

REPUBLIC OF KENYA

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT
MOMBASA**

APPEAL NO. E144 OF 2025

**YUANINA AUMA WERE
APPELLANT**

VERSUS

**STAFFING AFRICA LIMITED 1ST
RESPONDENT**

JAMES FINLAY KENYA LIMITED 2ND RESPONDENT

**[Being an appeal from the judgment of Hon. Lewis Gatheru delivered on 24 July 2025
in CMELRC No. E196 of 2024]**

JUDGMENT

The appeal arises from the judgment delivered on 24 July 2025 in Mombasa CMLRC. The appellant seeks that the appeal be allowed and that the judgment be set aside or varied, with costs.

The grounds of appeal are that:

- 1. The learned magistrate erred in not awarding the claimant [appellant] the prayers sought in the Memorandum of Claim despite the appellant adducing sufficient evidence.*
- 2. The learned magistrate erred in fact by dismissing the claimant's suit despite the respondent admitting that they employed her.*
- 3. The learned magistrate erred in fact by failing to take into account and to consider the evidence adduced on behalf of the appellant.*
- 4. The learned magistrate failed to appreciate the submissions of the appellant by finding judgment in favour of the respondent.*
- 5. In all the circumstances of the case, the findings of the learned magistrate are insupportable in law or based on the evidence adduced.*

The basis of the claim was that the appellant claimed that he was employed by the 1st respondent and seconded to the 2nd respondent as a cleaner and general worker in 2002. She was promoted to the tea packing department from 2007 to 8 August 2023. On this date, after completing her shift at 4 pm, she was summoned by Ms Cecilia, who verbally terminated her employment through summary dismissal. The respondent stated that they no longer needed employees aged 56 and above; thus, she was directed not to report for duty, and her employment was terminated. The appellant claimed that employment was terminated without due process and justification after 21 years of service. This was unlawful, contrary to sections 41, 43, and 44 of the Employment Act (the Act). The claim was for:

- a) 12 months' compensation Ksh. 182,419.
- b) Notice pay ksh. 15,201.65
- c) Underpayments for 3 years, Ksh. 115,259.40
- d) Service pay for 21 years Ksh. 159,617.32
- e) Annual leave for 21 years Ksh. 319,234.65
- f) Costs of the suit.

In reply, the respondents filed a response, denying the claims that the 1st respondent employed the appellant and seconded her to the 2nd respondent as an employee and general worker. Employment was as a casual, dependent on the availability of work on a day-to-day basis; hence, there was no need for summary dismissal, as alleged. The respondents started employing the appellant as a casual labourer in the tea packing department, as a piece-rate worker, and on a day-to-day basis, dependent on the availability of work. The issue of termination of employment did not arise. In November 2018, the respondents engaged the appellant as a casual agent and not in 2002 as alleged. In 2018, the appellant was engaged by an entity known as manpower Network Limited, which was later replaced by the 1st respondent upon a contract with the 2nd respondent dated 1 October 2021. On 14 February 2024, parties attended before the labour officer for conciliation, and a report dated 22 February 2024 was submitted with recommendations. The appellant was paid all terminal dues based on the daily per-hour rate as a casual labourer. There was no termination of employment as alleged since there was no written contract. Work was allocated on a needs basis and paid for daily.

The response also stated that on 1 October 2021, the 2nd respondent contracted the 1st respondent to supply manpower for its worksites at the James Finley Limited premises. This

included clerks, blending, forklift drivers, tea packers, and cleaners. The 1st respondent took over the contract from the previous company, Manpower Network Limited, which had been engaged since 2016. During this engagement, the applicant worked on a casual basis from November 2018 as a piece-rate worker. The 1st respondent acquired the previous company in August 2023, and the 2nd respondent instructed them not to take on any former employees aged 56 or over, which led the 1st respondent to terminate employment. The 1st respondent offered different work, but the applicant declined. The claims made are not justified and should be dismissed with costs.

The learned magistrate heard the parties and held that there was no proof of employment; hence, the claim of alleged unfair termination of employment did not arise. The claim was dismissed.

The appellant submitted that her employment was with the 1st respondent and that she was seconded to the 2nd respondent from 2002 to 8 August 2023, when she was summarily dismissed. The wage paid was ksh. 12,000 per month, which was an underpayment. The respondents paid NSSF dues as confirmation of employment.

The appellant submitted that the respondents admitted that the appellant was an employee on a casual basis. The case was that notice before termination of employment was not necessary due to the casual nature of employment. However, there was an admission that employment was terminated for all those aged 56 or older. Under section 47(5) of the Act, there was proof of employment, and there was no due process leading to the summary dismissal. The appellant worked for 21 years and is entitled to the provisions of sections 35, 41, 43 and 45 of the Act as held in **Matsesho v Newton [2022] eKLR**. The claims made are justified. The appeal should be allowed, and the judgment of the trial court reviewed.

The respondents submitted that, under section 47(5) of the Act, the employee has the burden of proving unfair termination of employment, which the appellant failed to address. This then removed the respondent's duty under section 43 of the Act to justify the termination of employment. The trial court correctly analysed the facts and the law and well established that employment was not proved and the remedies sought were not justified.

The respondents submitted that the appellant testified that she was paid KSh. 12,000 per month, but the M-Pesa statements confirmed that she was paid for the work she did. The issue of notice pay, underpayments or compensation for casual work did not arise.

Determination.

This is a first appeal. Accordingly, the court has the duty to re-evaluate the evidence on record and reach its conclusions on the dispute. However, keep in mind the fact that this court neither saw nor heard the witnesses in the cause testify and must therefore give due consideration to this fact.

The appellant asserts that employment commenced in 202002 until 8 August 2023. The appellant admitted that employment was by the 1st respondent and seconded to the 2nd respondent. To prove employment, the appellant produced the M-Pesa and NSSF statements.

The respondents admitted that employment was by the 1st respondent on a needs basis and would be placed with the 2nd respondent on secondment. The application was employed only on casual terms, with pay terminable at the end of each day.

Indeed, casual employment is allowed under the Act. The employee is taken on a needs basis for work that starts and ends each day without the need for continuity. Work that is not continuous or needed each day and is protected under section 37 of the Act, that is, casual employment as defined under section 2 of the Act.

In this case, the appellant's assertion that she was employed in the tea packing department was challenged by the respondent. The M-Pesa statements produced assist the court to decipher the following transactions:

On 25 August 2023, the 1st respondent paid the appellant Ksh. 3,395.

On 21 August 2023, a payment of Ksh was made. 1,388.

On 30 June 2023, a payment of Ksh. was made. 652.

On 22 June 2023, a payment of Ksh. was made. 1,512.

In her evidence, the appellant testified that she had a letter contract, but this was not produced. She returned it to the respondent and was then laid off. The issue leading to the termination of employment was a report to the NSSF.

The appellant also testified that, according to her M-Pesa statements, the respondents paid her a total of Ksh. 12,000.

In reply to the claim, the respondents filed various work records for casual employees placed with the 2nd respondent. The appellant was coded number 5690059. In August 2023, she worked for 3 days.

The work attendance sheets do not demonstrate continuity of work in any given month. The wages paid each month are inconsistent and not uniform. They reflect a daily salary for a casual employee.

Although there is proof of employment, it was on a casual basis. This is a lawful and legitimate mode of employment under the Act. The employer, being the 1st respondent, is allowed to allocate available casual duties to an employee on a needs basis as held in **Ibrahim v Reliance Hospital Limited [2023] KEELRC 2539 (KLR)**. In **Rashid Odhiambo Allogoh & 245 others v Haco Industries Limited [2015] eKLR**, the court emphasised that casual employment is permissible under the law.

Equally, in this case, the evidence demonstrates that the appellant was a casual employee who was paid for the work done. Under section 47(5) of the Act, the burden to prove that there was unfair termination of employment was not discharged.

The learned magistrate well addressed the facts and the law and dismissed the claim. The appeal is without merit and is hereby dismissed. The appellant is to pay the respondents' costs of the appeal.

Delivered in open court at Malindi, this 11th day of December 2025.

M. MBARŪ
JUDGE

In the presence of:

Court Assistant: Davis Wekesa

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