

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

APPEALS DIVISION

APPEAL NUMBER E104 OF 2025

SANA INDUSTRIES LIMITED.....APPELLANT

-VERSUS

MARY WAYUA KINYOTA.....RESPONDENT

(Being an Appeal from the Judgment and Decree of the Hon. D. Orago (SRM) delivered on 18th March 2025 in Ruiru MCELRC Cause No. E128 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 18th March 2025 in Ruiru MCELRC

Cause No. E128 of 2024 between the parties filed a Memorandum of Appeal dated the 1st of April 2025 seeking the following orders: -

- a) **This Honourable court allows this appeal.**
- b) **The judgement of Hon. Diana Orago delivered on 18th 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**

GROUND 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.

d. Service pay from June 2019-2022	Kshs. 43,032.00
e. 12 months' salary as compensation for unlawful termination of employment	Kshs. 172,148.00
Total	Kshs. 313,612.00

f. Certificate of service

g. Costs and interests from a) to e) above

(Pages 3-5 of Appellant's ROA dated 30th May 2025).

14. The Respondent filed her Verifying Affidavit sworn on 24th July 2024, 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 6-82 of ROA).
15. The claim was opposed by the Appellant who entered appearance and filed a memorandum of response dated 19th September 2024 (pages 85-89 of ROA). They also filed a list of witnesses dated 19th September 2024, witness statement of AGNES KAGWIRIA of even date, and list of documents of even date with the bundle of documents attached (pages 90-103 of ROA).

16. To counter the Appellant's case, the Respondent filed a Reply to memorandum of response, dated 7th October 2024 (pages 83-84 of ROA).
17. The Respondent's case was heard on the 4th 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 Ms. Pepela (pages 210-212 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 Mr. Kang'ethe (pages 213-214 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 18th of March 2025 partially allowing the Claimant/Respondent's claim to the tune of Kshs. 198,860/- comprising of 4 months' salary as compensation for unfair termination, one month's salary in lieu of notice, service pay, severance pay, and unpaid leave. It also ordered that the Claimant/Respondent be issued with a Certificate of Service (judgment at pages 217-224 of ROA).

DETERMINATION

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

Issues for determination

22. In their submissions dated 6th August 2025, the Appellant identified the following issues for determination, namely:-

- i. Whether the trial Magistrate erred in finding that the Respondent's employment converted 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 awarding one month's salary in lieu of notice and Kshs. 57,376.00 being 4 months' compensation without reasonable justification;
 - iv. Whether the trial Magistrate erred in awarding service pay;
 - v. Whether the trial Magistrate erred in awarding Kshs. 43,032.00 being severance pay.
23. Conversely, the Respondent identified the following similar issues in his submissions dated 8th September 2025.
- i. Whether the Learned Magistrate erred in finding that the Respondent's employment had converted from casual to term contract by dint of Section 37 of the Employment Act;
 - ii. Whether the Learned Magistrate erred in finding that the Respondent's employment was unfairly terminated on account of redundancy;
 - iii. Whether the Learned Magistrate erred in the reliefs granted;
 - iv. Who pays the costs of the Appeal.

24. The court found the issues for determination in the appeal are as follows-

- i. Whether the Learned Magistrate erred in finding that the Respondent's employment had converted from casual to term contract by dint of Section 37 of the Employment Act;
- ii. Whether the Learned Magistrate erred in finding that the Respondent's employment was unfairly terminated on account of redundancy;
- iii. Whether the Learned Magistrate erred in the reliefs granted;

Whether the Learned Magistrate erred in finding that the Respondent's employment had converted from casual to term contract by dint of Section 37 of the Employment Act;

The Appellant's submissions

25. The Appellant submits that the Respondent was engaged on casual terms, working only when work was available, paid at Ksh. 652/- daily on a biweekly basis. This is corroborated by the Respondent's own bank statements. (Record of Appeal page 13-82). The engagement falls under the statutory definition of "casual employment" under Section 2 of the Employment Act. 9. 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.

The Respondent's submissions

26. The evidence on record is that the Respondent was employed by the Appellant as a general worker in April 2019 until 22nd June 2022 when her employment was terminated on account of redundancy work. The Respondent produced in evidence her bank statement from equity bank that clearly showed that she was receiving a salary from the Appellant throughout the period from August 2019 to June 2022. This was a period of over 3 years. Though the Appellant admitted the Respondent was its employee, it did not produce any records of employment to show when the Respondent was employed and the days the Respondent worked. The trial court upon analyzing the evidence rightly held that the Respondent had worked for the Appellant for a period of 3 years 3 months. The Appellant did not adduce any

evidence to show that the Respondent was not in its employment continuously from April 2019 to 22nd June 2022. We humbly submit that this being a first appeal, the court has the duty to re-evaluate the evidence and reach its own conclusion but it must however be alive to the fact that, it is the trial court that had the advantage of hearing the witnesses evidence and observing their demeanor. We are guided by the decision in the case of Odera Vs. Aga Khan Hospital Kisumu (Civil Appeal E011 OF 2020) (2014) KEHC 3408 (KLR) where the court stated; "This being a first appeal, this court is under a duty to re-evaluate and assess the evidence adduced before the trial court and reach its own independent conclusion. This is what section 78 of the Civil Procedure Act subscribes to. The court must, however, bear in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand." We are further guided by the decision in Makube Vs. Nyamuro (1983) eKLR where the court of Appeal observed; "However, a court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did." Further in the case of PN Mashru Limited Vs. Omar Mwakoro Makenge

alias Omar Masoud Voi Civil Appeal No. 9 of 2017 the court stated; "This was aptly stated in the case of Seile Vs. Associated Motor Boat Company Ltd (1968) and Peters Vs. Sunday Post Ltd (1985) EA 424 where in the latter case, the court therein rendered itself as follows: "It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses But the jurisdiction to review the evidence should be exercised with caution; it is not enough that the appellate court might have come to a different conclusion." The trial court having found that the Respondent had worked for the Appellant for a period of 3 years 3 months rightly held that the Respondent's employment had assumed permanency and was deemed to be one where wages are paid monthly as was held in the case of Nanyuki Water & Sewage Company Ltd Vs. Benson Mwiti Ndiritu & 4 Others (2018) eKLR where the court of Appeal held; "..... 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 aggregated 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." Section 2 of the Employment Act defines a casual employee to mean, "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 longer period than twenty-four hours at a time." We humbly submit that the Respondent having been in service for a continuous period of 3 years and 3 months could not be termed a casual employee and the trial court rightly held that the Respondent's employment had assumed permanency in accordance with the provisions of section 37(1) of the Employment Act. We urge this court to so find.

Decision

27. The trial court applied the definition of casual under section 2 of the Employment Act and the provision on conversion of casual to contract term under section 37 of the Employment Act, which provides for conversion of casual work as follows:- ‘Conversion of casual employment to term contract.
37. (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 trial court then held- ‘The claimant averred in her Memorandum of Claim that she was employed on or about April, 2019 as a general labourer and that she was dismissed on or about June 2022. This period translates to about three years, three months. On its part, the respondent maintained that the claimant was a casual employee, who would be engaged occasionally. There was no evidence from the respondent's end to confirm that the claimant was not in its employment regularly and continuously from 2019 to September, 2022. In absence of proof to the contrary. I am led to conclude that the contract of service of the claimant assumed permanency and was deemed to be one where wages are paid non-monthly. In essence, section 35(1) (c) of the Employment Act became applicable to the claimant's contract of service in terms of section 37(1). Such was the holding by the Court of Appeal in the case of Nanyuki Water & Sewage Company limited v Benson Mwiti Ntiritu

& 4 others (2018) eKLR where it was held as follows: "Section 37 of the Employment Act, 2007 applies to the employment of the Respondents to the effect that their casual employment was converted into a contract of service where wages are paid monthly and to which section 35 (1) o) of the Act applies. The Respondents were entitled to such terms and conditions of service as they would have been entitled to under this Act had they not initially been employed as casual employees." I adopt and apply the holding of the Court of Appeal in the case herein. Having reviewed the bank statements produced by the respondent in the lower court, I confirmed the continuous engagement as a casual, of the respondent, by the appellant from August 2019 to 1st July 2022, when the last payment was made by the appellant (pages 53-81 of ROA). Accordingly, the Respondent's engagement converted from casual to a term contract (section 37 of the Employment Act); hence, she was protected from unfair termination. I find no basis to interfere with finding and decision by the lower court that the engagement of the Respondent converted from casual to contract term.

Whether the Learned Magistrate erred in finding that the Respondent's employment was unfairly terminated on account of redundancy;

The Appellant's submissions

28. 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 11th July 2022. 13. A series of disciplinary documents—including a show cause letter and summary dismissal letter—were issued, but she never responded or engaged through the labour office as required under Section 47 of the Employment Act. (Record of Appeal page 95-98). 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).

The Respondent's submissions

29. The Respondent's evidence is that she reported to work on 22nd June 2022 and worked the whole day. That in the evening, her supervisor came with a list of names of employees and read out the names and the Respondent's name was called out. That those called out were informed that the Appellant had terminated their employment with immediate effect due to reduced work.

This amounted to termination of employment on account of redundancy as was held in the case of Abigael Jepkosgei Yator & Another Vs. Hanan International Co. Ltd (2018) eKLR where the court held; "Reduced work has been defined in law as redundancy." The Appellant alleged that the Respondent was sent on short term break from 24th June 2022 due to reduced work. The Appellant did not adduce any evidence to show Respondent was sent on a short term break or when she was to resume duty. The Appellant alleged that the Respondent absconded duty on 11th July 2022 without permission. We humbly submit that the Appellant's evidence is not believable. The Appellant is clearly scrambling to cover its tracks after unlawfully terminating the Respondent's employment on account of redundancy. The Appellant purported show cause letter, return to work notice, letter allegedly calling the Respondent to a disciplinary hearing and summary dismissal letter were all stage managed in an attempt by the Appellant to cover its wrongful conduct. The Respondent was categorical in her evidence that she was never served nor did she receive any of those letters. The Appellant did not tender any evidence to show that the letters were sent to or delivered to the Respondent. The Appellant did not adduce any evidence to show it made any efforts to establish the whereabouts of the

Respondent who had been its employee for more than 3 years. Indeed, as has been severally held by our courts that when as an employer alleges that an employee has absconded duty, the employer must show efforts made to contact such an employee. This was held in the case of Simon Mbuthi Mbone Vs. Intersecurity Services Ltd (2018) eKLR where the court stated; "An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success." The Appellant failed to prove that the Respondent absconded duty. The evidence on record supports a case of termination on account of redundancy. It is however clear that the Appellant failed to comply with the provisions of section 40 of the Employment Act which are mandatory thus making the termination of the Respondent unlawful, unfair and wrongful. The Appellant had the burden to prove it had justification/valid and lawful basis for terminating the Respondent's employment on account of redundancy. In the case of Daniel Mburu Muriu Vs. Hygrotech East Africa Ltd (2021) eKLR the court held that the provisions of Section 43 on the burden of proof for termination of employment applied to termination of employment on account of redundancy. The court in the said case stated; "..... Further section 43 of the Act on Proof of reason for the termination

by the employer and section 45 on unfair termination apply to termination on redundancy just as they apply on other terminations. Hence both substantive and procedural fairness apply on redundancy and an employer who fails either test stands to be held liable for unfair or wrongful and unlawful termination." The Appellant made no attempt to adduce evidence on reduction of work hence failed the substantive test. The Appellant further failed to show it complied with the mandatory provisions on procedure provided for under section 40 of the Employment Act. The Appellant failed to give notice to the Respondent prior to termination of her employment. The Appellant also failed to give notice to the labour office as envisioned by section 40 (1) (a) and (b). the Appellant did not consult and/or afford the Respondent any hearing before the termination nor did it adduce any evidence on the criteria used in selecting the Respondent for termination on redundancy. We are guided by the decision in the Court of Appeal case Cargill Kenya Limited -v- Mwaka & 3 Others (Civil appeal 54 of 2019) (2021) KE CA 115(KLR) where the court stated; "While the requirement of consultation is not expressly provided in Section 40 of the Employment Act, this requirement is implied as the main reason and rationale for giving the notices in Section 40(1)(a) and (b) to the Unions and employees of an

impending redundancy. In this respect we wholly adopt the reasoning of Maranga. J.A (as he then was) in Kenya Airways Limited -vs-Aviation and Allied Workers Union Kenya & others Nairobi Civil Appeal No. 46 of 2013 (2014) eKLR where the learned Judge held as follows; "49..... Section 40(1) of our Employment Act does not expressly state the purpose of the notice although it also does not expressly provide for consultation between the employer and the employees or their trade unions before the final decision on redundancy is made, on my part I find the requirement of consultation provided for in our law and implicit in the Employment Act itself. By dint of the Article 2(6) of the Constitution of Kenya 2010, the treaties and conventions ratified by Kenya are now part of the law of Kenya....."Kenya is a state party to the International Labour Organization (ILO), which it joined in 1964 and is bound by the ILO conventions. Article 13 of Recommendation no. 166 of the ILO Convention No. 158 - Termination of Employment Convention 1982 requires consultation between the employers on the one hand and the employees or their representatives on the other before termination of employment under redundancy. It reads; "1. When the employer contemplates termination for reasons of an economic technological, structural or similar nature, the employer shall; (a) Provide the workers

representatives concerned in good time with relevant information including the reasons for the termination contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out. (b) Give, in accordance with national law and practice the workers representatives, concerned as early as possible, an opportunity for consultations on measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment." The court went further to state; "Furthermore, consultation is also now specifically required by Article 47 of the Constitution and the fair Administrative Action Act, Article 47 and Section 4(3) of the Fair Administrative Action Act provide that where an Administrative action is likely to adversely affect the rights or fundamental freedoms of any person the Administrator shall give the person affected by the decision (a) Prior and adequate notice of the nature and reasons for the proposed administrative action; (b) An opportunity to be heard and to make representations in that regard..." The Respondent did not provide any proof of the criteria it used in the selection of employees to be declared redundant. The respondent has the burden to prove the criteria it used in the selection of employees to be

declared redundant. This was held in the case of Cargill Kenya Limited (supra) where the court held; "First, an employer should include the factors set out in Section 40(1)(c) of the Employment Act in the criteria for evaluating and selecting the employees to be declared redundant. Second, the employer is required to prove that the criteria was objectively uniformly and fairly applied." From the foregoing it is apparent that the Appellant failed the procedural test hence the trial court rightly held that the termination of the Respondent's employment was unlawful, unfair and wrongful and we urge the court to so find.

Decision

30. The trial court held on this issue, that - 'The respondent asserts that the claimant was on short break that she failed to show up again. It stated that the same was due to the fact that work had reduced. The claimant relied on the case of Abigael Jepkosgei Yator & another v China Hanan International Co.Ltd (2018) eKLR, where the court stated- "Reduced work has been defined in law as redundancy.' Redundancy is defined as "redundancy" means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment

at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment; (section 2 of the Employment Act).

31. The claimant pleaded that the appellant on the 22nd June 2022, terminated her employment without any justification. In a witness statement, the respondent stated that on the evening of 22nd June 2022, one Wahome, their supervisor, came with a list and said the respondent/claimant she was let go due to reduced work, hence the reduction of the number of employees. The respondent said no letter of termination was issued (page 8 of ROA). Conversely, the appellant vide witness statement of Agnes Kagwiria stated the respondent was not sent home on the 22nd June 2022 but 24th June 2022 for 2 2-week break and was expected back to work on 11th July 2022, which she failed to. The witness in the statement said that the disciplinary process was complied with and produced the notice to show cause up and other related documents including the dismissal letter (pages 92-93 of ROA was the witness statement of RW1, and at pages 95-98 of ROA were the disciplinary process documents). During cross-examination, the claimant/respondent denied having received the documents related to the

disciplinary process (pages 211-212 of ROA). During cross-examination, RW1 told the court the disciplinary process documents were served by the union shop steward, the letters did not have the address of the claimant/respondent, and she was not sure whether the respondent was served. The trial court found a case of redundancy and unfair termination for failure to comply with procedural fairness.

31. Upon analysis of the evidence before the trial court, I had no basis to interfere with the finding of the trial court. The Respondent's employment was terminated on account of reduced work. There was no evidence that she was asked to return to work as alleged and the RW1 admitted she had no evidence that the disciplinary process letters were served on the claimant. The finding of redundancy and unfair termination is upheld.

Whether the Learned Magistrate erred in the reliefs granted;

32. The Trial court granted various orders, which I will reconsider.

a. Compensation for unfair termination

The Appellant's submissions

33. Whether the trial magistrate erred in awarding KSh. 14,344 being one month's pay in lieu of notice and kshs. 57,376.00 being for 4 months' compensation without reasonable justification? -The Respondent was awarded Ksh. 57,376.00 being 4 month's compensation for unfair termination, based off an alleged monthly salary of Ksh. 14,344.00. It is worth noting that the Respondent did not adduce any document to substantiate that she earned the pleaded amounts, even when her own bank statements did not bear any such figure. The Appellant on the other hand sufficiently proved that the Respondent earned a daily wage of Ksh. 652/- which would be paid on a bi-weekly basis depending on the number of days worked. The Respondent confirmed the same during cross-examination. (Record of Appeal page 212) Should the Respondent have worked continuously every month; she would've been entitled to a monthly pay of Ksh. 13,040.00. The Appellant wishes to draw this court to the decision delivered in the matter of Komu v Sana Industries Limited [2025] KEELRC 75 (KLR) where this same honourable court on the said issue held that;- 31. The termination was thus based on lawful reasons and cannot attract compensation for unlawful termination. This position was adopted in same case cited by the appellant in Under the provisions of Section 45(5) of the

Act, the Court should take these records of the appellant. They are relevant. To assign compensation would be to reward the appellant over his acts of misconduct. In this regard zero (0) compensation is appropriate.” The Appellant thus submits that from the foregoing, the trial magistrate erred in finding that the Respondent was unfairly terminated from employment and the 4 month compensation was on the higher end.

The Respondent’s submissions

34. The Respondent is entitled to compensation for unfair termination of employment. The trial court awarded the Respondent Kshs. 57,376 being 4 months' salary. The trial court clearly indicated that it considered the provisions of section 49 (4) of the Employment Act in making the award. In the case of Nation Media Group Ltd Vs. Munene (2025) KECA 114 (KLR) the court of Appeal observed; "It is notable that an award equivalent to a number of wages or salary not exceeding twelve months and based on the gross monthly wage or salary of an allowable remedy under section 49(1) of the Employment Act where termination of a contract of an employee is unjustified. In addition, the considerations and factors that a court is required to take into account in awarding this remedy come into play in this appeal,

particularly those stated in section 49 (4) (a) - (f) of the Employment Act

We humbly submit that the trial court duly took into account relevant matters and rightly exercised her discretion in awarding the Respondent 4 months salary as compensation for unfair termination of employment.

Decision on compensation

35. The Supreme Court of Kenya in *Ken freight (E.A) Limited v Benson K. Nguti* SC Pet. No. 37 of 2018 [2019] eKLR explained the applicability of the provisions of Section 49 of the Employment Act as hereunder;

“.....What then should be the correct award on damages be based on? Having keenly perused the provisions of Section 49 of the Employment Act, we have no doubt that once a trial court finds that a termination of employment as wrongful or unfair, it is only left with one question to determine, namely, what is the appropriate remedy? The Act does provide for a number of remedies for unlawful or wrongful termination under Section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder. To us, it does not matter how the termination was done, provided the same was challenged in a Court of law, and where a Court found the same to be unfair or wrongful, Section 49 applies....” The exercise of the

discretion of the court is not capricious or whimsical and the court should justify the award (Olpejeta Ranching Limited v David Wanjau Muhoro (2017)e KLR.” The trial court is guided to apply remedies under section 49 on finding unfair termination. One of the remedies is compensation, of which the trial court, taking into account factors under section 49(4) of the Employment Act, awarded 4 months' salary as compensation, the maximum being 12 months. The reason for termination was not proved as valid (section 43 of the Employment Act). The relied on decision in Komu v Sana Industries Limited [2025] KEELRC 75 (KLR) by the appellant was thus irrelevant. Taking into account the circumstances of the termination and period of work 2019-2022, I find the award of 4 months' gross salary compensation not excessive and hence no basis to interfere. (Mbogo v Shah). RW1 had no record of how the salary was computed, save for the daily rate. The employer had an obligation to prove the payable salary, and failing to do so, the claim of total payable monthly salary of 14,344.00 was uncontroverted. The compensatory award is upheld of **Kshs, 57376/-**

36. Notice pay is payable under section 36 of the Employment Act for lack of procedural fairness and is upheld of Kshs. 14,344.

37. Service pay -The appellant submitted as follows- service pay is not payable to the Respondent as the Appellant would remit NSSF to the Respondent's account, subject to provision of the same. Thus, any claim for unremitted NSSF cannot be claimed through the court, as was held by the court in *Simiyu v Nzoia Sugar Company Limited (Employment and Labour Relations Claim E005 of 2021) [2022] KEELRC 1758 (KLR) (12 May 2022)* (Judgment) that: "The claimant ought to have lodged a claim with the statutory body which the mandate and powers to even levy penalty under section 14 of the NSSF Act (Cap 258). The court had no basis of interfering with the work of the statutory body on its mandate. Only the NSSF could impose penalties for non-remittance. The claim for NSSF contribution and the penalty should have been pursued with the statutory body. The entire claim for unremitted NSSF dues and penalties were declined." In any event the Respondent is entitled to service pay which in this case we object to, then the Appellant therefore is opposed to the inflated computation of service pay at 30 days per completed year, with no valid explanation to account for the double computation. In the absence of proof of such terms from a contract of service, the Appellant persuades this court to abide by the decision of the Superior Court in *Fredrick Ngari Muchira, Howard Kipkoech Korir & 98*

Others v Pyrethrum Board of Kenya [2013] eKLR where the Superior Court held that: "...Accordingly, in the absence of more favourable agreement between the management staff and the Respondent, the court finds that the Claimants in the management cadre are entitled to fifteen (15) days' pay for each completed year of service as per Section 40(g) of the Act as there is no established basis for the court to order the Respondent to pay out at a higher rate of thirty (30) days per year served." Conversely, on service pay, the respondent submitted as follows- The Respondent's employment with the Appellant commenced in April 2019. The Respondent's evidence is that the Appellant did not remit any NSSF contribution on her behalf during the entire period of her employment. The Respondent was therefore not under NSSF scheme and is therefore entitled to service pay in accordance to section 35 (5) of the Employment Act for the period of this 3 complete years. This was held by the decision in the case of Wycliffe Juma llukol Vs. Board of Management Father Okodui Secondary School (2022) eKLR where the court held; "The court finds that having been in service, the Claimant is entitled to service pay for those years when he was not under the NSSF Scheme." We find further guidance in the case of Chakaya Vs. Meat Magic Enterprises Ltd (2024) KEELRC No. 13451 (KLR) where the court held; "On the claim for

service pay, the appellant's admissions of his NSSF membership is significant. He admitted his membership but the Respondent did not remit his dues, a crucial point in the case. This matter would have been resolved instantly by the Respondent by submission of the payment statement together with proof of payments to the statutory body. Such is lacking, and despite the appellant being registered with NSSF, that is insufficient proof that there were monthly remittances for the appellant's benefits. Payment of statutory dues is placed upon the employer. Such deductions should be at source, and remittances must have evidence. The trial court erred in relying on the Respondent's mere allegations that the appellant was a member of the fund without any proof. Service pay is due based on the last wage paid for a minimum of 15 days for each full year worked. The appellant worked for four full years at Kshs. 25,000 per month. The claim of 750,000 in service pay is justified." The Appellant herein did not produce any evidence of remittance of NSSF dues. We humbly submit that the award of service pay is justified." The appellant's evidence before the trial court on remuneration of the respondent had no NSSF (PAGE 103 OF ROA). Section 35(5) of the Employment Act, as read together with section 36 of the Act, entitled the Respondent to service pay for each complete year worked. I agreed with the

appellant the applicable rate for service pay is 15 days for each year. The award at 30 days is set aside and substituted with award for 15 days for each year thus half the amount awarded Kshs. **21516/-**

38. Severance pay – The court upheld the trial court's position that the termination based on reduced work was redundancy. Severance pay is payable under section 40 (g) of the Employment Act at a rate of 15 days per each complete year worked. The trial court found 3 complete years of service and awarded 43032, which the court finds was an error. The award ought to be Kshs $14,344.00 \times 15/30 \times 3$, thus **Kshs. 21516.**

39. Claim for leave pay -The trial court awarded leave as pleaded. The claimant did not lay any proof of having applied for leave, and it was denied. The claim for leave is thus limited to 18 months under section 28(4) of the Employment Act to wit- '4) The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1)(a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)

(a) being the period in respect of which the leave entitlement arose. ' The award for leave is set aside and is substituted with 18 months pay , thus **Kshs. 21,516.**

CONCLUSION

40. In conclusion, the appeal is allowed partially. The Judgment and Decree of the Hon. D. Orago (SRM) delivered on 18th March 2025 in Ruiru MCELRC Cause No. E128 of 2024 is set aside and substituted as follows-

- a. Judgment is entered for the claimant against the respondent as follows-**
- b. The termination is held as unlawful and unfair.**
- c. Compensation for unfair termination for 4 months Kshs. 57376/-**
- d. Salary in lieu of notice Kshs.14344**
- e. Service pay Kshs 21516/-**
- f. Severance pay Kshs, 21516**
- g. Leave in lieu Kshs. Kshs. 21516**
- Total sum 136,268**
- h. Half costs**
- i. Interest**
- j. Certificate of service be issued to the claimant.**

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

42. Stay of 30 days.

43. It is so Ordered.

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

J.W. KELL,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – Eredi

Respondent – Muthini h/b Ms. Kang’ethe