

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

APPEAL NUMBER E103 OF 2025

SANA INDUSTRIES LIMITED.....APPELLANT

-VERSUS

ANDREW WEKESA AIBU.....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. E124 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. E124 of 2024 between the parties filed a Memorandum of Appeal dated the 1st 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

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 wilfully frustrated disciplinary proceedings against him, 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 his own dismissal from employment.
6. The Honourable Magistrate erred in failing to give a reasoned justification of how she arrived at 10 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 using Kshs.17,420/- as a basis for computing wages despite the evidence presented showing that the Respondent never earned any such amount and despite the Appellant's contention that it paid a minimum daily wage of Kshs. 652/- per day making the total monthly wage Kshs.16,900/-
9. The Honourable Magistrate erred in awarding one month salary in lieu of notice despite evidence showing that the claimant had absconded duty.
10. 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: $(16,900 \times 21/28) \times 3 \text{ Years} = 38,025/-$
11. The Honourable Magistrate erred in fact and in law by failing to consider the Appellant's evidence presented in court.

BACKGROUND TO THE APPEAL

12. The Respondent filed a suit against the Appellant vide a statement of claim dated 30th November 2023 seeking the following orders: -

- a. One month's salary in lieu of notice Kshs. 17,420.00

| | | |
|----|---|-------------------------|
| b. | Leave days accrued since April 2013 | |
| | @ 26 days per year x 10 years | Kshs. 174,200.00 |
| c. | Service pay for 6 years | Kshs. 104,520.00 |
| d. | 12 months' salary as compensation for Unlawful termination | Kshs. 209,040.00 |
| | Total | Kshs. 505,180.00 |
| e. | Certificate of service | |
| f. | Costs and interests from a) to d) above | |

(pages 4-6 of Appellant's ROA dated 3rd July 2025).

14. The Respondent filed his Verifying Affidavit sworn on 30th November 2023, as well as his list of witnesses, witness statement, and list of documents together with the bundle of documents attached, all of even date (pages 7-96 of ROA).
15. The claim was opposed by the Appellant who entered appearance and filed a response to statement of claim dated 15th January 2024 (pages 99-101 of ROA). They also filed a list of witnesses dated 22nd April 2024, witness statement of AGNES KAGWIRIA of even date, and list of documents of even date with the bundle of documents attached (pages 102-110 of ROA).
16. To counter the Appellant's case, the Respondent filed a Reply dated 24th January 2024 (pages 97-98 of ROA).

17. The Respondent's case was heard on the 29th of January, 2025 with the Respondent testifying in the case. He relied on his filed witness statement as his evidence in chief, produced the documents attached to his list of documents, and was cross-examined by counsel for the Appellant Mr. Eredi (pages 132-134 of ROA).
18. The Respondent's case was heard on the same day with the Respondent 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 134-136 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. 418,080/- comprising of 10 months' salary as compensation for unfair termination, one month's salary in lieu of notice, service pay, and unpaid leave. It also ordered that the Claimant/Respondent be issued with a Certificate of Service (judgment at pages 138-144 of ROA).

DETERMINATION

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

Issues for determination

22. In their submissions dated 7th 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. 174,200.00 being 10 months' compensation without reasonable justification;
- iv. Whether the trial Magistrate erred in awarding Kshs. 104,520/- as service pay;
- v. Whether the trial Magistrate erred in awarding Kshs. 121,940.00 being unpaid leave.

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;
- iii. Whether the Learned Magistrate erred in the reliefs granted;
- iv. Who pays the costs of the Appeal.

24. The court, having perused the submission by the parties, finds the issues placed before it for determination in the appeal to be-

- 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;
- 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;

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 13-94). 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.

Respondent's submissions

26. The evidence on record is that the Respondent was employed by the Appellant as a loader in April 2013 and thereafter promoted to a loading supervisor where upon he worked until 17th July 2023 when his employment was terminated. The Respondent produced in evidence his bank statements from Equity bank and KCB bank that clearly showed that he was receiving a salary from the Appellant throughout the period from April 2013 to 17th July 2023. This was a period of over 10 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 10 years 3 months. The Appellant did not adduce any evidence to show that the Respondent was not in its employment continuously from April 2013 to 17th July 2023. The trial court having found that the Respondent had worked for the Appellant for a period of 10 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."

Decision

27. The trial court held that the employment of the claimant as pleaded of April 2013 to 14th July 2023 was not controverted by the appellant and relied on section 10(7) of the Employment Act to wit- ‘ (7) 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. ’
28. The claimant produced as his evidence bank statement to effect that he was first paid salary by the appellant on the 29th November 2013. The court established that he was further paid salary by the appellant in the next 2 months with last salary on 17th July 2023. The respondent’s witness Agnes Kagwiria at cross-examination confirmed the Respondent worked from 2013 and left in July 2023. The court finds that the conversion was merited under section 37 of the Employment Act and hence the Court had no basis to disturb the finding of the trial court.

Whether the Learned Magistrate erred in finding that the Respondent’s employment was unfairly terminated:

Appellant’s submissions

29. 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 October 2023. A series of documents—including a show cause letter and summary dismissal letter—were issued, but he never responded or engaged through the

labour office as required under Section 47 of the Employment Act. (Record of Appeal page 109- 110). 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).

Respondent's submissions

30. The Respondent's evidence is that on Friday 14th July 2023 at the close of the day, he was allocated the duty of ensuring that employees left the company premises after being searched to curb theft. That as he stood at his allocated station he saw one of the Appellant's manager known as Kwan running after a female employee. He was not aware why the said manager was running after the said employee. The said manager shouted at the Respondent to run after the said employee who had already gone past the gate. That the Respondent ran outside the gate but did not find the said employee. Trouble for the Respondent started when he reported that he did not find the employee. The manager accused him of having assisted the employee escape. The said manager together with the human resource manager attempted to coerce him to sign a statement admitting he had helped the female employee escape but he refused to sign and was chased out of the premises. The Respondent reported to work on Monday 17th July 2023 but found his name had been removed from the list of employees and he was informed of his termination with immediate effect. The Appellant on the other hand allege the Respondent was dismissed from employment for neglecting his duty as supervisor in conducting searches and other lawful duties. It is clear from the Respondent's evidence that he was a supervisor in the loading section. He was not part of the security personnel. That the

duty of searching employees and stopping employees who were suspected of theft was the job of the security personnel. Moreover, the Respondent could not have been expected to search female employees. We humbly submit that nothing the Respondent did or failed to do warranted a dismissal and there was therefore no justification for the summary dismissal. As was held in the case of Walter Ogal Anuro Vs. Teachers Service Commission (2013) eKLR that; "..... 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." Section 43 (1) of the Employment Act puts the burden to prove justifiable reasons for termination of employment upon the employer. We humbly submit that the Appellant failed to discharge that burden. The Appellant alleged that it issued the Respondent with a show cause letter however, no evidence was adduced to prove the Respondent received the said letter. The Appellant alleged to have given the letter to a purported shop steward in the name of Lucas Bala to deliver to the Respondent. This person was never called as a witness to prove service of the said letter. The Respondent's evidence is that he never received any letter from the Appellant nor was he ever called for any disciplinary hearing.

Decision

31. 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).

32. The burden of proving claims of employment is according to section 47(5) of the Employment Act to wit –‘(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.’’ It was not in dispute that the Respondent was an employee of the appellant and there was termination of employment. The burden to prove validity of the reason for termination of the employment lay with the appellant as employer as per section 43 of the Employment Act. The appellant through its witness Agnes Kagwiria said the claimant’s services were terminated for gross-misconduct of failing to do his work as supervisor and refusing to comply with the disciplinary process.

33. During cross-examination the respondent admitted he was called for a meeting on the day of dismissal. He told the trial court that he failed to conduct search on one of the employees hence the request by the employer to give a statement which he said he did not give. On re-examination the respondent told the said he failed to give a statement as he was being forced to write things that he did not do. That he was a supervisor and not a security person to search

ladies. He was a store supervisor, and at checkout, he was asked to stop certain ladies from entering a toilet, which he failed to do, asserting he was not a security person.

34. During cross-examination of the respondent's witness, Kagwiria, said that the respondent was manning a toilet and allowed a lady to sneak out. She summoned him to explain, but the claimant declined to write a statement. The witness could not confirm whether the claimant got the show cause letter, which was received by the shop steward (page 109 of the ROA). Kagwiria had no evidence as to whether the respondent was called for a disciplinary hearing. RW1 confirmed the claimant was not part of the security department.
35. The trial court held that there was no evidence that the claimant was issued with notice to show cause and called for a disciplinary hearing on the allegations, hence unfair termination. The court found the appellant's witness confirmed that there was no evidence that the claimant received the show cause letter, and no evidence that he was called for a disciplinary hearing. The reason for termination was related to failure to stop someone from sneaking out. RW1 confirmed that the claimant was not part of security, hence the reason was not related to his job description. The court found no basis to fault the trial court holding that termination was unlawful for lack of valid reason for the termination and for lack of procedural fairness according to section 41 of the Employment Act. 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]e KLR.

Whether the Learned Magistrate erred in the reliefs granted:

36. The trial court awarded relief as follows-

'I declare the termination of the claimant unlawful and unfair.

I enter judgment for the claimant against the Respondent as follows-

3. Compensation for unfair termination Kshs. 174,200/-

4. Salary in lieu of notice Kshs.17,420/-

5. Service pay Kshs 104,520/-

6. Unpaid leave Kshs 121,940/-

TOTAL Kshs. 418,080 /=-

1. Half Costs

2. Interest

Certificate of service be issued to the Claimant.”

37. On compensation for unfair termination award, the ground of appeal was as follows- The Honourable Magistrate erred in failing to give a reasoned justification of how she arrived at 10 months' salary as damages for unfair termination.

38. The trial court simply stated it had factored section 49(4) of the Employment Act in the award. The section states as follows- **‘49(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following— (a) the wishes of the employee; (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or**

contributed to the termination; and (c) the practicability of recommending reinstatement or re-engagement; (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances; (e) the employee's length of service with the employer; (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination; (g) the opportunities available to the employee for securing comparable or suitable employment with another employer; (h) the value of any severance payable by law; (i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee; (j) any expenses reasonably incurred by the employee as a consequence of the termination; (k) any conduct of the employee which to any extent caused or contributed to the termination; (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and (m) any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee. "

39. The court agreed the trial court did not explain the actual factors it took into account in the award, which I proceeded to do. The respondent served a long period, from 2013 to July 2023. He was accused of issues outside his job description. He was not afforded procedural fairness under section 41 of the Employment Act before dismissal. The court finds that the award of equivalent of 10 months salary as compensation for unfair termination is not excessive and no basis to disturb the award of Kshs. 174,200 (Mbogo v Shah).

40. **The notice pay** for 1 month is justified and was due under section 36 of the Employment Act and is upheld as awarded for the sum of Kshs. 17420.
41. **Service pay-** There was no evidence of the claimant being a beneficiary under NSSF. Section 35(5) of the Employment Act as read together with section 36 of the Act, where the employee is not NSSF/Pension they are entitled to service pay. The Respondent was entitled to service pay for each complete year worked. I agreed with the appellant that the applicable rate for service pay is 15 days for each year. The award of Kshs. 104520 was in error for being based on 30 days and is set aside and substituted with half the amount, being 15 days per year, thus **Kshs. 52260.**
42. Unpaid leave award -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 thus- '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 substituted with 18 months pay, thus **Kshs. 26130.**

CONCLUSION

43. 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. E124 of 2023 is(confirmed) 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 10 months Kshs. 174200**
- c. **Salary in lieu of notice Kshs.17420**
- d. **Service pay Kshs 52260**
- e. **Leave in lieu Kshs. 26130**

Total sum 270,010/-

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

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

45. Stay of 30 days.

46. It is so Ordered.

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

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – Eredi

Respondent – Muthini h/b Kang’ethe

Original