

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

APPEAL NUMBER E096 OF 2022

BANBROS LIMITED.....APPELLANT

-VERSUS-

TITUS MUNYAO MUSYOKA.....RESPONDENT

(Being an Appeal from the Judgment and Decree of the Hon. B. Kasavuli (PM) delivered on 13th June 2022 in Mavoko MCELRC No. E046 of 2021)

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. B. Kasavuli (PM) delivered on 13th June 2022 in Mavoko MCELRC No. E046 of 2021 filed a Memorandum of Appeal dated the 8th of July 2022 seeking the following orders: -
 - a) **The appeal be allowed and the judgment of the lower court be set aside.**
 - b) **The suit against the Appellant in the lower court be dismissed in its entirety.**
 - c) **The costs of this appeal and of the lower court be borne by the Respondent herein.**

GROUND OF THE APPEAL

2. The Honourable Magistrate erred in law and in fact by holding that the Claimant was a permanent employee of the Respondent (Appellant) contrary to the evidence presented to court.
3. The Honourable Magistrate erred in failing to differentiate between the various forms of employment such as piece rate and permanent employment thereby arriving at erroneous findings and conclusions in his judgement.
4. The Honourable Magistrate erred in law and in fact by holding that the Claimant was unfairly terminated from employment by the Respondent contrary to the evidence before court.
5. The Honourable Magistrate erred in law and in fact by failing to take into consideration the Respondent's submissions thereby reaching an erroneous decision.
6. The Honourable Magistrate erred in law and in fact by specifically aggregating a salary for the Claimant when there was no basis for such assumption.
7. The Honourable Magistrate erred in law and in fact by failing to take into account the evidence placed before Court thus arriving at the wrong decision.
8. The Honourable Magistrate erred in law and in fact in awarding the Claimant damages for unfair termination as against the Respondent.

9. The Honourable Magistrate erred in law and in fact in awarding the Claimant service pay contrary to the provisions of Section 35(6) of the Employment Act.
10. The Honourable Magistrate erred in law and in fact in awarding the Claimant unpaid leave days and paternity leave despite there being no-evidence to support such claims for relief.
11. The Honourable Magistrate erred in law and in fact by considering factors that he ought not to have considered and disregarding factors which he ought to have considered.

BACKGROUND TO THE APPEAL

12. The Respondent filed a suit against the Appellant vide a memorandum of claim dated 20th May 2021 seeking the following orders: -

- a. A declaration that the Claimant’s termination of employment was unlawful and unfair.
- b. The Claimant be paid his terminal dues as set out herein below:

i) 1 months' salary in lieu of notice	Kshs.39,000/-
ii) Compensation for unlawful/unfair termination	Kshs.468,000/-
iii) 12 years' unpaid leave from 2010 to 2021	Kshs.468,000/-
iv) Unpaid paternity leave for the year 2005, 2007,2011 and 2019	Kshs.84,000/-
v) Service Pay for 7 years (2009 -2015)	Kshs.157,500/-
vi) 7 years' house allowance	Kshs.491,400/-
Total	Kshs.1,707,900/=
- c. Interest at court rates on (b) above from the date of filing the claim.

- d. Such other or further relief as this Honourable Court may deem just to grant.
 - e. The Respondent to issue the Claimant with Certificate of Service under Section 51 of the Employment Act, 2007.
 - f. Costs of this suit.
- (pages 6-9 of Appellant's ROA dated 26th September 2025).

- 14. The Respondent filed his bundle of documents and undated witness statement dated (pages 11-23 of ROA).
- 15. The claim was opposed by the Appellant, who entered an appearance and filed a memorandum of response dated 1st July 2021 (pages 24-27 of ROA). They also filed a list of witnesses dated 1st September 2021; witness statements of RUTH OGONE dated 25th May 2021; and list of documents dated 1st September 2021 with the bundle of documents attached (pages 33-249 of ROA).
- 16. To counter the Appellant's response, the Claimant filed a reply to statement of defence dated 26th July 2021 (page 28 of ROA).
- 17. The Respondent's case was heard on November 18, 2021, with the Respondent testifying in the case. He relied on his filed witness statement as his direct evidence and presented his documents as the Claimant's exhibits. He was cross-examined by counsel for the Appellant, Mr. Mbeche (pages 328-330 of ROA).

18. The Appellant's case was heard on the same day with the Appellant calling one witness: Ruth Ogona, as RW1, who testified on their behalf. She relied on her filed witness statement as her evidence in chief, and produced the Respondent's documents as exhibits. She was cross-examined by counsel for the Respondent Ms. Jeruto (pages 331-334 of ROA).
19. The parties took directions on filing of written submissions after the hearing, and complied.
20. The Trial Magistrate Court delivered its judgment on the 13th of June 2022 partially allowing the Claimants/Respondent's claim to the tune of Kshs. 1,201,000/-, comprising of one month's salary in lieu of notice, unpaid leave days, service pay, house allowance, and 6 months' salary as compensation for unfair termination (Judgment at pages 323-326 of ROA).

DETERMINATION

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

Issues for determination

22. In their submissions dated 15th August 2025, the Appellant identified the following issues for determination:
 - i. Whether the Respondent was an employee of the Appellant for the period between 2nd April 2003 to 1st September 2009.
 - ii. Whether the Respondent was an employee of the Appellant for the period between 2nd September 2009 to 2015.
 - iii. Whether the Respondent was an employee of the Appellant from the year 2015 to 2019 when the parties mutually separated.

- iv. Whether the Respondent was unlawfully/unfairly terminated from employment.
- v. Whether the Respondent is entitled to the reliefs as sought before the trial court.
- vi. Who should bear the costs of the trial court as well as for the appeal.

23. The Respondents identified the following issues for determination in their submissions –

- a) Whether claims arising from the Respondent's employment are time-barred under Section 89 of the Act.
- b) Whether the purported clearance certificate bars the Respondent's claims.
- c) Whether an employment relationship existed between the parties from 2009 to 2015, rendering the claims for unpaid leave, service pay, and house allowance sustainable.
- d) Whether the lower court's awards were excessive or unsupported.
- e) Whether the Appeal warrants interference with the trial court's findings.
- f) Who should bear the costs?

24. The court discerned that the issues placed by the parties before it for determination in the appeal were as follows-

- a. Whether the Respondent was an employee of the Appellant for the period between 2nd April 2003 to 1st September 2009 and Whether claims arising from the Respondent's employment are time-barred under Section 89 of the Act. And
- b. Whether the purported clearance certificate bars the Respondent's claims.
- c. Whether the Respondent was an employee of the Appellant for the period between 2nd September 2009 to 2015 rendering the claims for unpaid leave, service pay, and house allowance sustainable.
- d. Whether the Respondent was unlawfully/unfairly terminated from employment.
- e. Whether the Respondent is entitled to the reliefs as sought before the trial court.

Whether the Respondent was an employee of the Appellant for the period between 2nd April 2003 to 1st September 2009, Whether claims arising from the Respondent's employment are time-barred under Section 89 of the Act and Whether the purported clearance certificate bars the Respondent's claims.

The Appellant's submissions

25. The Appellant confirms that it engaged the Respondent in employment as a cleaner from 2nd April, 2003 to 1st September, 2009, when they mutually separated. The Appellant invites this Honourable court to take note of the fact that the foregoing engagement was terminated and parties mutually separated as evidenced by the Clearance Certificate dated 1st September, 2009 (See page 38 of the Record of Appeal). Following the mutual separation, parties executed the clearance certificate which had a discharge clause discharging the Appellant from any further claims relating to that employment contract. The discharge clause stipulated as follows; - "I Mr Munyao Musyoka Titus of P.O Box 76511, Nairobi acknowledge receipt of Kshs.44,198.00 (in words fourty four thousand, one hundred and ninety-eight only) as detailed below in full and final settlement and also acknowledge that I have no further claims against the Company." In light of the foregoing, any claims arising between the period of employment running from 2nd April, 2003 to 1st September, 2009 cannot stand as they fall squarely within the ambit of the discharge clause covered in the Clearance Certificate dated 1st September, 2009. 20. These claims include; - i. The claim for unpaid paternity leave for the year 2005 and 2007. ii. The claim for service pay from the year 2009 to 2015. 21. It is our submission that the Clearance Certificate signifies a voluntary and mutual separation between the Appellant and Respondent. Having been executed by both parties, the same remains to be binding. Consequently, the Respondent's employment with the Appellant that began on 2nd April, 2003, lapsed on 1st

September, 2009. Furthermore, on cross-examination, the Respondent did not dispute signing the clearance certificate. 23. To fortify our submissions above, we rely on the case of Sheila Kiplangat v Uniliver Tea Kenya Limited [2022] eKLR where the Honourable Justice Onesmus Makau cited with approval the Court of Appeal decision in Costal Bottlers Limited –V – Kimathi Mithika [2018] eKLR where the court in determining whether or not a settlement agreement or discharge voucher bars a party thereto from making further claim, held that: - “In our minds, it is clear that the parties had agreed that Payment of the amount stated in the settlement Agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the respondents’ termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent’s part at the time he executed the same. It did not matter that the amount thereunder would be deemed as adequate. As it stood, the agreement was a binding contract between the parties... All the ELRC was required to do was to give effect to the intention of the parties as discerned from the settlement agreement. ...Giving effect to the parties’ intention meant that the ELRC could not entertain the suit filed by the respondent. This is because the respondent had waived his rights to make any further claim in relation to his relationship with the appellant” . In light of the foregoing, it is our submission that from the clearance certificate, the parties’ intention was quite clear. Both the Appellant and the Respondent agreed that payment of the amount of Kshs. 44,198.00 would absolve the Respondent from any other claims under the employment contract that lapsed on 1st September, 2009. That even if there was no discharge clause in that Clearance Certificate, any claim arising out of that engagement ought to have been brought on or before 1st September, 2012. That is within 3 years as per section 89 of the Employment Act. As it stands,

no claim was filed in the year 2012. Therefore, the above claims still fall. To buttress the foregoing submission, we place guidance on section 89 of the Employment Act which stipulates that; - “Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.” The above section is couched in mandatory terms. A claim arising out of a contract of employment must be led within 3 years. As held in the case of Divecon Limited -vs- Samani [1995-1998] 1 EAP.48, a decision relied upon by the Honourable Justice Radido J. in Josephat Ndirangu - vs – Henkel Chemicals (EA) Limited, [2013] eKLR, “The limitation period is never extended in matters based on contract. The period can only be extended in claims founded on tort and only when the applicant satisfies the requirements of Sections 27 and 28 of the Limitation of Actions Act.” Being that this was not the case with the above listed claims, we submit that not only was the Appellant discharged from these claims by the Respondent, but they are also time barred and they ought to be dismissed in the first instance.

The Respondent’s submissions

26. The lower court's implicit rejection of the limitation defence is unimpeachable. Section 89 of the Act provides a three-year limitation period from the date the cause of action accrues, but this is subject to the doctrine of continuing wrong where employment is ongoing, as was the case here. The Respondent's evidence established continuous service from 2nd April, 2003, to termination in 2015, rendering claims for paternity leave (2005/2007), service pay (2009-2015), unpaid leave (2010-2014), and house allowance (2012-2014) accruing within the

limitation period upon final termination. (See payslips and job allocation slips at pages 38 and 43-225 as well as the and the Respondent's trial submissions at pages 250- 273 of the Record of Appeal). The Appellant's contention that claims ought to have been filed by 1st September, 2012, is fallacious, as it presupposes a break in service unproven at trial and as has been observed in a plethora of judicial precedent on this issue that limitation periods in employment disputes run from the date of termination where entitlements are terminal dues, not isolated breaches. To fortify this position, recent jurisprudence underscores that recurring entitlements like unpaid leave and allowances constitute "continuing wrongs" under Section 89, allowing claims from the last accrual. In the seminal case of Mohamed v Balali [2025] KEELRC 758 (KLR), the court held that non-payment of house allowance accrues monthly as a continuing injury, barring only portions beyond three years from filing and more notably the court pronounced itself thus: "The claim for a house allowance for 151 months from December 2009 to October 2022 was awarded as pleaded. However, non-payment of a house allowance where due accrues monthly, hence a continuing injury as defined under Section 89 of the Employment Act. Where such accrues, it should be addressed within 12 months upon cessation of such injury and damage as held in Warrakah (Suing as the Administrator and Legal Representative of the Estate of Gakweli Mohamed Warrakah - Deceased) v Mwatsami [2024] KECA 579 (KLR) that a continuing injury, its continuance after the date of the first action is a new cause of action for which a second action can be brought, and so from time to time until the injury is discontinued. This position is reiterated in the case of Kenya Agricultural and Livestock Research Organization v Kenya Scientific Research International Technical and Institution Workers Union [2024] KECA 1577 (KLR) and Kenya Railways Corporation v Ododa & 216 others [2024] KECA 1620 (KLR) that The law provides that the time limit of filing claims of continuing injury or damage should be within 12 months after cessation of the continuing

wrong. Section 89 of the Employment Act should thus be interpreted to mean that regardless of the three-year lapse for the institution of employment disputes if an employer continues to breach a term of the agreement agreed between the employer and employee, the employer remains liable until the breach is purged.” The Appellant's selective reliance on a single document, the clearance certificate ignores the Respondent's rebuttal evidence, and appellate interference is unwarranted absent perversity. b) Whether the purported clearance certificate, bars the Respondent's claims. The Appellant's heavy reliance on the clearance certificate as a discharge of future claims is misplaced and otiose. The lower court rightly disregarded it, as agreements waiving statutory entitlements are invalid under Section 3(6) of the Act, which provides that no contract shall oust or vary the Act's protections. The Supreme Court in *Kenfreight (E.A) Limited v Benson K. Nguti* [2016] eKLR held that disclaimers or settlements purporting to waive non-waivable rights (e.g., terminal dues under Sections 35, 40, and 49) are void ab initio, emphasizing that labour laws protect vulnerable employees from coerced waivers. Consequently therefore we humbly submit that the certificate, signed amid termination, cannot bar claims for accrued statutory benefits like service pay or leave, as it contravenes public policy and Article 41(5) of the Constitution prohibiting exploitation. Furthermore, the Appellant's citation of *Coastal Bottlers Limited v Thomas Ndolo Mulwa* [2018] eKLR is inapposite, as that case involved a voluntary settlement without duress, unlike here where the Respondent's trial evidence demonstrated signing post termination without full disclosure of entitlements. The lower court's finding aligns with the jurisprudence flowing from the Supreme court in the seminal case of *Kenfreight (E.A) Limited* (Supra), rendering the certificate nugatory and the Appellant's failure to adduce evidence of independent advice or consideration further vitiates it, rendering the certificate nugatory. This ground is unmeritorious.

Decision

27. The court established that it was not in dispute that the respondent was a former employee of the appellant from 2nd April 2003 to 1st September 2009 (page 38 of ROA). The issue was whether the claims arising during the period were time-barred under section 89 of the Employment Act and, further, they barred by a discharge voucher. The respondent submits the claims were continuing injury, hence not time barred. The trial court held that despite the clearance certificate there was evidence the employee employer relationship continued as evidenced by job cards and NSSF statement. This court did not find any award for the period 2003 to 2009. The court then determined there was no dispute about the existence of the clearance certificate. The court confirmed that payment of NSSF stopped in September and resumed in 2015. There was a clear break, and thus any claims under employment ending in September 2009 expired 3 years post-termination. I so hold.

Whether the Respondent was an employee of the Appellant for the period between 2nd September 2009 to 2015 rendering the claims for unpaid leave, service pay, and house allowance sustainable.

The appellant's submissions

28. The Appellant submits that after the mutual separation on 1st September, 2009, it did not at any point engage the Respondent in any form of employment between 2nd September 2009 and the year 2015. Consequently, the Respondent cannot lawfully be seen to seek compensation for any claims during this period as he was not in employment with the Appellant. If indeed he was in

employment during this time, nothing would be easier for him to do than to provide proof of the same. Accordingly, the claims of unpaid leave from the year 2010 to 2014, service pay for the year 2009, October to December, 2014, and the claim for house allowance for the year 2012 to December, 2014 cannot stand. The Respondent was not in employment with the Appellant during this period, as the employment contract had lapsed in September, 2009. As such the Respondent cannot seek these claims.

The Respondent's submissions

29. The lower court's finding of continuous employment from 2003 to 2015 is factually robust and evidentially unassailable. The Respondent adduced payslips, job allocations, and material usage records evidencing ongoing engagement post-2009, unchallenged by the Appellant beyond bare denials. Under Section 10 of the Act, employment is inferred from conduct, remuneration, and control all present here. The Appellant's claim of no relationship from 2009-2015 is contradicted by their own records (e.g., payslips for 2010-2014), and the lower court correctly shifted the burden under Section 47(5) after the Respondent's prima facie case. In *Simon Mbithi Mbane v Inter Security Services Limited* [2018] eKLR, the court held that documentary evidence like payslips trumps oral denials in proving continuity. The Appellant's failure to produce countervailing records (as custodians under Section 74) seals their fate. 25. Augmenting this, in *Mweni v Child Welfare Society of Kenya* [2024] KEELRC 2301 (KLR), payslips and job slips were deemed sufficient proof of employment, even absent a formal contract. Claims for unpaid leave (Sections 28-29), service pay (Section 40), and house allowance (Section 31) thus stand, as the trial court judiciously quantified based on uncontroverted service length.

Decision

30. During the hearing the claimant admitted he was not on NSSF and NHIF from 2010 to 2015. RW1 told the court that the respondent/claimant was not working from 2010 to 2015. On cross-examination, the RW1 said the claimant resumed in 2015 as an independent contractor. The trial court stated that it relied on the NSSF statement and job card to find continuous engagement and payslip issued in 2017 (page 324 of ROA). The respondent submitted he had produced payslips for 2010-2014, but on perusal of the record, the court did not find such payslips. The court did not find job cards for the period. The NSSF statement relied on by the trial court indicated that remittances resumed January 2015. I hold that the trial court erred in finding there was continuous employment in the period 2010-2014.

Whether the Respondent was unlawfully/unfairly terminated from employment.

Appellant's submissions

31. On the onset, the Appellant submits that after the mutual separation on 1st September, 2009, it did not engage the Respondent in any employment until sometime in the year 2015 when it engaged the Respondent on a piecework employment, independently, where he worked on a daily basis based on the availability of work at the Appellant's workshop. During this time, he was not paid a salary but was instead paid on a pro-rata basis on tasks completed following days attended at the workshop as shown by the job allocation slips provided in the Record of Appeal from page 44 to 225. Each task elicited different payment amounts as seen under the field labeled "Job amount" on the said slips. The Appellant invites the Court to note that the amount received by the Respondent at the end of each month greatly varies and as such cannot be termed as a salary. In addition to this, the Appellant also submits that the frequent

changes alongside the fact that the Respondent attended its workshop intermittently and not every day as is expected of an employee is evidence that he was not employed by the Company. This can be seen looking at the extract of the payments issued to the Respondent at page 189 of the Appellant's bundle where the total payments at the end of the month are not the same, which is corroborated by the payment generation reports in the subsequent pages 227 to 245. The amounts are further corroborated by the weekly piece work payment forms. The Respondent has purported to insinuate that by dint of the Appellant remitting funds and contributing to the National Social Security Fund (NSSF) on his behalf for the period between 2015 and 2020, the Appellant was therefore his employer. However, the Appellant posits to this Court that the remittance of those dues was voluntary and as a result of the said workers ceding that right to the Appellant. This position is reflected in the minutes following a meeting between the Company's officials and representatives of the piece rate workers held on 12th July 2019 (see pages 246 and 247 of the Appellant's bundle of documents) to debate on a Notice to strike ensuing from the Company's decision to stop remitting these dues. Subsequently, the argument that remittance of NSSF dues was a sign of employment is far from the true position. The Appellant further draws the attention of this Honourable Court to the fact that there were no remittances of NSSF dues for the months of February and April 2015 as well as June 2019. The Respondent never raised any concerns nor whenever piece rate work was available. The Employment Act 2007, defines piece work as: "any work the pay for which is ascertained by the amount of work performed irrespective of the time occupied in its performance." The Appellant submits that given the arrangement in place where the Respondent would present himself at its workshop, be assigned tasks and thereafter be paid for work done, clearly illustrates that he was performing piece work and as such was a piece rate worker. To this end, we place reliance in the case of Benard Maithya Matu & 5

others v Acme Containers Limited [2021] eKLR where the ELRC Court distinguished an ordinary employee from a piece rate worker and determined that the rights accorded to an ordinary employee are different to those of a piece rate worker. 40. In light of the foregoing, the Appellant submits that the Respondent, upon completion of work assigned, had the quality of the same verified by a supervisor from the Appellant in order to effect payment. The Respondent has alleged that since there was a supervisor gauging the work done, the relationship should be classified as that of an ordinary employee. However, it is our position that that is not the case as without confirmation that the work was done to par, payment could not issue, since it was the expectation of the Appellant that the Respondent would perform a task to its standard in consideration for payment on completion. The Appellant invites the Court to note that at each of the job allocation slips there is an entry that reads "Quality of job done" which demonstrates the role played by the supervisor. The Appellant submits that the Respondent's allegations that the provision of materials at the workshop implies an employer-employee relationship are misplaced. The Appellant plies the business of building buses and coaches; therefore, it is misleading to say that the Respondent was supposed to come with his own materials to perform tasks. If this was the case with all piece rate workers, the quality of work done would not be standardized and would not meet the needs of the Appellant, hence the supply of building materials from the Appellant. The Appellant further submits that the Respondent's contention regarding materials during work is misleading and false. For example, looking at slip Serial No. 2257 appearing on page 43 of the Appellant's bundle, the amount under the field of "Job amount" is Kshs. 827, while on page 44, which is the back of the said slip (top right corner), there is a list of supplies used in the job which are separately costed and totaled to the amount of Kshs. 4,760.36. The same is reflected by the other slips on the said pages, that is, Serial No. 2300 and 2390. Consequently, it is untrue that the

amount paid per the allocation slips was simply the cost of material used. In view of the foregoing, the Appellant submits that the Respondent was not its employee during the period in question but rather engaged as a piece rate worker on an independent basis. His remuneration was directly tied to specific tasks completed and varied accordingly, which is inconsistent with the payment of a regular salary. The remittance of NSSF dues, where it occurred, was voluntary and did not in itself create an employment relationship. We therefore urge this Honourable Court to find that the Respondent's claims founded on an alleged employer-employee relationship are misconceived, unsubstantiated, and unsustainable in law, and accordingly to dismiss them with costs to the Appellant.

32. Whether the Respondent was unlawfully/unfairly terminated from employment. The Respondent, in both his pleadings and testimony at the trial court, alleged that he was unlawfully terminated from employment. To support this claim, he advanced several reasons which, on scrutiny, revealed material inconsistencies. First, the Respondent stated that he was presented with an Independent Contractor's contract, which he declined to sign until he sought legal advice. He claimed that, as a result, a manager issued him with a letter and told him to seek employment elsewhere. Secondly, the Respondent alleged that during a union meeting with the Appellant's management where a strike notice was being discussed, he posed a question which angered the management, and as such later informed that he was no longer wanted. However, on cross-examination, the Respondent failed to explain why his name did not appear among the attendees in the minutes of that meeting produced in Court. Further, we wish to bring to the court's attention that the alleged coercion to sign the contract, the union meeting, and the supposed termination are separated by a span of about seven months. This raises serious doubt as to whether these events are connected to the

Respondent's exit from employment.. The Appellant therefore submits that these allegations amount to an afterthought for the reasons that nothing in the Respondent's evidence explains how he continued to perform piece rate work for seven months thereafter, if indeed he was being harassed at the work place. The Appellant submits that the Respondent was never terminated at any point in. This was corroborated by RW1, who testified that no termination letter or related document was ever issued. The Respondent, being a piece rate worker and not bound by a fixed term contract, left of his own volition and later sought an "acknowledgment" letter after securing employment elsewhere. To buttress our submission above we urge this court to be guided by the case of Nyevu Sibya Maithya & 14 Others v. Krystalline Salt Limited [2017] eKLR, the Employment and Labour Relations Court held that;- "piece rate employees, paid strictly by output, are not regular employees under the Employment Act and cannot sustain claims for unfair termination or statutory benefits tied to time-based employment." The Court in the above case found that the claimants had voluntarily ceased working after rejecting lower piece rates, and no termination could be attributed to the employer. Further, Section 47(5) of the Employment Act clearly places the burden of proving unfair termination on the employee, while the employer bears the burden of justifying termination once it is established. It stipulates that;- (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 is trite law that 'he who alleges must prove'. In the case of George Ogweno v Autolitho Limited [2018] eKLR the ELRC Court made a determination that the employee is supposed to discharge the statutory burden of proof by demonstrating that unfair termination if any did indeed occur. The Appellant humbly submits

that the Respondent has not provided any proof to tilt the balance of probability in his favour. Therefore, the Respondent contends that given the probative value of documentary evidence provided and its witnesses' testimony at the trial court, it has reflected the correct position which supersedes the oral testimony given by the Respondent during the hearing of this suit. In this case, the Respondent has not discharged that burden. Guided by the above authorities, the Appellant submits that the Respondent has not proven that any termination occurred, let alone an unfair one. The Respondent was a piece rate employee who left of his own choice, and the claims of unlawful termination must therefore fail.

Decision

33. The trial court relied on the NSSF statement, job cards, and a payslip of 2017 as proof of continued employer-employee relations. The appellant produced minutes held by it and the employees/contractors' representatives of the 12th July 2019, the issue being the refusal to deduct NSSF, NHIF, and PAYE for contract employees. (pages 246-247 of ROA). The appellant explained to the representative that they had no issue with the deduction of NSSF, NHIF, and PAYE as long as it was agreed to be voluntary, and the representatives agreed; thus, the deduction was not proof of employment. The court, on perusal of the job allocation documents, was satisfied that they pertained to specific jobs. The respondent was paid based on work done. (Pages 43-225 of ROA). The court agreed with the decision in Nyevu Sibya Maithya & 14 Others v. Krystalline Salt Limited [2017] eKLR, that;- *“piece rate employees, paid strictly by output, are not regular employees under the Employment Act and cannot sustain claims for unfair termination or statutory benefits tied to time-based employment.”* The court was persuaded that the NSSF payments were not evidence of continuous employment as there were minutes to prove it was on a voluntary basis. The conversion

under section 37 of the Employment Act only applies to casual work. The court then found that the trial court erred in fact and law in finding that the respondent was an employee and not a piece rate worker.

Whether the Respondent is entitled to the reliefs as sought before the trial court.

34. The court, having held that the respondent was a piece rate worker, held that the compensation for unfair termination, notice ,leave, service pay, and house allowance were not due, and the entire judgment is set aside.

CONCLUSION

35. The appeal is allowed. The Judgment and Decree of the Hon. B. Kasavuli (PM) delivered on 13th June 2022 in Mavoko MCELRC No. E046 of 2021 is set aside and substituted with a judgment that the suit is dismissed with costs to the respondent.

36. To temper justice with mercy, taking into account the long period the respondent provided services to the appellant, I make no order as to costs in the appeal. Each party to bear own costs in the appeal.

37. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF NOVEMBER, 2025.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – Owino

Respondent –absent

ORIGINAL