REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

APPEAL NO. E172 OF 2025

MAVJI HARJI PATEL …… APPELLANT

VERSUS

MAINGI MUTHOKA MULI …… RESPONDENT

[Being an appeal from the judgment of Hon. J. B. Kalo delivered on 5 August 2025, Mombasa CMELRC No. E478 of 2022]

JUDGMENT

The appeal arises from the judgment delivered on 5 August 2025 in Mombasa CMELRC No. E478 of 2022.

The appeal is that the learned magistrate erred in law and fact in finding that the respondent was employed in 1995, contrary to the evidence that he was employed as a casual in 2021. The finding that there was a term contract and not casual employment was contrary to the evidence. There was desertion of duty, and hence the award of notice pay at KSh. 1,400 was unwarranted. The award of leave pay at Ksh. 41,139 was in disregard of the law, and the alleged underpayment was awarded at Ksh. 438,192 was contrary to the fact that there was casual employment not deserving compensation of Ksh. 14,000.

The background to the appeal is a claim filed by the respondent before the trial court.

His case was that he was employed by the appellant as a farm worker on 1 February 1995 in Likoni, Mwananguvuze in Mombasa County. The basic wage was KSh. 1,400 per month, which was below the minimum wage. He worked continuously until 30 June 2022, at a graduated wage of Ksh. 10,500 per month. The appellant terminated his employment without notice or justification. On the material day, the respondent was directed to vacate the appellant’s house immediately. The wages are paid in KSh. 1,400 instead of Ksh. 13,572.90 was underpayment. Upon the unfair termination of employment, the respondent claimed the following terminal dues:

a) One month's salary in lieu of notice, Kshs. 10,500.00

b) House allowance for 329 months at the rate of 15% of the basic salary 15/100 x 1,400.00 10,500 x 329 Kshs. 518,175.00
c) Unpaid leave days 653.10 350 x 21 x 27 years Kshs. 198,450.00
d) Underpayment below the minimum wage (13,572.90-1,400 10,500) x 329 months Kshs. 1,010,984.10
e) Unpaid overtime (121.30 x 1hr x 30days x329 months) Kshs. 1,197,231.00
f) Compensation for unlawful termination 1,400.00 (10,500 x 12) Kshs. 126,000.00
g) Service pay 10,500/2 x 27 Kshs. 141,750.00
h) Unpaid NHIF 500 X 329 Kshs. 164,500.00
i) Costs of the suit.

The appellant denied the claims and that there was no payment of a basic wage of Ksh. 10,500. The response is that the respondent was employed in 2014 on a casual basis as a farm worker, and this did not constitute employment, as the farm work was seasonal. Wages were paid weekly and not monthly as alleged. There was no work beyond one month. As a farm worker, the employment ended with each day. On 30 June 2022, the respondent showed up for work and, upon being paid his wages, left without return. Due to the nature of the engagement, the appellant did not search for him. The wages paid weekly did not form a basis for the alleged unfair termination of employment. There was no need for notice, taking of annual leave, accommodation and the claims made are unwarranted.

The learned magistrate heard the parties and held that there was an employment relationship between the parties, which was terminated unlawfully and unfairly. The wage paid was Ksh. 1,400 per month, hence applied this rate in assessing the claimant. The court awarded the following:

a) Notice pay Ksh. 1,400.
b) Leave pay Ksh. 41,139.
c) Underpayments 438,192.
d) 10 months' compensation Ksh. 14,000.
e) Certificate of service.
f) Costs of the suit.

On the appeal, the appellant submitted that there was no evidence of employment or conversion of the casual/seasonal engagement into employment. The Respondent failed to tender any credible or documentary evidence demonstrating continuity of service, duration of

engagement, or the existence of a contract of service capable of conversion under Section 37 of the Act. The Appellant's uncontroverted position was that the Respondent was a casual labourer who worked intermittently when his services were required, earning daily wages of Kshs. 350. This position was corroborated by both the manager and the proprietor, who confirmed that the Respondent's engagement was task-based, dependent on the availability of farm work, and terminated automatically upon completion of such tasks. The Respondent himself admitted under cross-examination that he had no evidence to show that he had been continuously employed from 1995, yet this was the very foundation of his claim.

Section 37 of the Act provides for conversion of casual employment into regular employment only where an employee works for a continuous period of not less than one month or performs work that cannot reasonably be completed within three months. The Respondent never met this statutory threshold. He testified that he prepared land, planted, weeded, and harvested, activities that are inherently seasonal and intermittent. He was never under a continuous engagement, nor did the Respondent produce a single pay slip, contract, or register evidencing continuous work.

Shifting the burden of proof to the appellant was contrary to Sections 107, 108, and 109 of the Evidence Act, which unequivocally place the burden on the party asserting a fact. The Respondent asserted continuous employment from 1995, and therefore, the evidential and legal burden rested squarely on him. Having failed to discharge it, the court ought to have dismissed his claim. The Appellant had no obligation to prove a negative that the Respondent was not a continuous employee, as held in Zarika **Adoyo Obondo v Tai Shunjun & another [2020] KEELRC**.

The appellant submitted that in **Bernard Ocheing Odhiambo & Another v Prime Aluminium [2016] eKLR,** the court dismissed a claim because the employee did not plead or tender any evidence to prove that he worked continuously as required under section 37 of the Act. To hold otherwise would undermine freedom of contract and distort the Act's legislative intent. In **Rashid Odhiambo Allogoh & 245 Others v Haco Industries Ltd [2015] eKLR,** the court reaffirmed that continuity of engagement and the mode of payment do not, per se, remove an employee from the category of a casual worker. The Appellant's practice of remitting NSSF and NHIF contributions was a humane gesture, not an acknowledgement of a permanent employment relationship.

The findings that the Respondent was employed from 1995 to 2022 defy logic and evidence. The Appellant acquired the farm only in 2014, while the Respondent's alleged employment began in 1995, long before the Appellant's ownership. It is therefore legally and factually impossible that the Respondent could have been in the Appellant's employment since 1995. In **Patriotic Guards Ltd v James Kipchirchir Sambu [2018] KECA 799 (KLR**), the court held that Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing.

Given the seasonal nature of the employment, notice was not necessary, and the reliefs granted lacked justification.

The respondent submitted that there was proof of employment, and the judgment of the trial court should be confirmed with costs. The respondent discharged his burden of proof as required under section 47(5) of the Act. In **Josephine M. Ndungu & others v Plan International Inc. [2019] eKLR**, under section 47(5) of the Act, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that the termination did not fall within the four corners of the legal threshold set out by section 45 of the Act. In **Muthaiga Country Club v Kudheiha Workers [2017] eKLR,** the court held that:

> *The grievants, having denied, through their witness, the reasons given for their dismissal, discharged their obligation under Section 47(5) of the Act by laying the basis for their claim that an unfair termination of employment had occurred. This brought into play Section 43(1) and 47(5) of the Act that places the burden upon the appellant to prove the alleged reasons for termination of the grievants' employment, and justify the grounds for the termination of the employment.*

The appellant submitted that an employer who alleges that an employee deserted his duties must show that efforts were made to reach the employee. In **William Gituma Gateere v Taa Limited ELRC NO. 1835 OF 2014,** the court held that an employer who asserts that the employee deserted duty must demonstrate that some effort was made to reach the employee. The Claimant's Manager, who is said to have made these efforts, was not called as a witness, and the Court was therefore unable to assess the efficacy of these efforts. An employer relying on the ground of desertion of duty to justify a termination of employment must show that efforts have been made to get in touch with the deserting employee. The employer must give the employee reasonable notice that termination of employment is being considered.

The Respondent was dismissed from work on 30 June 2022. 32. The Appellant knew the whereabouts of the Respondent, and no communication was made to prevail upon the Respondent to report to work.

Under Section 45 of the Act, the employer must not only prove that the reason for termination is valid and fair but also that the employment was terminated in accordance with fair procedure, as under Section 41 of the Act. In the case of Mary **Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR,** the court held that before an employer can exercise their right to terminate an employee's contract, there must be a valid reason or reasons that touch on grounds of misconduct, poor performance, or physical Incapacity. Once this is established, the employee must be issued with a notice, given a chance to be heard, and then a sanction decided by the respondent based on the representation made by the affected employee.

In the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR,** the court held that for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness. In the instant case, there is no evidence filed by the Appellant to indicate that it provided the Respondent with a fair hearing. This is a clear indication that the Respondent was not subjected to a fair process before a decision was made.

The appeal should be dismissed with costs.

Determination

This being a first appeal, the court is required to reassess the record, review the findings and make its conclusions. However, keep in mind that the trial court had the opportunity to observe the witnesses testify.

To begin with, the employer has a legal duty to keep work records, including those of casual employees, under section 10(6) and (7) of the Act, read together with section 74 of the Act.

This burden was to be discharged. The appellant's assertions that it acquired the farm where the respondent was engaged in 2014 remain bare.

Additionally, the admission that the respondent worked on the farm for weeding, planting, and harvesting, and was paid weekly, places him under the protections of section 37 of the

Act. Indeed, the appellant had housed the respondent. This, in itself, made the respondent available and under the appellant's control.

The learned magistrate correctly addressed the facts and the law and held that the employment was protected under section 37 of the Act.

Upon the application of section 37 of the Act, the subject employee becomes a right-holder under the Act. The benefits due to the employee apply as held Kenyatta University v Thomas & 25 others [2025] KECA 1014 (KLR).

In **Kenyatta University v Maina (Civil Appeal 261 of 2020) [2022] KECA 1201 (KLR),** the Court of Appeal held that it was an unfair labour practice to deny a non-permanent employee the rights of a permanent employee. In contrast, the subject employee had worked for many years on casual terms.

In this case, the respondent was housed by the appellant, and his statutory dues to NSSF and NHIF were paid. This confirms the nature of control, employment and wages paid weekly.

Therefore, where an employee is engaged in work that is not likely to end in a day or a month, or is under a fixed-term contract with a start or end date, they become protected under section 37 of the Act. See **Kitui Flour Mills Limited v Mitambo & another (Appeal E188 & E187 of 2024 (Consolidated)) [2025] KEELRC.**

Before termination of employment, the respondent was entitled to notice. Where the appellant alleges that he absconded duty or failed to report to work, the appellant, as the employer, had the legal duty under section 18(5)(b) of the Act to issue notice terminating employment and to serve the labour officer. The employment relationship must be formally terminated to bring it to a close. This is the duty of the employer as held in Omar t/a Meat Magic Enterprises v Kalu [2025] KEELRC 325 (KLR) and the case of Kisombe & another v Inchcape Kenya Limited [2025] KEELRC 1446 (KLR). Leaving the employee at large only invites a case of unfair termination of employment.

The award of notice pay and compensation is justified.

However, the learned magistrate applied the wage of Ksh. 1,400 per month to assess the awards.

The respondent amended the claim on the basis that he was earning a wage of Ksh. 10,500.

By June 2022, a general worker employed in Likoni, Mombasa County, earned Ksh. 14,025.40. The paid wage of Ksh. 10,500 per month was an underpayment of Ksh. 3,525.40.

The wage due in notice pay is Ksh. 14,025.40.

The tabulation for compensation for 10 months should be premised on the due wage of KSh. 14,025.40 x 10 = Ksh. 140,254.

Upon cessation of employment on 30 June 2022, the respondent filed his claim on 22 August 2022. The underpayment being a continuing injury under section 90 of the Act, he can only claim the underpayment back 12 months, as held in Bakery Confectionery Food Manufacturing & Allied Workers Union (K) v Wrigley Company (East Africa) Limited & another [2025] KECA 2021 (KLR). The court reiterated the findings in **Michira & 41 Others v Aegis Kenya Ltd t/a Leopard Beach Hotel [2023] KEELRC 2551 (KLR)),** in which the Court held that, in addressing a continuing injury, time begins to run from the date an employee exits employment, and that, such a claim must be specifically pleaded and filed within twelve months of cessation, which the appellant in this matter did not do.

In this case, the underpayment of Ksh. 3,525.40 is due in KSh. 42,028.80 only.

The respondent enjoyed housing with the appellant. To claim a house allowance over and above the basic wage paid, and to have the underpayment addressed, would be to negate section 31 of the Act.

Regarding the alleged unpaid annual leave, without work records, this is a right due under section 28 of the Act. The employee has the right to rest. However, annual leave cannot be accumulated beyond 18 months pursuant to section 28(4) of the Act.

In this regard, the respondent is only entitled to 33 leave days based on the basic wage of Ksh. 14,025.40 and the total due in Ksh. 15,427.94.

The overtime claim was not particularised. The details of the start and end hours were not gone into. This was well addressed by the learned magistrate and dismissed.

On the claim for service pay, upon the finding that there were payments to NSSF and NHIF, under section 35(5) and (6) of the Act, such is not due.

On costs, the respondent's claim before the trial court was largely successful. He is entitled to 50% of his costs. Given the appeal's partial success, each party should meet its costs.

Accordingly, the judgment in Mombasa CMELRC No. E478 of 2022 is hereby reviewed in the following terms:

a) **The respondent was employed by the appellant, whose employment was terminated unfairly;**
b) **Notice pay Ksh. 14,025.40.**
c) **10 months' compensation Ksh. 140,254.**
d) **Leave pay Ksh. 15,427.94.**
e) **Underpayments 15,427.94.**
f) **For the trial court, the respondent has 50% of the costs.**
g) **For the appeal, each party to bear its costs.**

Delivered in open court at Mombasa, this 22nd day of January 2026.

M. MBARŨ

JUDGE

In the presence of:

Court Assistant:

…… and ……..……