

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

APPEAL NUMBER E106 OF 2025

SANA INDUSTRIES LIMITED.....APPELLANT

-VERSUS

CICILIA

NYAMBURA

NDUNG’U.....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. E125 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. E125 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.
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 9 months' salary as damages for unfair termination.
7. The Honourable Magistrate erred in fact and in law by awarding Kshs. 156,760/- 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 severance pay despite having made a finding that the Respondent was never declared redundant.
9. 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/-
10. The Honourable Magistrate erred in awarding one month salary in lieu of notice despite evidence showing that the claimant had absconded duty.
11. 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: $(16,900 \times 21/28) \times 3 \text{ Years} = 38,025/-$

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 7th December 2023 seeking the following orders: -

- | | |
|--|-------------------------|
| a. One month's salary in lieu of notice | Kshs. 17,420.00 |
| b. Leave days accrued since April 2012
@ 26 days per year | Kshs. 156,780.00 |
| c. Service pay from 2012-2015 | Kshs. 52,260.00 |
| d. 12 months' salary as compensation for
Unlawful termination | Kshs. 209,040.00 |
| Total | Kshs. 435,500.00 |
| e. Certificate of service | |
| f. Costs and interests from a) to d) above | |

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

14. The Respondent filed her Verifying Affidavit sworn on 7th December 2023, 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 6-60 of ROA).

15. The claim was opposed by the Appellant who entered appearance and filed a memorandum of response dated 15th January 2024 (pages 63-65 of ROA). They also filed a list of witnesses dated 20th May 2024, witness statement of AGNES KAGWIRIA of even date, and list of documents of even date with the bundle of documents attached (pages 66-75 of ROA).
16. To counter the Appellant's case, the Respondent filed a Reply to memorandum of response, dated 24th January 2024 (pages 61-62 of ROA).
17. The Respondent's case was heard on the 29th of January, 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 99-101 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 102-103 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. 400,660/- 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 105-110 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. 52,260/- as service pay;
- v. Whether the trial Magistrate erred in awarding Kshs. 156,780.00 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 on perusal of the pleadings, finds the issues 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 bi-weekly basis. This is corroborated by the Respondent's own bank statements. (Record of Appeal page 12-59).

The engagement falls under the statutory definition of "casual employment" under Section

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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. 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 cleaner in June 2012 until 5th January 2021 when her employment was terminated. 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 2012 to January 2021. 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 June 2012 to 5th January 2021. 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 held that the employment of the respondent by the appellant was continuous and converted according to section 37 of the Employment Act. The claimant produced before the trial court a banking statement from November 2013 (page 12 of the ROA). The Court on perusal of the bank statements established that the claimant was paid salary by the appellant continuously for 3 months from November 2013 to February 2014. That was sufficient proof of continuous engagement for more than 3 months. The Appellant's witness during cross-examination told the trial court that the claimant worked for 9 years. The conditions for conversion of casual to contract term is under section 37 of the Employment Act to wit- "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 can not 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. (2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days. ‘’ I find no basis to fault the finding of the trial court on the conversion of casual to contract term employment as there was evidence she worked and was paid bi-weekly for 9 years.

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

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 7th January 2021. 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

29. The Respondent's evidence is that on 5th January 2021 as she was attending to her work she was summoned by one of the Appellant's manager and the Human Resource Manager and interrogated regarding some electric wires that were found cut in one of the Appellant's go downs. That she was not aware of the cut electric wires and she informed the said managers as much. That the Human Resource Manager told her to go home for 3 weeks to give the management time to investigate the matter but when she reported back to work after the 3 weeks. She was not allowed to resume work as the Respondent's manager chased her away and told her never to step in the premises as her employment had been terminated. The Appellant on the other hand allege that the Respondent absconded duty from 7th January 2021 and was never seen since then. We humbly submit that the Appellants' evidence is not believable. The Appellant is clearly scrambling to cover its tracks after unlawfully terminating the Respondent's employment without any justification and without due process. 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 10 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 Mbithi 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." We humbly submit that the Appellant failed to prove that the Respondent absconded duty.

Decision

28. 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).

29. The burden to prove 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 claimant was an employee of the appellant, and that there was a termination of employment. The burden to prove the validity of the reason for termination lay with the appellant as the employer as per section 43 of the Employment Act. The appellant, through its witness Agnes Kagwiria, said the claimant absented herself from work and never returned.

Indeed, as has been repeatedly held by the court, when an employer alleges that an employee has absconded from duty, the employer must show efforts made to contact such an employee. This was held in the case of Simon Mbithi 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." There was no proof of effort to reach the claimant on the alleged absenteeism hence her version of the story that on the 5th January 2021 on being accused of cut wires was asked to stay away and on return dismissed was not controverted thus proved on balance of probabilities. The court then found no basis to fault the trial court holding that termination was unlawful for lack of a valid reason for the termination and unfair for lack of procedural fairness. 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).

Whether the Learned Magistrate erred in the reliefs granted:

30. The trial court entered judgment for the respondent against the appellant as follows-

- 1. I declare the termination of the claimant unlawful and unfair.*
- 2. 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 52,260/-*

6. Unpaid leave Kshs 156,780/-

TOTAL Kshs. 400,660/-

1. Half Costs

2. Interest

3. Certificate of service be issued to the claimant''

31. On compensation for unfair termination, the ground of appeal was as follows-
- a. The Honourable Magistrate erred in awarding excessive damages when the Respondent in fact absconded duty, hence abetting her own dismissal from employment. The court found the reason for absconding was not proved.
32. The trial court awarded the equivalent of 10 months salary and stated it considered the factors under section 49(4) of the Employment Act. The claimant had worked from November 2013 to 5th January 2021(as per the bank statements at page 12 of ROA). RW1 said the respondent worked for 9 years. The reason for termination was not proved and there was no record of previous disciplinary issue. In the circumstances, I do not find the award of 10 months salary compensation excessive. While the appellant disputed the salary claimed as total for the month it did bother to produce the wages records for comparison. The court finds no basis to fault the trial court for reliance on pleaded salary by the claimant (Mbogo v Shah). The award is upheld.

33. **The notice pay** for 1 month is justified and was due under section 36 the Employment Act and is upheld as awarded for the sum of Kshs. 17420.
34. **Service pay-** There was no evidence of the claimant being under NSSF and remittances. 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 claimant was entitled 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 of Kshs. 52,260 was in error for being based on 30 days for each year worked and is set aside and substituted with half the amount being 15 days per year thus **Kshs. 26,130.**
35. **Unpaid leave** -The trial court awarded leave as pleaded. The claimant did not lay before the trial court, 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 substituted with 18 months pay , thus **Kshs. 26,130.**

CONCLUSION

36. 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. E125 of 2023 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 10 months Kshs. 174200**
- c. Salary in lieu of notice Kshs.17420**
- d. Service pay Kshs 26130**
- e. Leave in lieu Kshs. 26130**

Total sum 243880

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

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

38. Stay of 30 days.

39. 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