



**Mwatu v Twin River 1 Estate (Appeal E306 of 2024)
[2025] KEELRC 3531 (KLR) (10 December 2025) (Judgment)**

Neutral citation: [2025] KEELRC 3531 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E306 OF 2024
JW KELI, J
DECEMBER 10, 2025**

BETWEEN

JOHN MAINDU MWATU APPELLANT

AND

TWIN RIVER 1 ESTATE RESPONDENT

(Being an Appeal from the Judgment and Decree of the Hon. I. F. Koome (SRM) delivered 26th September 2024 in Thika MCELRC E006 of 2022 (formerly Milimani MCELRC No. E962 of 2020))

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. I. F. Koome (SRM) delivered 26th September 2024 in Thika MCELRC E006 of 2022 (formerly Milimani MCELRC No. E962 of 2020) between the parties filed a Memorandum of Appeal dated the 23rd October 2024 seeking the following orders: -
 - a) This Appeal against the judgment delivered on 26th September 2024 in Thika MCELRC Cause No. 6 of 2022 be allowed.
 - b) Costs of this Appeal and those of the Trial Court be awarded to the Appellant.

Grounds of the Appeal

2. The Honourable Magistrate failed to take into account and appreciate the meaning of Section 37 (2) of the *Employment Act* 2007 hence grossly misdirected himself on a point of law and fact that the Appellant had to prove that he was not paid off duty allowances despite finding that the Appellant's casual employment had converted to term contract by dint of Section 37 of the *Employment Act* and he was therefore entitled to be paid off duty allowances in accordance with the said section.



3. The Honourable Magistrate erred in law and fact in failing to take into account the evidence on record and failing to appreciate that the Respondent did not produce any payslips belonging to the Appellant and wrongly directed parties to work out the amount due to the Appellant on account of annual leave due despite awarding him the prayer for annual leave.
4. The Honourable Magistrate misdirected himself in law by applying wrong principles in denying the Appellant costs of the suit.

Background to the Appeal

5. The Claimant/Appellant filed a claim against the Respondent vide a memorandum of claim dated the 7th of August 2020 seeking the following orders: -
 - a) A declaration that the termination was unlawful, unfair, untimely and harsh and an order that the Claimant be paid his dues and benefits of Kshs. 388,250/- as aforesaid.
 - b) A declaration that the Claimant is entitled to a Certificate of Service.
 - c) Costs of the claim plus interest therein.(pages 6-9 of Appellant's ROA dated 17th April 2025).
14. The Claimant filed his list of documents dated 7th August 2020 with the bundle of documents attached, list of witnesses of even date, and witness statement of even date (see pages 11-14 of ROA).
14. The claim was opposed by the Respondent who entered appearance and filed a response to claim dated 23rd August 2021 (pages 21-22 of ROA). They also filed a list of documents dated 23rd August 2021; witness statement of POLYCARP GITHAIGA dated 24th April 2023; and a list of documents of even date with the bundle of attached (pages 23-26 of ROA).
14. To counter the Respondent's response to the claim, the Appellant filed a response dated 3rd May 2023 (page 27 of ROA).
14. The Claimant/Appellant's case was heard on the 18th of April 2024 where the claimant testified in the case, relied on his witness statement as his evidence in chief, produced the documents attached to his list of documents, and was cross-examined by counsel for the Respondent Mr. Macharia (pages 59-60 of ROA).
14. The Respondent's case was heard on the same day with the respondent calling one (1) witness, Polycarp Githaiga Njuguna, to testify on its behalf. He relied on his filed witness statement, and produced the Respondent's documents. He was cross-examined by counsel for the claimant Ms. Mideva (pages 61-62 of ROA).
14. The parties took directions on filing of written submissions after the hearing, and complied.
14. The Trial Magistrate Court delivered its judgment on the 26th of September 2024, partially allowing the Claimant's claim as pertained unpaid annual leave for 2 years with directions that the parties jointly work out the specific amount payable, with an order that each party pays their own costs (judgment at pages 48-55 of Appellant's ROA).

Determination

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



Issues for determination

14. In his submissions dated 16th October 2025, the Appellant identified the following issues for determination:
 - i. Whether the learned trial magistrate erred by failing to consider the provisions, particularly Section 37 (2) of the *Employment Act* 2007.
 - ii. Whether the learned trial magistrate erred in law and fact by disregarding the evidence on record and failing to appreciate that the Respondent did not produce pay records or payslips to rebut the Appellant's claim for unpaid dues.
 - iii. Whether the Appellant is entitled to costs of the trial court and this Appeal.
14. Conversely, the Respondent submitted on the grounds of appeal generally in their submissions dated 24th July 2025.
14. The court in the circumstances considered grounds of appeal raised by the appellant in his appeal.
 - a. The Honourable Magistrate failed to take into account and appreciate the meaning of Section 37 (2) of the *Employment Act* 2007 hence grossly misdirected himself on a point of law and fact that the Appellant had to prove that he was not paid off duty allowances despite finding that the Appellant's casual employment had converted to term contract by dint of Section 37 of the *Employment Act* and he was therefore entitled to be paid off duty allowances in accordance with the said section.

Appellant's submissions

14. The trial court acknowledged that the Appellant's employment had converted from casual to term contract under Section 37(1) of the *Employment Act*. However, the court went on to hold that the Appellant had to prove non-payment of off-duty allowances, shifting the evidential burden contrary to law. Under Section 37(2), once a casual employment converts to a term contract, the employee is entitled to all rights under the Act, including weekly rest days, annual leave, and other benefits. It states: "An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee." We rely on the case of *Kenyatta University v Thomas & 25 others* [2025] KECA 1014 (KLR) where the court held that: - "The Respondents opted to retain the petitioners on casual terms and which went on for period over and above what is allowed in law and the petitioners are now protected under the law, section 37 of the Act." Moreover, in the case of *Rashid Odhiambo Allogoh & 245 others v Haco Industries Limited* [2015] KECA 376 (KLR) the court stated: - "Section 37 provides that an employee whose contract of service has been converted (on account of a continuous service of three or more months like in the petitioners' case) and who has worked for two or more months from the date of employment as a casual employee, shall be entitled to such terms and conditions of service as he would have been entitled to under the Act had he not initially been employed as a casual employee." The Learned Magistrate therefore misdirected himself by acknowledging the conversion but failing to enforce the statutory entitlements flowing therefrom. The Appellant's right to off-duty allowances and other benefits crystallized under Section 37 upon conversion, and the Court ought to have made a specific award in recognition of that legal status.



Respondent's submissions

14. GROUND 1- The learned trial Magistrate failed to appreciate the meaning of Section 37(2) of the Employment Act, 2007 hence grossly misdirected himself on a point of law and fact that the Appellant had to prove that he was not paid off-duty allowance despite finding that the Appellant's casual employment had converted to a term contract by dint of Section 37 of the Employment Act and he was therefore entitled to be paid off-duty allowances in accordance with the said section. We reiterate that this being a first appeal, this court is under a duty to subject the entire evidence and the Judgment to a fresh and exhaustive examination with a view to reaching its own conclusions in the matter. In carrying out this duty this court has to remember that it has no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. The court has also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanor of witnesses. In a nutshell a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgment. For these propositions, generally refer to Section 78 of the Civil Procedure Act, Cap 21 Laws of Kenya which requires a first appellate court "to re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions. These provisions have been underscored in numerous decisions by the superior courts among them Peter M. Kariuki -vs- Attorney General [2014] eKLR where the court held inter alia as follows:- "We have also, as we are duty bound to do as a first appellate court [to] reconsider the evidence produced before the trial court and re-evaluate and draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See NGUI -vs- REPUBLIC [1984] KLR 729 and SUSAN MUNYI -vs- KESHAR SHIANI, Civil Appeal No. 38 of 2002 (unreported)." This being the first Appeal Court, there is a need to give a fresh look at the evidence adduced before the lower court, bearing in mind that the Honorable Court had no benefit of having seen or heard the witnesses as they testified. This is the principle espoused in the case of Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, where the Court of Appeal stated the following with regard to the duty of a first appellate court:- "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited (2009) 2F4 212 wherein the Court of Appeal held, inter alia, that:- "On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence." In Margaret Njeri Mbugua v Kirk Mweya Nyaga [2016] eKLR the Court of Appeal stated as follows of the role of the first appellate court: "..... The above is also true for the High Court sitting on a first appeal. The learned Judge should have reconsidered the evidence, evaluate it herself and drawn her own conclusions. In doing so she should have therefore considered the application to strike out the defence, the affidavit and evidence in support as well as the reply by the respondent. She failed to do this and therefore failed to consider matters she should have considered." It is our humble submission that the learned trial Magistrate did not fail to appreciate the meaning of Section 37(2) of the Employment Act, 2007 and did not grossly misdirect himself on a point of law and fact that the Appellant had to prove that he was not paid off-duty allowance despite finding that the Appellant's casual employment



had converted to a term contract by dint of Section 37 of the Employment Act and he was therefore entitled to be paid off-duty allowances in accordance with the said section. We invite this court to analyze the trial Magistrate's Judgment (on page 48-55 of the Record of Appeal) as it is our contention that the learned magistrate was persuaded to consider the weight of the evidence adduced therein and the Judicial authorities tendered in our submissions before the court in support of the Respondent case thus arriving at the right decision and holding above. The Honorable magistrate rightly distinguished a casual employee with the Claimant/Appellant herein and he rightly stated that according to section 37 of the Employment Act, his employment had converted to a Term contract. Further in terms of the off duty claim under this Ground of Appeal, we submit that the trial court was not tasked with any claim in that regard the Magistrate's Judgment (on page 48-55 of the Record of Appeal and the memorandum of claimant (page 6-10) of the Record of Appeal do not point towards any claim for off duty allowances. Further it is our humble submissions that Section 108 of the Evidence Act provides that burden of proof in a suit lies on that party who would fail if no evidence at all were given on either side. To avoid falling short of discharging his burden, the Claimant/Appellant was required to provide proof of the not paid off duty allowances. It is not contested that he failed to discharge that duty by not claiming for the same in the trial court as evidenced by his pleadings and thus the trial magistrate could not address himself on a claim not before the honorable court. We reiterate that the onus of proof lies with the Claimant as was held in *Evans Otieno Nyakwana Vs Cleophas Bwana Ongaro (2015) eKLR*. Justice Majanja held; "...As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107 (1) of the Evidence Act (Chapter 80 of the Law of Kenya), which provides: "107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist..." Furthermore, the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act as follows: '109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.'" We humbly submit that the Respondent demonstrated by providing Respondent's Exhibit 1- summary of Claimant's wages (on page 26 of the Record of Appeal). We urge the Honorable Court to find that there is the need for this court to have a wholesome examination at the evidence and pleadings on record, we take a personal interest on the trial magistrate Judgment and Claimant's pleadings as filed in the lower court. We submit that this ground fails in its entirety and the finding of the lower court should remain undisturbed where off duty allowances were not specifically pleaded for and thus the blatant introduction in disguise of the claim in the Memorandum of Appeal dated 23rd October, 2024 should fall short and thus the Ground should be dismissed.

Decision

14. This is the first appellate court and the court was guided by the decision in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR*, where the Court of Appeal stated the following with regard to the duty of a first appellate court—"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way." The impugned decision of the trial court was that the employment had converted under section 37 of the Employment Act, and the court proceeded to consider the reliefs sought. The appellant position is that the appellant was on conversion entitled to such terms and conditions of service as he would have been entitled to under the Act had he not initially been employed as a casual employee and relied in the case of



Rashid Odhiambo Allogoh & 245 others v Haco Industries Limited [2015] KECA 376 (KLR) the court stated: - "Section 37 provides that an employee whose contract of service has been converted (on account of a continuous service of three or more months like in the petitioners' case) and who has worked for two or more months from the date of employment as a casual employee, shall be entitled to such terms and conditions of service as he would have been entitled to under the Act had he not initially been employed as a casual employee." I agreed with the authority cited on conversion. The appellant submitted that the Learned Magistrate therefore misdirected himself by acknowledging the conversion but failing to enforce the statutory entitlements flowing therefrom. The Appellant's right to off-duty allowances and other benefits crystallized under Section 37 upon conversion, and the Court ought to have made a specific award in recognition of that legal status. On first appeal, the court evaluates the case before the trial court. Secondly, the responsibility of the court is to rule on the evidence and pleadings before the lower court and not to introduce extraneous matters not dealt with by the parties in the evidence before the lower court. The appellant's claim before the lower court was for unpaid salary allowance for 7 months, annual leave for 3 years, service gratuity payment for 15 days per year for 3 years, and uniform allowance for 4 years. There was no prayer for off-duty allowance. It is trite that parties are bound by their pleadings. At the appeal stage, the court cannot consider an unpleaded prayer not considered by the lower court, and more so when it is not a statutory entitlement under the Employment Act. The lower court was bound by the pleadings before the court and cannot be faulted for failing to grant an unpleaded relief. The appellant was specific on the reliefs he sought before the lower court and that was considered by the trial court. I find no merit in the ground of appeal.

Whether the trial court erred in relief granted as sought

14. The trial court held the appellant voluntarily resigned and on the relief sought, held as follows- 'On the claim for unpaid salary allowance for 7 months -Unpaid salary allowance (seven months) of Kshs. 45,500. The claimant urged the court to award him the amount claimed as unpaid salary. It was incumbent upon the claimant to prove that such dues were owed to him. While appearing in court, he could not tell the period for which he was claiming the pay. His witness statement was not helpful as it was scanty on details. According to RW1 and as evidenced by the summary of wages produced as R.exh.1, the claimant discontinued his services from June 2015 till 3rd week of February 2016 when he resumed work. He cannot certainly claim for any payment during that period unless the employer had sanctioned the same with pay. The onus of prove was on the appellant as was held in Evans Otleno Nyakwana Vs Cleophas Bwana Ongaro (2015) eKLR. Justice Majanja in that case observed that "as a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(1) of the Evidence Act (Chapter 80 of the Laws of Kenya), which provides: 107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. Furthermore, the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence, That is captured in sections 109 and 112 of the Act as follows:-109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person, In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of-proving-or-disproving that fact is upon him. The claim for payment of unpaid salary allowances thus fails" The court finds there was no ground of appeal related to this finding.
14. On leave sought for 3 months – The trial court held- 'Annual leave (3 years) Kshs. 19,500 The claimant prayed for compensation for annual leave for 3 years. He told the trial court that he worked continuously without proceeding on leave. While appearing in court, RW1 confirmed while relying on R.exh.1 that the claimant had worked continuously from 2nd week of February 2016 to 2nd week of



March 2016.²³ He confirmed further that the claimant was never given leave as he was a casual worker was paid according to days worked. Further that he was paid overtime. L already made a finding that, considering the period the claimant worked for the respondent, his contract was converted to a term contract pursuant to the provisions of section 37 of the Act. He was therefore entitled to at least 21 days annual leave for every calendar year that he had worked. The respondent has not tendered evidence to prove that he was compensated fully for it. Accordingly, the claimant is successful in this claim. He is entitled to annual leave pay for 2 years (from mid February 2016 to Mid February 2017 and from mid February 2017 to mid February 2018).²⁴ Both parties shall therefore work out the amount due to him. As a guide, the pay per month shall be taken as an average of monthly pay for each completed year of service.’ The decision on leave is contested at appeal.

Appellant’s submissions

14. The trial court erred in dismissing his claim for unpaid dues and compensation despite the existence of sufficient pleadings and uncontroverted evidence before the court. The Respondent neither produced employment records nor rebutted the Appellant's testimony regarding the terms and conditions of his employment. Under Section 10(6) (7) and section 74(1) of the *Employment Act*, 2007, an employer bears the duty to keep written employment particulars and produce them in legal proceedings when a dispute arises. Failure to produce such records entitles the court to presume that the employee's claims are truthful. It states: -"Section 10(6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.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." Section 74(1) An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars: -".....(e) of an employee's weekly rest days specified in section (1) of an employees annual leave entitlement, days taken and days due specified in section 28...." In the case *Muthoni & others 2 [2023] KEELRC 2077 (KLR)*, the court stated: - *Ngalawa Kenya Limited* "the Court is entitled to make a presumption where an employer does not produce records that if the same were available they would not be supportive of the narrative told by the employer." We therefore submit that the Respondent bore the statutory burden of producing employment records. The Respondent's failure to discharge that burden left the Appellant's evidence uncontroverted. The Trial Court should therefore have found that the Appellant proved his case on payment of off-duty allowances and payment of leave on a balance of probabilities.

Respondent’s submissions

14. The learned trial Magistrate erred in Law and fact by failing to take into account the evidence on record and failing to appreciate that the Respondent did not produce any pay slips belonging to the Appellant and wrongly directed parties to work out the amount due to the Appellant on account of annual leave due despite awarding him the prayer for annual leave. We submit and place huge reliance to the trial magistrate's Judgment specifically addressing this issue in its entirety as can be seen on (page 53 of the record of appeal) he indeed confirms that the claimant is successful in his annual leave claim and he is entitled to annual leave for 2 years (From mid February, 2016 to mid February 2017) and (from mid February 2017 to mid February, 2018). The learned magistrate goes further to direct that parties should therefore work out the amount due to the Claimant and as a guide the pay per month shall be taken as an average of monthly pay for each completed year of service. We humbly submit that there is no error on the part of the Learned magistrate and the issue of no pay slips being submitted by the Respondent cannot be a reason to inter that the magistrate made any error. It is on record that CWI stated to court that he was earning Kshs. 6,500 per month on (Pages 48-49 of the record of appeal -paragraph 1 and 5).



It is not a contested fact that the Respondent herein produced Respondent's Exhibit 1- which was a summary of the Claimant's wages which confirmed the period the Claimant had continuously worked for the Respondent being from the 2nd week of February, 2016 to 2nd week of March 2018. We submit that the appellant has not shown good grounds why this court should interfere with the discretion of the lower court and we urge this Honorable Court to uphold what the learned trial magistrate directed in his Judgment in terms of the annual leave and how parties were to calculate the amount due to the Claimant.

Decision

14. The ground of appeal was – “The Honourable Magistrate erred in law and fact in failing to take into account the evidence on record and failing to appreciate that the Respondent did not produce any payslips belonging to the Appellant and wrongly directed parties to work out the amount due to the Appellant on account of annual leave due despite awarding him the prayer for annual leave.” The court finds that the finding of leave due for 2 years was not in contest at appeal. The challenge was on the direction for parties to work out the payable amount. The court finds that the trial court ought to have established the due salary to the appellant following the conversion under section 37 of the *Employment Act*, which should have been guided by the applicable minimum wages in the period. During cross-examination, the claimant stated he was employed as a security guard. He was paid Kshs. 6500 per month. The court finds the appellant did not state whether he was day or night and the court gave day as the basic. The court finds that the minimum wages for a security guard(day) in February 2018 was Kshs 11541.50 plus 15% housing allowance as per the Regulation of Wages(General)(Amendment) Order 2017, effective 1st May 2017, thus the lawful monthly salary was Kshs. 13,272.70 per months. Leave was granted for 2 years thus 42 days which is thus tabulated as $13272.70/30 \times 42$ days thus Kshs. 18,581.80 / - awarded as leave days on appeal.
14. On service pay- The claimant produced an NSSF statement, and it was on that basis that he was denied service pay, consistent with section 35(6) of the *Employment Act*. The court finds no basis to fault the finding.
14. Ground of appeal that-“The Honourable Magistrate misdirected himself in law by applying wrong principles in denying the Appellant costs of the suit.” The principle of litigation is that costs follow the event. The trial court on finding conversion and leave was due ought to have granted costs to the claimant/appellant. Cost of the suit is awarded to the claimant.

Conclusion

14. In the upshot the appeal is allowed with respect to leave and costs. The Judgment and Decree of the Hon. I. F. Koome (SRM) delivered 26th September 2024 in Thika MCELRC E006 of 2022 (formerly Milimani MCELRC No. E962 of 2020) is set aside and substituted as follows:-
Judgment is entered for the claimant against the respondent as follows-
 - a. Leave pay awarded for the sum of Kshs. 18,581.80 /- payable with interest at the court rate from the judgment date.
 - b. Certificate of service
 - c. Costs of the suit.
14. The appellant is awarded costs at appeal.
14. It is so Ordered.



DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 10TH DAY OF DECEMBER, 2025.

J. W. KELL,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – Kibet h/b Mideva

Respondent- Macharia h/b Kariuki

