

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

ELRC APPEAL NO. E251 OF 2024

MEGA GARMENT INDUSTRIES

KENYA (EPZ) LTD.....

.....APPELLANT

VERSUS

MUENI KASINA

.....RESPONDENT

*(Being an Appeal from the judgment of the Hon. L.K. Sindani dated 24th day
of October, 2024, CMELRC E701 of 2021)*

JUDGMENT

Background

1. In the above-mentioned lower court suit, the Respondent sued the Appellant and sought against them;

a) Special damages KShs. 308,929.00.

Tabulated as;

- I. Notice pay KShs 17,692.00.
- II. Compensation for unfair termination $17,692 \times 12 =$
months Kshs212,304.00.
- III. Unpaid accrued leave days applied but not taken for
12 days $\times 680/=$ KShs. 8,165.00.
- IV. 4 Months' salary for the remainder of the contract
 $17,692 \times 4 =$ KShs. 70,768.00.

b) Costs of this suit.

c) Certificate of service.

2. The Appellant contested the Respondent's claim through an Amended Response to the Further Statement of Claim dated 19th April 2022. They asserted that the Respondent was engaged under a fixed-term contract from 6th January to 4th July 2020. The Respondent was never dismissed. Her employment ended when her employment contract expired.

The Respondent's case before the trial court

3. Her case was that she was first employed by the Appellant in April 2018 as a machinist, earning a monthly salary of KShs. 13,000, which was later increased to KShs. 17,692.00. Her employment was terminated by the Appellant's Human Resources Manager, Ms Naomi, in March 2020, despite her contract being scheduled to expire on 4th July 2020. Therefore, the termination was premature. Additionally, the Appellant failed to adhere to the procedural fairness requirements under Section 41 of the Employment Act, 2007.
4. At the time of termination, she had six leave days earned but not utilised.
5. She asserted that the termination of her employment was unfair. The Appellant's action of blatantly breaching the provisions of the Employment Act amounted to unfair labour practices.

Appellant's Case before the trial court

6. The Appellant stated that it would, from time to time, engage employees on short-term contracts ranging from one to six months, each contract standing on its own and never forming the basis for a subsequent one. The contracts provided for two full leave days per completed month of service, with the option of paying an employee in lieu of taking such leave. Upon expiry, a contract would not be renewed automatically, although a new one could be entered into, subject to workload demands.

7. The witness stated that the Respondent uses a biometric attendance system where each employee is assigned a unique identification number. When an employee logs in, the system records the date, time, user ID, name, department, designation, and terminal details. This biometric data is directly linked to payroll, ensuring payments correspond to the actual days worked.

8. The Respondent was employed under a fixed-term contract dated 6th January 2020, which was set to end on 4th July

2020. She was assigned employment number 1366, and all her salaries and leave entitlements were paid directly into her Equity Bank account.

9. The Respondent completed the full duration of her contract and was never dismissed unfairly or unlawfully and all her leave days had been either taken or fully compensated.

10. All allowances owed to the Respondent were duly paid through her bank account, and any accrued but unused leave was settled in accordance with the contract.

The Judgment by the Lower Court

11. After hearing the parties on their respective cases, considering their evidence and submissions by their Counsel, the trial Court found that the Respondent's employment was unfairly terminated by the Appellant in March 2020, despite her employment contract being set to expire on 4th July 2020. The termination was effected without notice, substantive justification and procedural fairness.

12. The Court determined that the Appellant's biometric records, submitted as evidence, were inadmissible owing to the lack of a certificate pursuant to Section 106B(4) of the Evidence Act. Furthermore, the Appellant failed to produce comprehensive attendance records for the relevant period, thereby casting doubt on the Respondent's actual attendance.

14. The Respondent was awarded:

- I. Compensation for unfair dismissal equivalent to 5 months' salary: Ksh 88,460.
- II. One month's salary in lieu of notice: KShs 17,692.
- III. Accrued leave pay: KShs 8,165.
- IV. A certificate of service.

The Appeal

15. Dissatisfied with the Judgment of the lower Court, the Appellant filed the instant appeal, setting forth the following grounds;

1. The learned Magistrate erred in Law and, in fact, in holding that the Respondent was unfairly terminated contrary to the evidence presented.

2. The learned Magistrate erred in Law and, in fact, in awarding Kshs 88,460.00 as compensation for unfair termination.

3. The learned magistrate erred in law and in fact in awarding Kshs 17,692.00 as salary in lieu of Notice.

4. The Learned Magistrate erred in Law and, in fact, in awarding Kshs. 8,165.00 as accrued leave, contrary to evidence presented outlining leave payments in lieu thereof.

5. The Learned Magistrate erred in law and in fact in failing to consider evidence tendered demonstrating that the contract between the parties lapsed by effluxion of time.

Appellant's submissions

16. The Appellant's Counsel argues that the Respondent failed to produce any documents or call witnesses to support her claim before the trial Court. In contrast, the Appellant presented evidence through its Human Resource Manager, Mr Duncan Kavita, including payslips, the contract reminder letter dated 2 June 2020, and biometric attendance records for June and July 2020. He emphasises that these documents were admitted without objection.

17. He points out that the Respondent admitted during cross-examination that she clocked in and out of work during June and July 2020, that she provided the bank account into which her salary was paid, and that she never produced bank statements to demonstrate any alleged non-payment.

18. Counsel faults the trial court's finding on accrued leave, arguing that Appellant's witness fully clarified the confusion between the Respondent's employment number and payroll number. He further submits that the learned

trial Magistrate ignored this explanation and erroneously found that the payslip belonged to another employee. To support this point, reliance has been placed on the case of **Mega Garment Industries Kenya (EPZ) Ltd v Owino Appeal No. E09 of 2020.**

19. The Appellant further argues that the awards for notice pay and compensation for unfair termination were unsupported because the Respondent failed to discharge her evidential burden under Section 47(5) of the Employment Act.

20. It is further submitted that the Respondent's own pleadings were inconsistent; the employment number in her Further Amended Memorandum of Claim differed from the one indicated in her written statement. It asserts that such contradictions undermine the credibility of her case because parties are bound by their pleadings.

21. Without prejudice, the Appellant's Counsel alternatively argues that even if the court were to find that the Respondent was unlawfully terminated, any compensation

should be limited to the four months remaining before the contract's expiry. For this proposition, it relies on the case **Benjamin Kai Chilumo v Water Supply and Sanitation Ltd 2015 KEELRC 1319 KLR** and **Anastacia Wambui Wanjiru v Management of Medina Palms 2015 KEELRC 108 KLR.**

22. The Appellant urges the court to allow the appeal, set aside the entire judgment of the trial court, and dismiss the primary suit. Alternatively, it requests that the court adjust the monetary awards and restrict any compensation strictly to the alleged four-month unexpired period of the contract.

Respondent's submissions

23. The Respondent's Counsel identifies three issues for determination in this appeal: whether the Respondent's contract of employment was terminated, and if so, was the procedure followed; whether the Respondent's contract expired by effluxion of time; and whether the reliefs sought would be granted.

24. Counsel argued that the Human Resources manager, Ms Naomi, whom the Respondent asserted dismissed her, was not called to testify to rebut the Respondent's evidence.

25. Under Section 43 of the Employment Act, 2007, the Appellant was legally obligated to demonstrate the reasons for the termination of the Respondent's employment. Furthermore, the Appellant was required to establish that the termination was conducted in a procedurally fair manner in accordance with the provisions of Section 41 of the Employment Act.

26. A clear reading of the evidence on record reveals that the Appellant did not at all adhere to the procedure set out under section 41 of the Employment Act, and that they did not have any fair and valid reason to terminate her employment.

27. On the second issue, Counsel submits that proof of the fact that the Respondent worked to the last day of her

contract would be by production of an attendance register and payslips for the entire tenure of her service. These were not tendered in evidence before the trial magistrate.

28. The documents produced, including the biometric register and the payslips for January and February, were found to contain obvious inconsistencies. The biometric register could not be verified because no certificate under sections 65(6) and 106B of the Evidence Act was provided, and the Appellant's witness could not clarify the origin of the document or the device that created it.

29. Furthermore, the register indicated that the Respondent was absent on almost all recorded days. However, on the days she was purportedly present, the status column was blank. The Respondent argues that these aspects render the document untrustworthy, fabricated, and intentionally incomplete.

30. The Respondent also challenges the credibility of the payslips placed before the court. One payslip correctly reflected employment number 1366, while another

dubiously bore the number PM 2785. The Appellant's witness failed to explain the origin of this new number, and the Respondent submits that one employee can't have two unrelated employment numbers.

31. It is further argued that the payslip indicating an alleged leave balance was illogical and internally inconsistent. The lack of essential payslips for the months following her termination reinforces her claim that she did not work during that time and had already been dismissed from employment.

32. The Respondent also disputes the validity of a purported reminder letter issued by the Appellant, which indicated that her contract was set to expire on 5th July 2020. This assertion conflicts with the terms of the contract, which explicitly state that it expired on 4th July 2020. She contends that the modifications and discrepancies were intentionally fabricated to suggest her presence at work falsely. Furthermore, she posits that the

Appellant's conduct exhibits a pattern of document manipulation designed to undermine her claim.

33. By reason of the premises, the Appellant failed to prove the contract's expiration, did not demonstrate that the Respondent worked until the alleged date, and did not call any of her colleagues—despite having over 3,000 employees—to support its version. Counsel further contends that under section 74 of the Employment Act, the Appellant had a statutory duty to maintain employment records. If the Appellant had been truthful, it could have easily produced payslips and attendance records for the critical months.

34. The Respondent's Counsel therefore urges the Court to find that the balance of probabilities strongly favours her account and that the evidence before the trial court was sufficient to establish unfair and unlawful termination.

Analysis and determination

35. In the case of **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123**, the court therein rendered itself as follows: -

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ...is by way of retrial, and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

36. I have carefully examined the grounds of appeal, the parties' pleadings, oral and documentary evidence presented at the trial court, and the written submissions by counsel. In my view, this appeal hinges on two main issues: (a) whether the Respondent was unfairly dismissed or if the contract simply expired through passing time,

and (b) whether the remedies granted were legally justified and evidence-based.

Whether the Respondent was unfairly terminated or the contract expired by effluxion of time

37. **Section 47(5) of the Employment Act** sets out a dual evidential burden. The employee must first establish the fact of dismissal. Once that is done, the employer must prove that the termination was lawful and fair. This principle was affirmed in **Pius Machafu Isindu v Lavington Security Guards Ltd [2017] eKLR**, where the Court of Appeal held:

“The appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): “to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”

38. Throughout the proceedings before the lower court, Respondent was consistent on how and by whom her employment was terminated. She asserted in March 2020 that the Appellant's Human Resources Manager instructed her not to continue reporting to work. This was a crucial figure at the centre of the termination. Inexplicably, the Appellant did not call the alleged Human Resource Manager, Ms Naomi, to rebut the Respondent's allegation. Failure to rebut direct testimony on a material fact entitles the court to draw an adverse inference under **Section 119 of the Evidence Act.**

39. The Appellant argued that the contract naturally expired on 4th July 2020; however, in my view, the evidence presented before the trial court to support this claim was not sufficiently convincing. The Appellant's witness admitted during cross-examination that they did not produce a complete record of biometric logs. It raises doubt regarding the credibility of the Appellant's evidence

when one weighs the Respondent's assertion that she was discharged in March 2020, and the fact that the Appellant inexplicably failed to produce in evidence Biometric logs and pay slips for the two immediate succeeding months [April and May]. In the eyes of a reasonable man, this would speak to the fact that she indeed ceased to continue working in March, as she explained, and the documents suggesting that she worked in June and July 2020 were an afterthought and crafted to defeat the Respondent's case.

40. In any event, this Court notes that the learned trial Magistrate declined to admit the biometric attendance records in evidence, as the Appellant did not tender a certificate of electronic evidence under section **106B (4) of the Evidence Act.**

41. I note that the Court's rejection of the electronic evidence has not been challenged in this appeal. The non-admission of the biometric logs in evidence dealt a significant blow to the Appellant's case. The Respondent's

evidence regarding the manner of her employment termination remained unchallenged as a result.

42. If the decision to ignore the evidence had been challenged, the Court would likely have raised concerns about when the trial Court noted the rejection. During the hearing, the Appellant's witness clearly stated that the Appellant had submitted documents listed under a specific documents list and was relying on them. At this point, the Respondent's Counsel probably would have objected to the reliance on those logs. The trial Magistrate could then have addressed that objection before moving forward. By seeming to allow the production of a document, it would be unfair for a party to later object to the document during submissions, as this could be seen as an ambush.

43. However, for clarity of record, the foregoing premise [paragraph 42] does not change the wider finding herein that the Appellant exited her employment at the expiry of her fixed-term contract.

44. Furthermore, a fixed-term contract indeed ends automatically at the conclusion of its specified period, as established in **Registered Trustees of the Presbyterian Church of East Africa & Another v Ruth Gathoni Ngotho-Kariuki [2017] eKLR**. However, for an employer to invoke the doctrine of effluxion of time, it must prove that the employee actually worked until the final day or was officially released. The lack of such evidence, combined with unchallenged testimony that the Respondent was instructed not to return to work, underpins the conclusion that termination occurred in March 2020, not in July 2020.

45. Their vision clouded by the position they took as regards the manner of separation, the Appellant did not present evidence geared towards demonstrating that there was compliance with the mandatory procedure under Section **41 of the Employment Act**, the reason for the termination [**Section 43**], and that the reason was valid and fair [**Section 45 of the Act**]. Without evidence,

this Court concludes that the Appellant did not discharge their legal burden under these stated provisions of the law.

46. In the upshot, I find that the learned trial Magistrate did not err in holding that the Respondent's employment was terminated before the appointed lapse day for her fixed-term contract, and that the termination was unfair.

Whether the remedies awarded were justified in law.

47. Section 49[1][c] of the Employment Act, 2007, bestows authority on courts to grant compensatory relief for an employee who has successfully challenged their employer's decision to terminate their employment or summarily dismiss them, as unfair. However, it is important to note that the authority is discretionary and exercised on a case-by-case basis. The learned trial Magistrate having exercised a discretion to award the Respondents five months 'gross salary, the award can only be disturbed if certain factors are demonstrated to

have influenced the award, and that the award in its nature deserves to be disturbed.

48. Any party challenging a decision based on an exercise of discretion must show that the trial Court either considered irrelevant matters, failed to consider relevant ones, or wrongly applied legal principles, leading to an incorrect decision or an inappropriately low or high award of damages. The Appellant did not challenge the award on these grounds.

49. I have carefully examined the circumstances surrounding the termination of the Respondent's employment, including the Appellant's failure to adhere to the principles of procedural and substantive fairness, as well as considerations of the length of service and the remaining duration of her contract. I conclude that the learned trial Magistrate's decision was appropriate.

50. The Respondent's contract of employment was terminable by notice under section 35 of the Employment

Act. Undeniably, no notice was issued to the Respondent. Having found that the termination of her employment was unfair, I hold that she was entitled to notice pay. The learned trial Magistrate did not err in awarding her notice pay.

51. Under section 28(1) of the Employment Act, an employee is entitled to annual leave. Annual leave is a statutory right. Correspondingly, the employer has a duty to ensure and facilitate its enjoyment. In cases of dispute over whether the leave was utilised or not, and where the employee has explicitly stated the period of earned but untaken leave days in their pleadings and witness statement, it would be reasonably expected of the employer, as the keeper of employment records under Section 74 of the Employment Act, to produce records in evidence to demonstrate either that the employee utilised their entitled leave days or that there was compensation in lieu. In the matter before the trial court, the Appellant did not tender sufficient evidence to establish this. The

learned trial Magistrate did not err in making an award under the head of leave earned but unutilised.

52. In conclusion, I find the appeal lacking in merit. It is hereby dismissed with costs.

Read, Signed and Delivered this 27th Day of November 2025.

OCHARO KEBIRA

JUDGE

ORIGINAL