REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAKURU

ELRC APPEAL NO. E047 OF 2024

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

DAVID MWANIKI MWANGI
T/A SALAMA RESORT……………………………………… APPELLANT

VERSUS

MARY WAIRIMU MBUGUA…………………….. RESPONDENT

(Being an Appeal from the Judgment and Decree of the Honourable Bildad Ochieng, Chief Magistrate, delivered 16th May 2024 in Nakuru CM ELRC No. 12 of 2019)

JUDGMENT

1. The Appellant, being dissatisfied with the judgment and decree of the Honourable Bildad Ochieng, Chief Magistrate, filed this appeal vide a Memorandum of Appeal dated 10th June 2024 on the following 12 grounds that:

   1. ***The learned trial magistrate erred in law and in fact by failing to appreciate the fact that the Claimant was a casual worker and***

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that the Claimant has never worked continuously for over a month as ably confirmed by DW-1 when he testified.

2. ***The learned trial magistrate erred in law and in fact by its own motion and without any evidence to hold that the Claimant has worked continuously for over a month and as such and in line with the provisions of section 37(1)(a) of the Employment Act, her contract had been converted from casual worker to permanent employee. The said finding was not supported by evidence since the fact that the Claimant was a casual worker had never been denied or controverted.***

3. ***The learned trial Magistrate erred in law and in fact by failing to appreciate that the Claimant herself conceded to the fact that she was a casual worker and this fact was further corroborated by the Defendant when he testified.***

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4. ***The learned trial Magistrate erred in law and in fact in misinterpreting the provisions of section 37(1)(a) of the Employment Act and assumed the same can just be applied even when there is evidence that a Claimant was a casual worker and she conceded to that fact and at no time was she continuously employed by the Respondent now Appellant for over a month as required the same to be converted from casual to permanent basis.***

5. ***The learned trial magistrate erred in law and in fact by holding that the Respondent now Appellant unfairly and unlawfully terminated the Respondent yet as per the testimony by the Claimant she confirmed that there was a criminal case against her and which lasted 20th June 2017 to 29th August 2018 and during this whole period she did not contact the Respondent and only came back after the charges were dropped and which was over a year later. It was practically not possible for a casual worker or even a permanent employee to***

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wait and abscond from duty for over a year and then still expect to still be employed after such a long period of absence from work.

6. ***The learned Magistrate erred in law and in fact in failing to appreciate that the Claimant, after failing to go to work or inform the Respondent of her whereabouts for over a year, then the contract of services, if any, would automatically lapse and/or be terminated by operation of law.***

7. ***The learned Magistrate erred in law and in fact in failing to dismiss the Claimant's cause considering the overwhelming evidence adduced by the Respondent in support of its defence and where it demonstrated that the employment claim by the Claimant was based on sinking sand and she was a casual worker who later on voluntarily stopped offering her services to the Respondent for over an year and the Respondent thus looked for another casual worker to offer him the said services.***

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8. ***The learned trial Magistrate erred in law and in fact in awarding notice of pay, whereas the Claimant was a casual worker and as such not entitled to the same.***

9. ***The learned trial Magistrate erred in law and in fact in awarding underpayment, whereas the Claimant was not entitled to the same, and neither was the same proved to the required standard.***

10. ***The award of notice pay, underpayment and compensation to the Claimant by the trial magistrate are totally unsupported in law and by evidence on record since the Claimant was a casual worker and all these remedies thus were not available to her.***

11. ***The learned trial Magistrate erred in law and in fact in purporting to put into perspective materials and facts not contained in the pleadings, evidence and submissions of parties.***

12. ***The learned trial Magistrate erred in law and in fact in failing to consider the***

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evidence on record, the Respondent's submissions and the circumstances of the case prior to making his final findings.

2. The Appellant prays that:

   a. ***This appeal be allowed***

   b. ***Whole of the decision and/or judgment of Honourable B. Ochieng dated and delivered on 16th May 2024 in Nakuru CM ELRC No. 12 of 2019, awarding the Claimant notice pay, underpayment and compensation totalling Kshs.565,061/= be set aside and/or varied, and in its place the suit be dismissed with costs to the Respondent now Appellant.***

   c. ***The costs of the appeal, as well as the costs of the suit in the lower court be borne by the Respondent.***

3. The appeal was disposed of by way of written submissions.

<u>Appellant's submissions</u>

4. The Appellant submitted that it is the court's dur\ to re-hearing based on the record as set out in the case ***of Selle V Association Motor Boat Co. Ltd***

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[1958] EA 123 where the Court of Appeal held that a first appellate court "must reconsider the evidence, evaluate itself and draw its own conclusions though it should bear in mind it has neither seen nor heard the witnesses."

5. The Appellant submitted that she had been a cleaner at the Respondent's Resort since 2007, and was verbally employed and paid in cash until 2013, with no written contract. The Appellant submitted that the trial court inconsistently accepted some claims while rejecting others on identical evidence, violating the maxim ***quod approbo non reprobo***. The award of notice pay amounting to Kshs.13,715/=, underpayments amounting to Kshs.510,201/=, and compensation amounting to Kshs.41,145/= was based on the erroneous finding of permanent employment. The appellate court is urged to intervene, citing the case of ***Butt V Khan [1982-88] KAR 1***, which permits interference where awards are based on wrong principles or misapprehended evidence. The trial court failed to provide a breakdown or documentary proof for underpayments, contrary to the case of ***Kenya Power and Lighting Company Limited V Nathan***

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Karanja Gachoka & another [2016] KEHC 1362 (KLR) and ***sections 107 and 109 of the Evidence Act***, which place the burden of proof on the claimant. The handwritten schedule lacked authentication, violating the principle ***semper necessitas probandi incumbit ei qui agit***. In the case of ***Hahn V Singh [1985] KLR 716***, special damages must be specifically pleaded and strictly proved. The award of notice pay contradicted ***section 35(1)(a) of the Employment Act***, which exempts casual workers from notice entitlement. Similarly, the compensation under ***section 49(1)(c) of the Employment Act*** was unwarranted, as the Respondent was a casual worker who deserted her job, not a victim of unfair termination, as set out in the case of ***Kenfreight (E.A) Limited v Benson K. Nguti [2016] KECA 409 (KLR)*** where the Court of Appeal upheld that Appellant failed to follow due process under the Employment Act, 2007, and confirmed that Respondent was entitled to remedies under ***section 49 of the Employment Act*** including compensation for unfair termination.

6. The Appellant contended that the trial court's award of Kshs. 565,061/= was legally flawed and

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unsupported by evidence, citing the case of ***Kenya Airways Ltd V Aviation & Allied Union Kenya & 3 others [2014] eKLR***, where the court warned that "awards must reflect legal standards, not moral sympathy." The compensation of three months' salary lacked justification under ***section 49(4) of the Employment Act***, which mandates consideration of factors like length of service and conduct. In ***Ol Pejeta Limited V David Wanjau Muhoro [2017] KECA 329 (KLR)***, the Court of Appeal emphasized that an unexplained *quantum* renders an award capricious. The trial court inconsistently accepted underpayment claims while rejecting leave and gratuity for lack of proof, violating the maxim ***aequitas sequitur legem***.

7. The Appellant submitted that ***section 10(7) of the Employment Act*** was misapplied, as both parties admitted casual employment, negating any burden shift. The Respondent failed to produce wage orders or pay slips, rendering her underpayment claim unsustainable as set in the case of ***Kenya Plantation & Agricultural Workers Union V James Finlays (K) Limited (Finlay Flowers) [2018] KEELRC 1182 (KLR)***. ***Section 35(5) of the***

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Employment Act excludes casual employees from gratuity or compensation, and the Respondent's intermittent work disqualified her from such benefits, invoking the maxim ***expressum facit cessare tacitum***. The award, driven by sympathy rather than law, contravened ***Kenya Airways Limited V Aviation & Allied Workers Union, Kenya, Minister For Transport, Minister For Labour & Human Resource Development & Attorney General [2014] KECA 403 (KLR***).

8. The Appellant submitted that the trial court also ignored the Appellant's evidence of operational disruption due to the Respondent's prolonged absence, a misdirection warranting appellate intervention under ***Mbogo V Shah [1968] EA 93***. The judgment violated ***sections 35, 37, 41, 43, and 49 of the Employment Act*** and must be vacated.

9. On costs, the Appellant relied on ***section 27(1) of the Civil Procedure Act, which*** mandates that costs follow the event, a principle reaffirmed in the case of ***Supremarine Handling Services Ltd V Kenya Revenue Authority [2010] eKLR***, entitling the Appellant to costs for both the appeal and the lower

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court proceedings. The Appellant seeks costs for both the appeal and the subordinate court proceedings, arguing that the Respondent's claim was speculative, unsupported by evidence, and amounted to frivolous litigation. The principle that costs are compensatory, not punitive, was affirmed in ***Orix (K) Ltd V Paul Kabeu & 2 others [2014] eKLR***, where the court held that costs reimburse the successful party for expenses incurred. The Respondent, aware of her weak case marked by prolonged absence, lack of a written contract, and irregular attendance, persisted in litigation, prompting unnecessary judicial expenditure. In ***Jasbir Singh Rai & 3 Others V Tarlochan Singh Rai & 4 others [2014] eKLR***, the court emphasized that costs deter frivolous claims and ensure justice.

10. The Appellant relied on ***section 12(4) of the Employment and Labour Relations Court Act*** empowers the court to award costs where just, and in ***Kenya Sugar Research Foundation V Kenyatta University & 2 Others [2018] eKLR*** reaffirmed that costs should follow the event unless good cause is shown. The Respondent’s claim consumed public resources and lacked an evidentiary foundation, fitting the description in ***Republic v Rosemary Wairimu***

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Munene ex parte Applicant V Thuru Dairy Farmers Co-op Ltd [2014] eKLR. The guiding maxims *actus curiae neminem gravabit*, *ubi jus ibi remedium*, and *ex turpi causa non oritur actio* underscore the Appellant's right to restitution and the need to discourage baseless litigation.

11. The Appellant urged the court to allow the appeal as prayed and that the Respondent bear the full burden of costs.

Respondent's submissions

12. The Respondent submitted that the Appellant is challenging the trial court's judgment awarding her Kshs.565,061/= for unfair termination. The Appellant asserts that her continuous employment from 2007 to 2017 converted her status from casual to permanent term ***under section 37(1) of the Employment Act,*** and that her oral contract was valid per ***sections 8(1) and 10(7) of the Employment Act***.

13. The Respondent argued that her arrest while on duty did not amount to abscondment and that the Appellant failed to follow due process under ***sections 41 and 43 of the Employment Act*** before terminating her. In ***Kenyatta University v Esther***

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Njeri Maina [2021] KECA 764 (KLR), the Court of Appeal dealt with the employment status of Esther Njeri, who had worked continuously for nearly ten years as a secretary without a formal contract, being paid daily wages on a monthly basis. The court affirmed that long continuous service cannot be disguised as casual work, and employees in such circumstances are entitled to full employment rights. In ***Boniface Francis Mwangi v B.O.M. Iyego Secondary School [2019] KEELRC 1621 (KLR)***, the court had considered whether the Claimant's dismissal for failing to report to work amounted to a lawful summary dismissal. The court held that under section 44(4)(a) of the Employment Act, absence without lawful cause constitutes gross misconduct, but emphasized that due process must still be followed before termination. The court stated that while desertion can justify dismissal, employers must issue notices and conduct fair hearings before ending employment. Also, ***Ol Pejeta Ranching Ltd v David Wanjau Muhoro(supra)***, the Court of Appeal upheld the trial court finding that the Respondent's termination after 25 years of service was unlawful and amounted to unfair dismissal, but it varied the

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remedies awarded. The court emphasized that while long service entitled him to compensation, reinstatement was not appropriate given the breakdown of trust and the passage of time.

14. The Respondent urged the court to dismiss the appeal with costs.

Analysis and determination

15. Being the first appellate court, this court's duty is to re-evaluate, assess and analyze the evidence tendered before the trial court and subject it to an independent analysis so as to arrive at its own conclusion as to whether or not to uphold the decision of the trial court as set out in ***Selle Associates V Associated Motor Boat Company Ltd (supra)***. and ***Peter M. Kariuki V Attorney General [2014] KECA 713 (KLR).***

16. The court has considered the records of appeal, the memorandum of appeal, and the submission by both parties. The issue for determination is whether the appeal is merited.

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17. It is undisputed that the Respondent was employed as a cleaner in 2007 and was arrested on 20th June 2017 on theft allegations vide Nakuru Criminal case No 167 of 2017. The criminal case was dismissed for non-attendance by the court on 29th August 2018. Upon going back to work, the Appellant was informed that her services were no longer required. In the learned trial magistrate's judgment, he stated that the Respondent's employment was converted from casual to permanent employment in accordance with section 37(1) of the Employment Act, which provides as follows:

"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

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shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service."

18. There are good number of authorities on conversion of casual employment to a term employment. An employee who has worked for 10 years in one organization as in this case cannot be referred as a casual employee anymore UNLESS there are very clear records to support the casual worker relationship. In he case of ***Okello 7 4 Others -Vs- University of Nairobi Civil Appeal E. 185 of 2022.*** The court affirmed that even with continuous work under a casual arrangement the employment converts to a regular term contract, granting the employee statutory benefits and that remuneration of this converted contract must follow fair procedure.

19. The same was held in the ***Kenya Plantation and Agricultural Workers Union -Vs- Keen Kleeners Limited Appeal 101/2019, Halar Industries Limited -Vs- Muia Appeal 170 of 1992*** the Court cited the case of ***Nanyuki Water Sewerage Limited -VS- Mwiti ntiritu & 4 Others 2018 KECA***

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196(KLR) to affirm that monthly wages can indicate permanency.

20. Going by the foregoing, the court is of the view that the learned trial magistrate made a sound judgment in terms of conversion of casual employment to permanent term employment in accordance with ***section 37(1) of the Employment Act*** since the Respondent worked for the Appellant since 2007 upto 2017 when her services were terminated. In ***Nanyuki Water & Sewage Company Ltd v Benson Mwiti Ntiritu & 4 Others [2018] KECA 196*** case already cited again the Court of Appeal held that under section 37 of the Employment Act, the respondents' casual employment converted into regular contracts since they had worked continuously beyond one month on tasks that could not be completed within three months.

21. Further, the Respondent was charged in Nakuru Criminal case No. 167 of 2017, and the case was dismissed, when she approached the Respondent after her criminal case was terminated she was informed she was dismissed.

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22. Even if an employee is arrested and detained by the police the employer must still follow due procedure in disciplining the employee as provided in Sections 41 and 45 of the Employment Act.

In the case of ***Lawrence Onyang Oduori -VS- Kenya Commercial Bank Limited Case 1592 of 2010***.

The court held:-

> "***The fact that an employee was absent from work on police arrest or detention for upto 14 days had not given the Employer the right to dismiss the Employee without observing procedural guarantees given under Section 41 & 45 of the Employment Act 2007 and the right to be heard is never discarded.”***

23. Indeed, even if an employee is involved in a criminal case it is still mandatory for the employer to take him through procedural tenets of substantive justification and procedural fairness.

24. There is no evidence adduced to demonstrate the reasons alluded to connect the Respondent to misconduct. The disciplinary process was also not

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followed as provided in Section 41 of the Employment Act.

25. The court having critically considered the lower court proceedings, the record of appeal and the respective submissions of the parties it comes to the conclusion that the Respondent was a permanent employee and was unfairly and unprocedurally terminated from employment.

    The Judgment of the trial court is held to be sound therefore and is upheld.

26. The awards by the trial magistrate are not excessive or oppressive and so the same are upheld.

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Orders accordingly.

Dated, Signed and Delivered virtually at Nakuru this 21st Day of November, 2025.

ANNA NGIBUINI MWAURE
JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules,** which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

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