



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT KISUMU

APPEAL NO. E060 OF 2024

CHEMELIL SUGAR COMPANY LTD.....**APPELLANT**

VERSUS

JERPHUS ODHIAMBO OWICH.....

....**RESPONDENT**

(Being an appeal from the judgment of Hon. Amos Kiprof Makoros delivered on 17th September 2024 in Tamu MELRC No. E009 of 2023)

JUDGMENT

1. Dissatisfied with the entire Judgment of the trial court in
**TAMU ELRC No. E009 of 2023, Jerphus Odhiambo
Owich v Chemelil Sugar Company Ltd**, the Appellant

filed a Memorandum of Appeal dated 15th October 2024 raising the following grounds:

- a. That the Trial Magistrate grossly misdirected himself in wholly adopting the Respondent's submissions and ignoring theirs.
- b. That the Trial Magistrate erred in law and fact in holding that the Respondent was a regular employee and not a fixed term employee despite the fact the Respondent was employed on a contract basis.
- c. That the Trial Magistrate erred in law and fact in holding that the Respondent's services were terminated by the Appellant when indeed the employment ended upon expiry of the contract.
- d. That the Trial Magistrate erred in law and fact in holding that the Respondent is entitled to a monthly salary of Kshs. 23,794/- as per the CBA and not Kshs. 15,393/- per month (Kshs. 513/- per day) as per the contract of employment.
- e. That the Trial Magistrate erred in law and fact in holding, that the Respondent was entitled to house allowance and leave allowance despite the fact that the

Respondent's salary was consolidated pursuant to the employment contract.

f. That the Trial Magistrate erred in law and fact in reaching a decision whimsically and capriciously based on emotional plea.

2. On the basis of these grounds, the Appellant prayed that the appeal be allowed, the judgment of the trial court be set aside, and in its place an order be issued dismissing the suit. The Appellant also sought costs of both the appeal and the trial court, together with any other order the Court may deem fit to grant.

3. The Appeal was canvassed by way of written submissions.

Appellant's Submissions

4. The Appellant submitted that the Trial Magistrate erred in holding that the Respondent's employment had converted into a regular term contract due to the long and continuous nature of service. It emphasized that the contracts produced by the Respondent as Cexh 1a-g, together with its own exhibits produced as Rexh 1-3, clearly demonstrated that

the Respondent was consistently engaged on fixed-term contracts. As regards termination of the Respondent's employment the Appellant maintained that it ended by effluxion of time. It submitted that the trial court erred in holding that the Appellant dismissed the Respondent from employment, drawing attention to the contracts produced in evidence showing that the Respondent's last contract ended on 17th March 2022. It maintained that the Respondent adduced no evidence of any further contract entered into beyond that date. Regarding salary, the Appellant submitted that the Trial Magistrate erred in finding that the applicable salary was Kshs. 23,794/- per month under the CBA rather than Kshs. 15,393/- per month as per the employment contract. It maintained that the Respondent was employed as a Mill Bed Attendant earning Kshs. 513/- per day, translating to Kshs. 15,393/- monthly, and that by accepting the contractual terms, the Respondent effectively waived reliance on the CBA salary. As for house allowance the Appellant submitted that the salary was consolidated. In conclusion the Appellant submitted that the Magistrate erred in disregarding the Appellant's Human Resource Manual

which provides for clearance prior to payment of terminal dues. It therefore urged the Court to allow the appeal.

Respondent's Submissions

5. The Respondent submitted that his employment had converted into a regular term contract by operation of law, having continued uninterrupted for more than two years. He relied on section 37(1) of the Employment Act, which provides that where a casual employee works continuously for one month or more, or performs work not expected to be completed within three months, the employment converts to a regular term. He relied on **Thomas De La Rue v David Opondo Omutelema [2013] eKLR**, which held:

“Ordinarily those terms and conditions of service are better and more favourable to the employee than the terms in individual contracts of employment or the minimum conditions set in statutes. Under the Act the terms of the collective agreement are incorporated into the contract of employment of every employee covered by that agreement and under section 59 a collective

agreement is binding upon all parties including all unionisable employees employed by the employer.”

6. He also cited **Kenyatta University v Maina Maina (Civil Appeal 261 of 2020) [2022] KECA 1201 (KLR)**, which held that issuing short-term contracts of three months was a tactical way of circumventing the provisions of section 37 of the Employment Act. On whether his employment ended by effluxion of time, the Respondent submitted that once the court correctly found that he was a regular employee, the Appellant was bound to comply with statutory termination procedures. He contended that no notice was issued, no hearing was conducted and no fair reason for termination was demonstrated, contrary to sections 35, 41 and 45 of the Employment Act. He relied on **Chogo v Nairobi Hospital [2025] KEELRC 1890 (KLR)** for the proposition that employers must prove substantive and procedural fairness. He submitted that the Appellant failed in both respects and the trial court therefore correctly held that the termination was unlawful. On the question of terminal dues and reliefs granted, the Respondent submitted that the trial court

rightly awarded unpaid salaries, leave, house allowance, leave allowance, gratuity, one month's salary in lieu of notice, a certificate of service, costs and interest. He asserted that these awards were grounded in statutory provisions including sections 28, 35, 49 and 51 of the Employment Act, and reinforced by the CBA. He contended that the Appellant did not substantively dispute the computations, but merely relied on the erroneous assertion that the contract had expired.

7. Regarding the allegation that the Trial Court misdirected itself or acted emotionally, the Respondent submitted that this claim was unfounded. He asserted that the court considered all submissions and documentary evidence, including contracts, payslips, leave documents and the CBA. He submitted that a court is not obliged to agree with a party's submissions, citing **Kenya Power & Lighting Co. Ltd v Vincent Mabeya [2021] eKLR**. He further submitted that the Appellant's reliance on the Human Resource policy requiring clearance before payment of dues could not supersede statutory rights or CBA provisions. He averred

that no evidence showed that he was asked to clear and refused to do so. He further asserted that clearance is a post-employment administrative step that cannot extinguish rights arising from wrongful termination. In conclusion the Respondent submitted that the Appellant had not demonstrated any error of law, misdirection or misapprehension of evidence by the trial court. He averred that the judgment was reasoned, grounded in the evidence and consistent with the Employment Act and CBA. He relied on **Mburu & 6 others v Kirubi [2023] KEHC 3599 (KLR)** which underscored that appellate courts would ordinarily not interfere with findings of facts unless they are plainly wrong or based on no evidence. Consequently, he urged the court to dismiss the appeal for lack of merit and to uphold the trial court's judgment, with costs.

Disposition

8. The court on appeal is required to evaluate and examine the record before the Magistrates' Court and the evidence presented before it in order to arrive at my own conclusion. This principle of law was enunciated in the celebrated case of

Selle v Associated Motor Boat Co. Ltd [1968] EA 123

where the Court of Appeal outlined the duties of a first appellate court as follows:

"I accept counsel for the respondent's proposition that 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."

[Emphasis supplied]

9. Having properly warned myself that I neither saw nor heard the Appellant nor the Respondent testify in trial, I have come to the following determination. I have duly evaluated the evidence they presented in the Trial Court, and which evidence and documents in support thereof, are before this Court.

10. The employee herein who is the Respondent, had been employed for an inordinately long period on contracts that were renewed. In terms of section 37 of the Employment Act, the contracts converted to the terms held by the Learned Trial Magistrate and I cannot fault the finding. As per the CBA, the terms of the employee were positively altered and the employer cannot renege on the CBA by referencing the contract. As the employee was entitled to the benefits under the CBA including improved pay, the Learned Magistrate was correct in applying the salary as per the CBA. It is abundantly clear the Appeal herein lacks merit and is accordingly dismissed with costs to the Respondent.

Orders accordingly.

Dated and delivered at Kisumu this 15th day of

December 2025

**Nzioki wa Makau, MCI Arb.
JUDGE**