Sana Industries Limited v Owiti (Appeal E107 of 2025)
[2025] KEELRC 3195 (KLR) (13 November 2025) (Judgment)

Neutral citation: [2025] KEELRC 3195 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E107 OF 2025

JW KELI, J

NOVEMBER 13, 2025

BETWEEN

SANA INDUSTRIES LIMITED ..... APPELLANT

AND

ROSEBELLA OWITI ..... 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. E129 of 2024)

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. E129 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.

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 her employment.

5. The Honourable Magistrate erred in awarding one month salary in lieu of notice despite evidence showing that the claimant had absconded duty.

6. 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 x 21/28) x 3 Years= 38,025/-

7. The Honourable Magistrate erred in fact and in law by failing to consider the Appellant's evidence presented in court.

Background To The Appeal

8. The Respondent filed a suit against the Appellant vide a statement of claim dated 24th July 2025 seeking the following orders: -

    a. One month's salary in lieu of notice Kshs. 16,080.00

    b. Leave days accrued since 2019 Kshs. 51,950.00

    c. Service pay from Sept 2019-Nov 2023 Kshs. 64,320.00

    d. 12 months' salary as compensation for

    unlawful termination of employment Kshs. 922,960.00

    Total Kshs. 325,310.00

    e. Certificate of service

    f. Costs and interests from a) to d) above

    (pages 3-5 of Appellant's undated ROA).

9. The Respondent filed her Verifying Affidavit sworn on 24th July 2024, as well as her list of witnesses and witness statement of even date. She also filed her list of documents together with the bundle of documents attached, dated 20th May 2024 (pages 6-58 of ROA).

10. The claim was opposed by the Appellant who entered appearance and filed a memorandum of response dated 19th September 2024 (pages 59-62 of ROA). They also filed a list of witnesses dated 19th September 2024, witness statement of AGNES KAGWIRIA of even date, and list of documents of even date with the bundle of documents attached (pages 63-123 of ROA).

11. The Respondent's case was heard on the 4th of February, 2025 with the Respondent testifying as PW1. She relied on her filed witness statement as her evidence in chief, produced the documents attached to her list of documents, and was cross-examined by counsel for the Appellant Ms. Pepela (pages 353-355 of ROA).

12. The Appellant's case was heard on the same day with the Appellant calling one witness, Agnes Kagwiria (DW1) to testify on its behalf. She relied on her filed witness statement as her evidence in chief, and produced the Respondent's documents. She was cross-examined by counsel for the claimant Mr. Kang'ethe (pages 355-356 of ROA).

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

14. 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. 196,670/- comprising of 4 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 358-364 of ROA).

Determination

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

Issues for determination

16. 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. 64,320.00 being 4 months' compensation without reasonable justification;

    iv. Whether the trial Magistrate erred in awarding Kshs. 64,320.00 as service pay;

    v. Whether the trial Magistrate erred in awarding Kshs. 51,950.00 being unpaid leave.

17. 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.

18. The court was of the considered opinion the issues placed before the court for determination in the appeal were –

    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;

The Appellant's submissions

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*;

19. 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 13-56). 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' submissions

20. The Respondent having worked for the Appellant for a period of 4 years 2 months, we humbly submit that 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 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

21. The trial court on the issue held as follows- The claimant averred in her Memorandum of Claim that she was employed on or about September, 2019 as a general labourer and that she was dismissed on or about 22 November, 2023. This period translates to about three years, three months.

22. On its part, the appellant maintained that the respondent was a casual employee, who would be engaged occasionally. There was no evidence from the appellant's end to confirm that the respondent was not in its employment regularly and continuously from September, 2019 to November, 2023. Section 10(7) of the *Employment Act* provides that 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. A construction of this provision is that the respondent being the employer, was under an obligation to disprove the fact that the claimant was not a casual employee. In this regard, and being the party responsible for maintenance of employment records, the appellant was under an obligation to prove by way of evidence that the respondent was engaged intermittently and not for a continuous period exceeding three months. In the absence of proof to the contrary, I am led to conclude that the contract of service of the claimant assumed permanency and was deemed to be one where wages are paid monthly. In essence, section 35(1) (c) of the *Employment Act* became applicable to the claimant's contract of service in terms of section 37(1). Such was the holding by the Court of Appeal in the case

of Nanyuki Water & Sewage Company limited v Benson Maiti Ntiritu & 4 others (2018) eKLR where it was held as follows: "Section 37 of the *Employment Act*, 2007 applies to the employment of the Respondents to the effect that their casual employment was converted into a contract of service where wages are paid monthly and to which section 35 (1) (c) of the Act applies. The Respondents were entitled to such terms and conditions of service as they would have been entitled to under this Act had they not initially been employed as casual employees." On re-evaluation of the evidence before the trial court the court found no basis to interfere with the finding of the trial court as RW1 confirmed the claimant was employed in September 2019 and left in November 2023 when she was accused of absenteeism. The respondent had the opportunity to provide a record to rebut the claim of continuous employment for more than 3 months but failed to do so (see section 10(g) of the *Employment Act*). The court further holds that the nature of casual engagement does not invite disciplinary proceedings for absenteeism, and the appellant, having pleaded the same as a reason or termination, cannot turn around and challenge the conversion by the trial court. Casual work is defined under section 2 of the *employment act* as - "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 a longer period than twenty-four hours at a time; "The court finds no basis to disturb the finding of the trial court that the respondent's engagement was contract term.

The appellant's submissions

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

23. 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 3rd, 21st and 22nd November 2023. 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

24. The Respondent's evidence is that she was granted permission on 21st November 2023 by her supervisor to go report the loss of her national identity card and apply for the replacement having earlier lost her identity card. That when she resumed work on 22nd November 2023 she found her name missing from the list of employees. That upon enquiring from her supervisor she was informed that her employment had been terminated with immediate effect but she was not given the reason for the termination. On the other hand, the Appellant alleged that the Respondent absconded duty on 22nd November 2023. 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 without any justification and without due process. 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 Appellant did not tender any evidence to show that the letters were sent to or delivered to the Respondent. The Appellant did not adduce any evidence to show it made any efforts to establish the whereabouts of the Respondent who had been its employee for more than 4 years. Indeed, as has been severally held by our courts that when as an employer alleges that an employee has absconded duty, the employer must show efforts made to contact such an employee. This was held in the case of Simon Mbuthi Mbone Vs. Intersecurity Services Ltd (2018) eKLR where the court stated; "An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate

that efforts were made to contact such an employee without success." The Appellant failed to prove that the Respondent absconded duty. 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 also failed to prove that it followed due process before terminating the Respondent's employment. Section 41 of the *Employment Act* provides the mandatory procedure an employer must follow before termination on employee's employment on account of misconduct or poor performance. This procedure was duly emphasized in the case of Abong Vs. Safaricom Limited (2024) KEELRC 2656 (KLR) where the court stated; "Section 41 of the *Employment Act*, 2007 sets out a mandatory procedure that must be followed by the employer contemplating terminating an employee's employment or summarily dismissing an employee from employment. The ingredients for due process are; Notification - the employer must inform the employee that they intend to take action against him or her and the reason(s) of the basis thereof; the hearing - the employer must afford the employee affected an adequate opportunity to make representations on the reasons. Interwoven with this right is the right of accompaniment. The employee should be allowed to be accompanied by a colleague of choice, or a trade union representative where applicable to the hearing. Lastly, the consideration - the employer has to consider the representations by the employee before making a final decision." We humbly submit that the Appellant failed to comply with this mandatory procedure before dismissing the Respondent from employment. The Appellant alleged that it issued the Respondent with a show cause letter, return to work notice, a hearing notice and a dismissal letter, however, no evidence was adduced to prove the Respondent received the said letters. The Appellant alleged to have given the letters to a union to deliver to the Respondent. The said union was never called as a witness to prove service of the said letters. The Respondent's evidence is that she never received any letter from the Appellant nor was she ever called for any disciplinary hearing. The Appellant did not adduce any evidence that it invited the Respondent for disciplinary hearing. In the case of Abong Vs. Safaricom Ltd (Supra) the court had this to say regarding service of disciplinary process documents; "Employers must heed this, where service of any disciplinary process documents is denied by the employee affected, it would not suffice for the employer to just assert that service was effected through the employee's last known email address. The employer must go further to demonstrate that the email was delivered."

Decision

25. 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).

26. On the reason for termination, the appellant contended that it was on basis of absconding duty. The appellant produced before the trial court a notice to show cause and a summary dismissal letter. The claimant said she had the authority to be away and denied receipt of the letters of show cause and dismissal. During the cross-examination RW1 told the trial court at cross-examination as follows- 'She was employed on September 2019. I don't have a schedule of all the days claimant worked. I don't have any documents as proof of employment terms. No warning letter was issued when the claimant was first absent. I don't have evidence that the series of letters were delivered to the claimant, neither that she was called. I don't have any record to show that the claimant took leave. I don't have any record showing that the claimant was paid for leave not taken. NSSF was remitted for days worked. I do not have any record showing NSSF remittance. Claimant didn't give any notice. The company paid salary on 1/12/23." The court, based on the foregoing testimony of the witness of the Appellant, finds that the reason or termination of absconding was not proved on a balance of probabilities as per section 43 of the *Employment Act*. Further, there was no proof of compliance with procedural fairness under section 41 of the *Employment Act*, as RW1 admitted she had no evidence that the claimant had been issued a show cause. The court finds no basis to interfere with the finding of the trial court on the unfair termination decision.

Whether the Learned Magistrate erred in the reliefs granted;

27. 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. 64,320/-

4. Salary in lieu of notice Kshs.16,080/-

5. Service pay Kshs 64,320/-

6. Unpaid leave Kshs 51,950/-

TOTAL Kshs. 196,670/-

Half Costs

Interest

Certificate of service be issued to the Claimant."

On compensation for unfair termination

Appellant's submissions

28. Compensation was awarded for unfair termination for equivalent of 4 months pay for Kshs. 64320 and the court stated it had considered the factors under section 49(4) of the *Employment Act*. The appellant submitted that the Respondent was awarded Ksh. 64,320.00 being 4 month's compensation for unfair termination, based on an alleged monthly salary of Ksh. 16,080.00. It is worth noting that the Respondent did not adduce any document to substantiate that she earned the pleaded amounts, even when her own bank statements did not bear any such figure. Conversely, the Appellant submitted that it sufficiently proved that the Respondent earned a daily wage of Ksh. 652/- which would be paid on a bi-weekly basis depending on the number of days worked. The Respondent confirmed the same during cross-examination. Should the Respondent have worked continuously every month; she would've been entitled to a monthly pay of Ksh. 13,040.00. The Appellant drew this court to the decision delivered in

the matter of Komu v Sana Industries Limited [2025] KEELRC 75 (KLR) where this same honourable court on the said issue held that;- 31. The termination was thus based on lawful reasons and cannot attract compensation for unlawful termination. This position was adopted in same case cited by the appellant in Under the provisions of Section 45(5) of the Act, the Court should take these records of the appellant. They are relevant. To assign compensation would be to reward the appellant over his acts of misconduct. In this regard zero (0) compensation is appropriate." The Respondent thus submits that from the foregoing, the trial magistrate erred in finding that the Claimant was unfairly terminated from employment and the 12- month's compensation being on the higher end.

Respondent's submissions

29. The Respondent is entitled to compensation for unfair termination of employment. The trial court awarded the Respondent Kshs. 64,320 being 4 months' salary. The trial court clearly indicated that it considered the provisions of section 49 (4) or the *Employment Act* in making the award. In the case of Nation Media Group Ltd Vs. Munene (2025) KECA 114 (KLR) the court of Appeal observed; "It is notable that an award equivalent to a number of wages or salary not exceeding twelve months and based on the gross monthly wage or salary of an allowable remedy under section 49(1) of the *Employment Act* where termination of a contract of an employee is unjustified. In addition, the considerations and factors that a court is required to take into account in awarding this remedy come into play in this appeal, particularly those stated in section 49 (4) (a) – (f) of the *Employment Act* We humbly submit that the trial court duly took into account relevant matters and rightly exercised her discretion in awarding the Respondent 4 months salary as compensation for unfair termination of employment.

Decision on the compensation

30. The court upheld the finding of unfair termination. The court, on finding unfair termination ,must consider application of remedies under section 49 of the *Employment Act*. Compensation is one of the remedies. The Appellant denied the claimed monthly salary but did not provide records to the contrary (section 10 of the *Employment Act*). The claimant had worked from 2019 to 2023. The court finds the award of 4 months' salary compensation fair and no basis to interfere. The award is upheld.

On unpaid leave

31. The trial court awarded leave for the entire period of service. The claimant told the court she had secured a day off. There was no evidence of having applied for leave and it being denied. I uphold my decision on leave in Komu v Sana Industries Limited [2025] KEELRC 75 (KLR).-'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." Likewise, the claim for accrued statutory annual leave is allowed on appeal but limited to the last 18 months thus 39 days applying the 26 days annual leave. The Court awards payment in lieu this 39/30 x 16900 total award Kshs. 21970/" The claim for statutory leave awarded for the entire service is set aside and substituted with award for 18 months thus Kshs. 24,120

32. On Service pay- there was no evidence that the claimant was on NSSF and the award for service pay is upheld as it is merited pursuant to the provisions of section 35 (5)and 36 of the *Employment Act*. The same is payable at the rate of 15 days for each year worked. The trial court erred in awarding the same for 4 years worked at 30 days. The award is set aside and substituted with half of the amount being 15 days for each year worked thus Kshs. 32,160.

Conclusion

33. 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. E129 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 4 months Kshs. 64,320/-

    c. Salary in lieu of notice Kshs. 16080

    d. Service pay kshs, 32,160.

    e. Leave in lieu Kshs. 24120

       Total sum 136,680

    f. Half costs

    g. Interest

    h. Certificate of service be issued to the claimant.

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

35. Stay of 30 days.

36. 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