

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

APPEAL NUMBER E133 OF 2025

SANA INDUSTRIES LIMITED.....APPELLANT

-VERSUS

TABITHA MUTHONI MUCHIRI.....RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Hon. D. Orago (SRM)
delivered on 8th April 2025 in Ruiru MCELRC Cause No. E083 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 8th April 2025 in Ruiru MCELRC Cause No. E083 of 2024 between the parties filed a Memorandum of Appeal dated the 8th of May 2025 seeking the following orders:-

a) This Honourable court allows this appeal.

b) The judgement of Hon. Diana Orago delivered on 8th April 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.
4. The Honourable Magistrate erred in failing to find that the Respondent absconded duty which then entitled the Appellant to terminate her 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 7 months' salary as damages for unfair termination.

7. The Honourable Magistrate erred in fact and in law by awarding Kshs. 95,040/- 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: $(15,840 \times 21/28) \times 3 \text{ Years} = 35,640/-$
10. The Honourable Magistrate erred in awarding severance pay despite having made a finding that the Respondent was never declared redundant.
11. The Honourable Magistrate erred in fact and in law by awarding Kshs. 63,360.00 as service pay.
12. The Honourable Magistrate erred in fact and in law by failing to consider the Appellant's evidence presented in court.

BACKGROUND TO THE APPEAL

13. The Respondent filed a suit against the Appellant vide a statement of claim dated 20th May 2024 seeking the following orders: -

a.	One month's salary in lieu of notice	Kshs. 15,840.00
b.	Leave days accrued since 2015	Kshs. 95,040.00
c.	Severance pay	Kshs. 95,040.00
d.	Service pay from June 2015-July 2019	Kshs. 63,360.00
e.	12 months' salary as compensation for unlawful termination of employment	Kshs. 190,080.00
	Total	Kshs. 459,360.00

f. Certificate of service

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

(pages 3-5 of Appellant's ROA dated 17th June 2025).

1. The Respondent filed her Verifying Affidavit sworn on May 20, 2024, along with her list of witnesses, witness statement, list of documents, and the attached bundle of documents, all of the same date (pages 6-79 of ROA).
2. The claim was opposed by the Appellant, who entered an appearance and filed a response to the statement of claim dated July 29, 2024 (pages 80-83 of ROA). They also filed a list of witnesses of the same date, a witness statement from AGNES KAGWIRIA of the same date, and a list of documents of the same date with the bundle of attached documents (pages 84-134 of ROA).

3. The Respondent's case was heard on February 18, 2025, with the Respondent testifying in the case. She relied on her filed witness statement as her primary evidence, produced the documents attached to her list of documents, and was cross-examined by the Appellant's counsel, Mr. Eredi (pages 153-154 of ROA).
4. 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 154-155 of ROA).
5. The parties took directions on filing of written submissions after the hearing. The parties complied.
6. The Trial Magistrate Court delivered its judgment on the 8th of April 2025 partially allowing the Claimant/Respondent's claim to the tune of Kshs. 380,160/- comprising of 7 months' salary as compensation for unfair termination, one month's salary in lieu of notice, unpaid leave, service pay, and severance pay. It also ordered that the Claimant/Respondent be issued with a Certificate of Service (judgment at pages 157-163 of ROA).

DETERMINATION

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

Issues for determination

8. 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. 110,880.00 being 7 months' compensation without reasonable justification;
 - iv. Whether the trial Magistrate erred in awarding Kshs. 63,360/- as service pay;
 - v. Whether the trial Magistrate erred in awarding Kshs. 95,040.00 being unpaid leave.
 - vi. Whether the trial Magistrate erred in awarding Kshs. 95,040.00 being severance pay.
9. 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.

10. The court on perusal of the issues outlined by the parties, finds the issues for determination are -

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

11. It was not in dispute that the claimant last worked on the night shift 6th July 2021. DW1 said the claimant had been engaged on a casual basis since 2014. The claimant pleaded that she was engaged on a permanent basis from June 2015 with a monthly salary of Kshs. 15,840. The trial court relied on the definition of casual worker under section 2 of the Employment Act and found that the claimant, having been engaged continuously from 2014 to 2021, the employment was deemed as contractual pursuant to the provision of section 37 of the Employment Act where having worked continuously for more than 3 months the employment was converted to contractual employment. The court finds no basis to interfere with the finding of the trial court as DW1 admitted engagement of the claimant from 2014 to 2021.

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

12. The appellant denied redundancy and submitted that the claimant failed to report to the day shift as per the notice of 1st July 2021 (page 88 of ROA was the notice). The notice ended the night shift and required employees to report on the day shift. The claimant, during cross-examination, said the shift change was informed by word of mouth. She told the trial court that the notice was not posted on the notice board and that she was not informed she should work during the day and denied receipt of notice. I evaluated the evidence before the trial court and found that the termination was indeed unlawful, as, if the claimant had absented themselves, the employer ought to have complied with section 41 of the Employment Act, and this was not done. The court upholds unfair termination.
13. The court finds the termination was unfair for lack of a valid reason and procedural fairness. I found no evidence of redundancy nor did the Learned Trial Magistrate find a case of redundancy. (see pages 159-162 of the ROA).

Whether the Learned Magistrate erred in the reliefs granted:

14. Compensation for unfair termination- the trial court awarded equivalent of 7 months' salary. The claimant had been engaged from 2015 to 2021. There was no valid reason given. The payable salary was said to be 680 per day. The employment converted thus the court upheld the general worker salary of Kshs 15840 as pleaded by the claimant. The award was not excessive. I find no basis to interfere with the award (Mbogo v Shah).
15. Salary in lieu of notice awarded was due for lack of procedural fairness and is upheld for the sum of **Kshs. 15,840** under section 36 of the Employment Act.

16. Severance pay is payable under section 40 of the Employment Act. The court found no finding by the trial court of redundancy and indeed there was no evidence of redundancy. The award of severance pay is set aside.
17. The trial court correctly held there was no evidence of the alleged NSSF remittances. The Court upheld service pay under sections 35(5) and 36 of the Employment Act. The trial court did not explain the basis of the award of Kshs. 63360, which was as sought. The award is set aside and substituted as follows- Service pay is awarded for 15 days for each complete year worked. The claimant sought service pay for June 2015 to July 2019. The complete years are thus 3 months $15/30 \times 15840 \times 3$ thus **Kshs. 23760.**
18. Leave in lieu – The claimant did not lead evidence why she never applied for annual leave. In Peter Kariuki Gachiri V Kenya Baptist Theological College (2019)e KLR paragraph 19 it was held :-‘the Court will consequently allow this head of claim for outstanding leave, but only for the last 18 months to separation, on account of section 28(4) of the Employment Act 2017.’’The court, in the same breath, applies section 28(4) of the Employment Act and awards 18 months' leave, thus Kshs. 15840×18 months = Kshs. 23,760. The award of Kshs. 95040 is set aside and substituted with **Kshs. 23,760** pay under claim of leave in lieu.

CONCLUSION

19. In conclusion the appeal is allowed partially. The Judgment and Decree of the Hon. D. Orago (SRM) delivered on 8th April 2025 in Ruiru MCELRC Cause No. E083 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 7 months Kshs. 110,880/-**
- c. Salary in lieu of notice Kshs.15840**
- d. Service pay Kshs, 23760**
- e. Leave in lieu Kshs. 23,760**

Total sum 174,240

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

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

21. Stay of 30 days.

22. 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 Ms. Kang’ethe