Sana Industries Limited v Wamaitha (Appeal E132 of 2025)
[2025] KEELRC 3194 (KLR) (13 November 2025) (Judgment)

Neutral citation: [2025] KEELRC 3194 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E132 OF 2025

JW KELI, J

NOVEMBER 13, 2025

BETWEEN

SANA INDUSTRIES LIMITED ..... APPELLANT

AND

JUDY NJERI WAMAITHA ..... 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. E079 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. E079 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 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 10 months' salary as damages for unfair termination.

7. The Honourable Magistrate erred in fact and in law by awarding Kshs. 132,660/- 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. 73,700.00 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 2014 Kshs. 132,660.00

    c. Service pay from June 2014-2019 Kshs. 73,700.00

    d. Severance pay Kshs. 132,660.00

    e. 12 months' salary as compensation for unlawful termination of employment Kshs. 176,880.00

    Total Kshs. 530,640.00

    f. Certificate of service

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

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

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 6-65 of ROA).

15. The claim was opposed by the Appellant who entered appearance and filed a response to statement of claim dated 29th July 2024 (pages 66-69 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 70-112 of ROA).

16. To counter the Appellant's response to the statement of claim, the Respondent filed a Reply dated 9th August 2024 (pages 113-114 of ROA).

17. 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 136-138 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 138-139 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 8th of April 2025 partially allowing the Claimant/Respondent's claim to the tune of Kshs. 501,160/- comprising of 10 months' salary as compensation for unfair termination, one month's salary in lieu of notice, unpaid leave, severance pay and service pay. It also ordered that the Claimant/Respondent be issued with a Certificate of Service (judgment at pages 140-147 of ROA).

Determination

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

Issues for determination

22. In their submissions dated 30th July 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. 147,400.00 being 10 months' compensation without reasonable justification;

    iv. Whether the trial Magistrate erred in awarding Kshs. 73,700/- as service pay;

    v. Whether the trial Magistrate erred in awarding Kshs. 132,660.00 being unpaid leave.

    vi. Whether the trial Magistrate erred in awarding Kshs. 132,660.00 being severance pay.

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 on account of redundancy;

iii. Whether the Learned Magistrate erred in the reliefs granted;

iv. Who pays the costs of the Appeal.

24. The court was of the considered opinion that the issues placed before the court for determination in the appeal are –

i. Whether the Learned Magistrate erred in finding that the Respondent's employment had converted from casual to term contract by dint of Section 37 of the *Employment Act*;

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

iii. Whether the Learned Magistrate erred in the reliefs granted;

Whether the Learned Magistrate erred in finding that the Respondent's employment had converted from casual to term contract by dint of Section 37 of the *Employment Act*;

Appellant's submissions

25. The Appellant submits that the Respondent was engaged on casual terms, working only when work was available, paid at Ksh. 652/- daily on a biweekly basis. This is corroborated by the Respondent's own bank statements. (Record of Appeal page 13-64). 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. 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 general worker in August 2014 until 2nd June 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 August 2014 to May 2023. This was a period of 9 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 9 years 10 months. The Appellant did not adduce any evidence to show that the Respondent was not in its employment continuously from August 2014 to 2nd June 2023. The trial court having found that the Respondent had worked for the Appellant for a period of 9 years 10 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 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 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 appellant contended that the Respondent was engaged on casual terms, working only when work was available, and paid at Ksh. 652/- daily on a biweekly basis. This is corroborated by the Respondent's own bank statements. (Record of Appeal page 13-64). That 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. Casual worker is defined under section 2 of the *employment act* as follows -"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; '' section 37 of the *employment act* provides for conversion of employment as follows- ''37. Conversion of causal employment to term contract (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."

28. The trial court held that this was a contract term of employment for lack of contrary evidence by the appellant that the claimant did not work continuously from January 2014 to June 2023 as claimed. The appellant had claimed it had engaged the claimant from time to time. The respondent had produced evidence of payment of wages in the period (At pages 13- 64 of ROA). The statements indicated that the respondent was engaged continuously for more than 3 months since September 2014. She then continued to work to the last payment remittance in May 2023. The court finds no basis to fault the finding of the trial court converting the casual work to a contract term under section 37 of the *Employment Act*.

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

Appellant's submissions

29. Being a casual employee, the Respondent's contract could be terminated at day's end per Section 35(1)(a) of the *Employment Act*. It was the Appellant's position that the Respondent absconded duty on 31st May 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 76-79).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

30. The Respondent's evidence is that she was granted permission by her supervisor to attend a parents meeting at her child's school on 31st May 2023 but when she resumed work on 2nd June 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 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." The Appellant produced attendance sheets for 15th May to 15th June 2023 and it is clear from the attendance sheets of 2nd June 2023 that the Respondent's name is missing. Indeed, the Respondent's name is missing from the lists produced by the Appellant for the month of June 2023 (see pages 94 – 112 of the record of Appeal.) Further the Appellant produced a list with employee names titled "workers going for short term break 31/05/2023 (page 93 of the record of Appeal). Respondent's name is on that list as number 32. The list however does not indicate a date when those listed were to resume work. The Respondent confirmed that she was not given or shown the said list on 2nd June 2023 when she found her name missing from the employees list. The Respondent was not told that she had been sent on a short term break. She was informed her employment had been terminated due to reduced work. On the other hand, the Appellant alleged that the Respondent absconded duty on 31st May 2023 without permission. If it is true the Respondent absconded duty on 31st May 2023 and never went back to work why then did the Appellant purport to send the Respondent on a short term break from 31st May 2023. How could the Appellant purport to take action against the Respondent for alleged absenteeism during a period it had purportedly sent the employee on a short term break. 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 purported show cause letter, return to work notice, letter 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. 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 9 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 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.

Decision

31. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the *Employment Act* to wit:- '45(2) A termination of employment by an employer is unfair if the employer fails to prove—

    (a) that the reason for the termination is valid

    (b) that the reason for the termination is a fair reason—

        (i) related to the employees conduct, capacity or compatibility; or

        (ii) based on the operational requirements of the employer; and

    (c) that the employment was terminated in accordance with fair procedure.'' To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the *Employment Act* (Walter Ogal Anuro v Teachers Service Commission[2013] eKLR).

32. The burden of proving claims of employment is according to section 47(5) of the *Employment Act* to wit –'(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.'' It was not in dispute that the respondent was an employee of the appellant and there was termination of employment. The burden to prove 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, in a witness statement before the lower court, stated that the claimant on the 31st of May 2023, without permission, absconded from duty. The Respondent produced show cause letter and invite for a disciplinary hearing and summary dismissal letter all on ground of absenteeism. During cross-examination, the claimant agreed she was absent on the 31st May 2023. The claimant says she was granted permission on the 30th of May 2023 by the supervisor to be away. During cross-examination, the witness for the appellant, Agnes Kagwiria, told the court that the claimant worked for 5 days a week, depending on workload. Kagwiria did not have proof of service of the letters (as relates to disciplinary process).

33. The trial court held that the appellant said the work had reduced but on review of witness statement of Agnes Kagwiria and her testimony the appellant was emphatic the reason for the termination was absconding duty which was corroborated by the respondent who admitted she was absent on the 31st may 2023 when she was alleged to be absent though she said she had permission of the supervisor. I find this was a normal termination. The court agreed with the trial court that there was no evidence of service of the show cause letter and the other letters on the claimant, and RW1 admitted the same. Where the ground of termination is absconding, the employer is required to comply with the provisions of section 41 of the *Employment Act* before the termination. This was not done to justify the reason, hence the court upheld the trial court decision that the termination was unlawful and unfair.

Whether the Learned Magistrate erred in the reliefs granted;

34. The trial court entered judgment for the respondent and granted the following relief- 1. I declare the termination of the claimant unlawful and unfair.

    " 1 enter judgment for the claimant against the Respondent as follows

2. Compensation for unfair termination Kshs. 147,400/-
3. Salary in lieu of notice Kshs.14,740/-
4. Severance pay Kshs 132,660/-
5. Service pay Kshs 73,700/-
6. Unpaid leave Kshs 132,660/-

Total Kshs. 501,160/-

1. Half Costs
2. Interest
3. Certificate of service be issued to the claimant."

35. On compensation for unfair termination – the trial court awarded the equivalent of 10 months salary as compensation and stated it factored the provisions of section 49(4) of the *Employment Act*. The claimant had worked from September 2014- May 2023. There was no previous record of disciplinary. Her testimony that she had permission to be absent was not contested. I find no reason to fault the award of 10 months salary compensation. The salary awarded of Kshs. 14740 was not controverted by the employer who had obligation to prove terms of employment under section 10(7) of the *Employment Act* to wit- '(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer. ' The compensation award of Kshs, 147,400 is upheld.

36. The award in lieu of notice of 1 month salary of Kshs 14,740 was due under section 36 of the *Employment Act* and is upheld.

37. Severance pay- the same is payable on account of redundancy under section 40 of the *employment Act* . The court found this was a termination on the grounds of absconding and not redundancy. The award of severance pay is set aside.

38. Service pay- There was no evidence of the claimant being under NSSF. Section 35(5) of the *Employment Act*, as read together with section 36 of the Act, where the employee is not an NSSF/ pension, they are entitled to service pay. The claimant is entitled to service pay for each complete year worked. I agreed with the appellant that the applicable rate for service pay is 15 days for each year. The award of Kshs. 73700 was in error for being based on 30 days and is set aside and substituted with half the amount being 15 days per year thus Kshs. 36,850

39. On unpaid leave -The trial court awarded untaken/unpaid leave as pleaded. The claimant did not lay any proof of having applied for leave, and it was denied. She managed to get permission to be away, and thus the mechanism of seeking permission could also have applied to ask for leave. 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. 22110.

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. E079 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 10 months Kshs. 147400

    c. Salary in lieu of notice Kshs..14740

    d. Service pay Kshs 36850

    e. Leave in lieu Kshs. 22110.

       Total sum 221,100

    f. Half costs

    g. Interest

    h. Certificate of service be issued to the claimant.

41. As the appeal was partially successful, I order each party to bear their 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 Ms. Kang'ethe