Sana Industries Limited v Ndeleva (Appeal E131 of 2025)
[2025] KEELRC 3193 (KLR) (13 November 2025) (Judgment)

Neutral citation: [2025] KEELRC 3193 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E131 OF 2025

JW KELI, J

NOVEMBER 13, 2025

BETWEEN

SANA INDUSTRIES LIMITED ..... APPELLANT

AND

FELISTUS KAVUU NDELEVA ..... 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. E080 of 2024)

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. E080 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

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 8 months' salary as damages for unfair termination.

7. The Honourable Magistrate erred in fact and in law by awarding Kshs. 88,440/- 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: (14,740 x 21/28) x 3 Years= 33,165/-

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. 58,960.00 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. 14,740.00

    b. Leave days accrued since May 2017 Kshs. 88,840.00

    c. Service pay from 2017,2018,2020-2021 Kshs. 58,960.00

    d. Severance pay Kshs. 88,840.00

    e. Unpaid salary from Dec 2022-March 2023

       During maternity leave Kshs. 58,960.00

    f. 12 months' salary as compensation for

       Unlawful termination Kshs. 176,880.00

       Total Kshs. 471,680.00

    g. Certificate of service

    h. Costs and interests from a) to f) above (pages 1-3 of Appellant's ROA dated 30th May 2025).

14. The Respondent filed her Verifying Affidavit sworn on 20th May 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 4-33 of ROA). The Respondent later filed her supplementary statement dated 2nd December 2024 (pages 34-36 of ROA)

15. The claim was opposed by the Appellant who entered appearance and filed a statement of response dated 15th August 2024 (pages 37-40 of ROA). They also filed a list of witnesses of even date, witness statement of AGNES KAGWIRIA of even date, and list of documents of even date with the bundle of documents attached (pages 41-53 of ROA).

16. The Respondent's case was heard on the 18th of February, 2025 with the Respondent testifying in the case. 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 75-77 of ROA).

17. 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 77-78 of ROA).

18. The parties took directions on filing of written submissions after the hearing. The parties complied.

19. 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. 368,500/- comprising of 8 months' salary as compensation for unfair termination, one month's salary in lieu of notice, severance pay, service pay, and unpaid leave. It also ordered that the Claimant/Respondent be issued with a Certificate of Service (judgment at pages 80-87 of ROA).

Determination

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

Issues for determination

21. 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. 117,920.00 being 8 months' compensation without reasonable justification;

    iv. Whether the trial Magistrate erred in awarding Kshs. 58,960/- as service pay;

    v. Whether the trial Magistrate erred in awarding Kshs. 88,440.00 being unpaid leave.

    vi. Whether the trial Magistrate erred in awarding Kshs. 88,440.00 being severance pay.

22. 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.

23. The court on perusal of the issues outlined by the parties, established the issues for determination to be-

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*;

The appellant's submissions

24. 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 3-30). 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 Simeiyo 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

25. The evidence on record is that the Respondent was employed by the Appellant as general worker in May 2017 until 29th September 2023 when her employment was terminated on account of reduced 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 May 2017 to September 2023. This was a period of over 6 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 uncontroverted evidence on record is that the Respondent had worked for the Appellant for a period of 6 years 4 months. The Appellant did not adduce any evidence to show that the Respondent was not in its employment continuously from May 2017 to 29th September 2023. 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 Odero v 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 v 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 v 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 v Associated Motor Boat Company Ltd (1968) and Peters v 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." We humbly submit that the Respondent having worked for the Appellant for a period of 6 years 4 months the trial court 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 v 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 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 6 years and 4 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

26. From the pleadings before the trial court, this court found it was not in dispute that the Respondent's engagement was terminated on 11th October 2023. The claimant said he was employed in 2017. During cross-examination the claimant/Respondent told the trial court he was employed in May 2017 and worked continuously from Monday to Friday and was paid every 12 weeks. He was subjected to statutory deductions. The Respondent applied and went on maternity leave and stated she was not paid while on maternity. The trial court held that the appellant did not provide evidence that the respondent did not work continuously for 3 months to dispute contractual employment taking into account the definition of causal under section 2 of the *Employment Act* and the conversion of causal to contractual under section 37 of the *Employment Act*. Section 37 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 court found it was established the Respondent worked for the appellant from 2017 to 2023 and was subjected to statutory deductions. The court found no basis to disturb the finding of the trial court that the Respondent's employment had converted 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

27. 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 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 45-48).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

28. The Respondent's evidence is that on 29th September 2023 she reported to work and worked the whole day. However, in the evening the supervisor came with a list of employees names, read them out and informed those whose names were read out including the Respondent herein that their employment had been terminated 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 v Hanan International Co. Ltd (2018) eKLR where the court held; "Reduced work has been defined in law as redundancy." On the other hand, the Appellant alleged that the Respondent absconded duty from 11th October 2023 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 did not adduce any evidence to show that the Respondent was at work between 30th September 2023 and 10th October 2023. 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 with any of those letters. The Appellant did not tender any evidence to show that the letters were sent to or delivered to the Respondent. In fact, the Appellant's witness admitted that she was not aware whether the Respondent received the said letters. 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 6 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 v 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 v 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 -vs 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, consuitation 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

29. The trial court established that the respondent failed to show up for work on account of reduced work. On appeal it is the Appellant's position that the Respondent absconded duty on 11th October 2023. The Respondent told the trial court that she was sacked on the 29th September 20123 and had signed the attendance register. That many people were sacked and she could not recall the number. That on 11th October 2023 she was not working. DW1 was Agnes Kagwiria, the Human Resources Officer of the appellant. She told the court at cross-examination that the claimant/respondent worked 5 days a week from 2016/2017 to 11th October 2023 and had no proof. The appellant produced letter of 25th October 2023 asking the claimant to return to work and accusing her of absenteeism without authority. The dismissal letter dated 20th November 2023 was also produced (page 48 of the record).

30. The respondent filed a supplementary statement dated 2nd December 2024 in which she explained on the 29th September 2024 she worked the entire day and in the evening their supervisor John called a meeting and informed them that the employment was being terminated immediately as the respondent was experiencing reduced work.

31. This court having evaluated the evidence before the trial court found the evidence of the respondent having been exited from employment on account of reduced work on the 29th September 2024 was not controverted by the employer. DW1 had no evidence of the delivery of the alleged disciplinary related letters on account of absconding. The appellant had no evidence of the respondent having worked beyond 29th September 2023, yet there was evidence of the existence of attendance registers. The court found no basis to disturb the finding of the trial court that the reason for termination of the employment was reduced work and that amounted to redundancy. There was no procedural fairness.

Whether the Learned Magistrate erred in the reliefs granted;

32. The trial court in judgment awarded compensation for unfair termination equivalent to 8 months' salary, notice pay, unpaid leave, severance pay, and service pay, which are now challenged on appeal.

33. On the compensation for unfair termination, the trial court said it considered the provisions of section 49 (4) of the *Employment Act* to arrive at an equivalent of 8 months' compensation. The court upheld the finding of unfair termination as there was no proof of compliance with section 40 of the *Employment Act* on the termination, to wit- 'Termination on account of redundancy. 40.(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions - (a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy: (b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer; (c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy; upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union; (e) the employer has where leave is due to an employee who is declared redundant , paid off the leave in cash; (f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and (g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service."The claimant had worked from 2017 to 2023. She had no record of disciplinary issues while employed

and was terminated unfairly. The award of equivalent of 8 months compensation was not excessive to warrant the interference of the 1st appellant court and is upheld (Mbogo v Shah).

34. The Notice pay is due under section 40 and 36 of the *Employment Act* and is upheld.

35. Unpaid leave- The appellant did not produce evidence of having accorded the claimant leave. The claimant applied for maternity and not annual leave. The appellant submits that to buttress on their argument for unpaid leave relied in the recent judgement delivered by this Honourable court with similar facts that is in the case of Komu v Sana Industries Limited [2025] KEELRC 75 (KLR) where her Ladyship Hon. J.W. Keli in upholding the provisions of the law on unpaid leave had this to say: 37. "The accrued leave is limited to 18 months under Section 28 subsection 4 of the Act as follows 38.The Court finds that the appellant knew he was entitled to 26 days of annual leave but had no evidence of having applied for leave and the same was denied. The Court upholds the decision cited by the Respondent in Peter Kariuki Gachiri V Kenya Baptist Theological College (2019)e KLR paragraph 19 to wit:-" 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." It was the Appellant's submission that the Respondent could have been deserving of unpaid leave computed as follows: (13,400×21/30) 3 years =28,140.00 (Record of Appeal page 70)

36. Conversely, the respondent submitted that her Respondent's uncontroverted evidence is that she never went on leave for the whole period that she worked for the Appellant and that her requests to go on leave were rejected by the Appellant. The Appellant though it alleged that the Respondent proceeded on leave or was paid for leave not taken did not produce any work records to prove its allegations, thus the Respondent's evidence remained uncontroverted. Further in the decision in the case of Mbukha v CRJE (Supra) in which case the court in regards to work records stated; "In employment and labour relations, the employer has the legal duty to submit work records. Section 10(6) and (7) of the *Employment Act*, 2007 (the Act) mandates the employer, upon a suit being filed, to file all the work records with regard to the subject employee. Such duty has not been discharged by the Respondent in this case and the application of section 107 and 109 of the *Evidence Act* does not remove the threshold pursuant to the provisions of section 20 of the *Employment and Labour Relations Court Act*, 2011. In the absence of a defence or work records, the court must believe the employee." That the Respondent proved that she had not been allowed to proceed on leave hence she was entitled to payment of the outstanding leave days as awarded by the trial court.

37. The court upholds own decision cited above to carry forward leave of 18 months only under section 28(4) of the *Employment Act* thus Kshs. 14740x 18 months thus Kshs. 22,110. The award for leave is set aside and substituted with Kshs. 22,110.

38. Severance pay – this is due under section 40 of the *Employment Act*. The same was awarded for 15 days for 3 completed years. The court found the completed years were 5 and not 3. The notice pay treated the monthly salary as 14,740. The award of 88440 was an error in computation and is set aside. The award is thus 14740/x15/30 x 5 years thus Kshs. 36850 award.

39. Service pay -The appellant submits that the claimant was on NSSF and thus not entitled to service pay. 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." The appellant further submitted that in any event the Respondent is entitled to service pay which in this case it objected 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, the respondent submitted that her employment with the Appellant commenced in May 2017. The Respondent produced her NSSF Statement that showed the Appellant did not remit NSSF dues for the years 2017, 2018, 2020, 2021 which is a period of 4 years. For a period of 4 years the Respondent was 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 4 years she was not under the scheme. This was held by the decision in the case of Wycliffe Juma llukol v 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." In case of Chakaya v 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. The court finds that there was no evidence of remittance of NSSF. The authority cited by the appellant is distinguished as the facts of this case indicate the claimant is not seeking orders as relates to NSSF contribution. The court finds that service pay is payable for 15 days for each complete year worked. The claimant sought service pay for 4 years and thus the computation was based on higher rate. The same is awarded for 15 days for 3 complete years namely 2018,2020 and 2021 thus Kshs. 14740x15/30 x 3 thus Kshs 22110. The amount of 58960 is set aside.

Conclusion

40. 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. E080 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 equivalent of 8 months Kshs. 117,920.

c. Salary in liue of notice Kshs. 14740

d. Severance pay Kshs. Kshs. 36850

e. Service pay Kshs, 22110

f. Leave in lieu Kshs. 22110.

Total sum 213,730

g. Half costs

h. Interest

i. Certificate of service be issued to the claimant.

41. As the appeal was partially successful, I order each party to bear its 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. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Appellant – Eredi

Respondent – Muthini h/b Kang'ethe.