appointed by itself, Mr. Lucas Bala, such issue of notice being in contravention to Section 41 of the Employment Act, an implied term of an employment contract that sets minimum terms and conditions of employment. Therefore, the Trial Court’s decision was merited. In

955 of 2011) 2013KEELRC386(KLR) (2May2013) the employee was dismissed by the employer on the ground that he had knowingly colluded with an imposter, alleged to be his cousin who shared his name, to use his academic certificates to obtain a job. The employee denied this vehemently and stated he did not know the impersonator. The employer dismissed both of them. The Court made a finding that although a genuine reason for termination was apparent, the procedure was in question. Due to the want of due process the dismissal was unlawful and unfair. In that the employer simply dismissed the employee without establishing his involvement with the imposter, and giving him time to prepare for allegations of him being his cousin, and him knowingly giving out certificates to the alleged cousin to source for work. It held that: - “22. In light of the foregoing, I find that Respondent had a genuine reason for terminating the Claimant's employment as required under Section 43 of the Employment Act. However, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.”

36. Whether there is uncontroverted evidence the Respondent absconded her duty-n We humbly submit that standard of proof with regard to absconding duty or absenteeism was never met by the Appellant. We humbly submit that this standard of proof on a balance of probability is met by the methods outlined in the aforementioned case of Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School [2015] eKLR. Reasonable efforts to deliver notifications directly to the employee as is stated under Section 41 of the Employment Act must be tendered as proof of a genuine reason for termination under Section 43 read together with Section 47 (5) of the Employment Act

these provisions place a burden of proof on the employer in addition of constituting the basic minimum terms of a contract of service. As the burden of proof is placed with regard to a genuine reason for termination is placed on the employer, after the Appellant admitted it summarily dismissed the Respondent without notice, the Respondent did not have any obligation to tender records that she did not absent herself outside her reply to the Appellants Defence until it was proved that due process was availed and that after more than 7 days of absence as prescribed under the Act, without reason, she was absent from work. In prudent response to this, she tendered a medical report that was admitted and measured up against the Appellants testimony on due process, issue of notices and its policy on delivery of notifications. We submit, the Appellant had the burden of proof with regard to its allegation on absenteeism or absconding. It failed to prove this reason for termination as prescribed by law, its evidence was implausible when the trial court interrogated it on the hearing, and its evidence on its strict adherence to section 41 of the Employment Act where it took note of on notifications to an employee as part of due process. The Honourable Court could not fathom the Appellant maintaining an employee for such a long duration of time, consistently paying them by electronic means every 30 days for 13 years, without having their contact details, or the admitted failure to call the Respondent, or follow up of notices when delivered to the shop-steward if an iota of good faith could be evident in their contravention of the law. This is seen on page 286 of the Record of Appeal during the examination of its witness. With regard to the Respondent controverting absconding (leaving work with an intention to end employment), we reiterate that the record of appeal is incomplete. The Respondent did tender a medical card/report showing that her child was sick on the 19/02/2024. This missing report was her

controverting absconding or unjustified absence, it was proof that her testimony was valid, the Appellant having opportune time to challenge it through means allowed by law on civil procedure and appeals or review. We submit, from the tenor of the trial and pleadings, it was proved on a balance of probability that her account and testimony was more credible than the Appellants. Additionally, we humbly submit that on page 225 of the Record of Appeal, paragraph 8, line 26-30, the Respondent denied any delivery of a termination notice to her or any attempt by the Appellant to deliver notifications to her personally as prescribed under Section 41 of the Employment Act. No absconding or absenteeism without proper cause was evident. Only unfair dismissal is evident.

### **Decision**

37. The reason for termination, according to the appellant, was absenteeism. DW1 admitted she was not sure the Respondent was served. The respondent said she was on medical permission to be off duty from 19<sup>th</sup> February 2024. That she returned on the 21<sup>st</sup> February 2024 and was informed there was no work for her.

During cross-examination, the claimant told the court that she did not sign in the register on 19<sup>th</sup> February 2024 since she knew she was going to be away. The claimant produced medical treatment notes for 19<sup>th</sup> February 2024 (respondent's supplementary record).

38. The trial court found that, for lack of proof of service upon the claimant, the show cause and the dismissal letters related to disciplinary proceedings, the termination was unlawful and unfair. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the Employment Act to wit:- '45(2) A termination of employment by an employer is unfair if the employer fails to prove—

- (a) that the reason for the termination is valid
- (b) that the reason for the termination is a fair reason—
- (i) related to the employees conduct, capacity or compatibility; or
- (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.” To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the Employment Act (Walter Ogal Anuro v Teachers Service Commission[2013] eKLR).

39. The court agreed with the trial court's finding on re-evaluation of the evidence before the trial court (Selle & Another -V. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus: "...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..." ). In the circumstances the court found no basis to interfere with finding on unlawful and unfair termination.

#### **Whether the trial court erred in relief granted.**

#### **Compensation for unfair termination**

40. The trial court awarded 12 months compensation for unfair termination. In the instant case the court finds the claimant contributed to her termination as she did not justify failure to report

on duty after 19<sup>th</sup> February 2024 as the baby was not admitted and neither did she seek permission again to be away. She did not deserve the maximum compensation. The court reduces the compensation to the equivalent of 10 months as there was no procedural fairness or service of reason for the termination and she was only away for 1 day. The claimant pleaded salary of Kshs. 13400. The respondent stated she was paid daily wages. The court upheld the conversion of casual to contract term. The court finds the wage of Kshs. 13400 was within the minimum wage and the appellant did not plead otherwise save to insist on daily wage. Thus award is set aside and substituted with award 10 months' pay of total sum of **Kshs. 134000**.

41. Salary in lieu of notice was due under sections 35 and 36 of the Employment Act and is upheld.
42. On untaken leave - the respondent led evidence she asked for permission to be away and it was allowed. She never led evidence of denial of leave on request. Section 28(4) of the Employment Act caught up with her, thus only 18 months' leave could be carried forward. The award of leave is substituted with 18 months pay thus 13400x 18 months award of **Kshs 20,100**.
43. On service pay -The NSSF statement had nil returns. The court finds that the Respondent was not under NSSF and was thus entitled to service pay at a rate of 15 days for each completed year of work. The role of the court on first appeal is as stated in Selle & Another -V Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

"...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..." The court then finds service pay was a relief of which the trial court erred in failing to award. The same is awarded for years 2015-2023 (9 years) Thus  $13400 \times 15/30 \times 9$  total sum of service pay of **Kshs. 60300.**

45. February salary 2024 was only due for 19 days worked, thus the trial court erred in awarding a full month, and the same is substituted as follows:  $13400 \times 19/30$ , thus Kshs. **8487/=**

### **CONCLUSION**

46. In conclusion, the appeal is allowed partially. The Judgment and Decree of the Hon. D. Orago (SRM) delivered on 18<sup>th</sup> March, 2025 in Ruiru MCELRC Cause No. E024 of 2024 is set aside and substituted as follows-

**Judgment is entered for the claimant against the respondent as follows-**

- a. The termination is held as unlawful and unfair**
- b. Compensation for unfair termination for the equivalent of 10 months' pay, Kshs. 134,000**
- c. Salary in lieu of notice Kshs. 13400**

- d. Service pay Kshs. 60300
- e. Leave in lieu Kshs 20,100
- f. February 2024 salary for 19 days Kshs, 8487/=

**Total sum 236287/-**

- g. Half costs
- h. Interest
- i. Certificate of service be issued to the claimant

47. As the appeal was partially successful, I order each party to bear their own costs on appeal.

48. Stay of 30 days.

49. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13<sup>TH</sup>  
DAY OF NOVEMBER, 2025.**

**J.W. KELI,  
JUDGE.**

**IN THE PRESENCE OF:**

Court Assistant: Otieno

Appellant – Eredi

ORIGINAL