



REPUBLIC OF KENYA



**Kenga v Baobab Beach Resort Mombasa (Cause E015 of 2025)  
[2026] KEELRC 168 (KLR) (29 January 2026) (Judgment)**

Neutral citation: [2026] KEELRC 168 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E015 OF 2025  
M MBARÚ, J  
JANUARY 29, 2026**

**BETWEEN**

**JOSEPH MUDUDU KENGA ..... CLAIMANT**

**AND**

**BAOBAB BEACH RESORT MOMBASA ..... RESPONDENT**

**JUDGMENT**

1.

- a. A declaration that his employment has converted from casual employee to contract/permanent.
- b. A declaration that employment was unfairly and unlawfully terminated.
- c. Damages for 12 months.
- d. One month's notice pay.
- e. Unpaid annual leave for 6 years, 2019 to 2024.
- f. Refund of unlawful deduction of Ksh. 10,000 made on the house allowance in March and April 2024.
- g. Damages for discrimination of Ksh. 100,000.
- h. Refund of money lost as a result of failing to employ the claimant permanently after working as a temporary employee from May 2019 to November 2021 for 30 months. As a result, the claimant lost the benefits of:
  - i. House allowance Ksh.11,004 x 18 months = Ksh.198,072
  - ii. Service charge Ksh. 20,000 x 18 months = Ksh. 360,000.



- i. General damages for frustrations and loss of job prospects.
  - j. Costs of the suit.
2. The claimant avers that he was employed by the respondent as a waiter under annual contracts from 2012 to 2024.  
The initial contract was with effect from 1 July 2013 to 2024.
3. The last contract was from 30 December 2021 to 2024 with a gross wage of Ksh. 17,855.51 and a house allowance of Ksh. 11,004.64 per month.  
The last contract was extended from 1 March 2024 to 31 March 2024.
4. The claim is that, despite the claimant applying for the supervisor position, he was assigned the role of a waiter. He worked for 10 years. Employment remained on annual contracts in disregard of the law.
5. Upon the expiry of the last contract on 31 March 2024, the respondent recalled the claimant to work on 1 April 2024, despite the claimant having been cleared and issued with a Certificate of Service.
6. The claim is that the claimant was engaged casually from June to August without his contract being renewed, yet continued to work on the same terms and conditions as before. This was done in bad faith to avoid paying the legal benefits due to the position held as a waiter in a permanent employment role. The claimant was apprised on 10 June 2024, but was not issued a written contract. His colleagues holding similar positions were issued written contracts.
7. On 15 June 2024, the claimant was recalled to work and continued working on the same terms and conditions. On 15 August 2024, the respondent changed his working shift, taking 2 weeks off, followed by 2 weeks of a shift to accommodate major renovations on the premises. After the shift on 13 September 2024, there was no communication.
8. On 28 October 2024, the claimant resumed duty, but the respondent officers informed him that he was in breach of policy. Upon appraisal, those who scored 70% had resumed duty, but he had scored 66%.
9. The claimant had worked on casual terms from May 2019 to November 2021, a period of 30 months, with the contract being confirmed on permanent terms. This was in breach of the law. He lost benefits in house allowance and service pay. The lack of communication during the appraisal denied the claimant his rightful position as a supervisor. His employment was terminated unfairly without due process.
10. The claimant testified that the respondent employed him under an annual contract. The last contract is dated 14 December 2021.
11. In March 2024, he was suspended from duty. The respondent continued to make payments to NSSF, NHIF, and other statutory dues, meaning that his employment did not stop. From 2019 to 2021, the respondent continued to pay his statutory dues under his contract. He was paid until March 2024, after which the respondent asserts he was on casual employment, but the statutory dues were remitted. This confirms that the claimant should have been on permanent terms of employment. He was denied employment benefits, as claimed.
12. Upon cross-examination, the claimant testified that he was based at Kwale while working for the respondent. He worked as a waiter under fixed-term contracts from 2012 to 2024. From 2015 to 2021, he was employed by another employer based at the Mombasa airport. The respondent's work was seasonal; hence the term contracts. The respondent has filed different term contracts with extension letters. Upon the expiry of each contract, the respondent had the option to extend the employment



- or terminate it. The last contract was dated 1 December 2023 for 3 months ending on 28 February 2024. Through a letter dated 24 February 2024, the contract was extended to 30 March 2024. It had an expiry notice, and a Certificate of Service was issued.
13. The claimant testified that he was recalled to work without any written contract. He did not clear and retain his work tools, including the uniforms. While employed by the respondent, he was accommodated within the premises. There was a CBA that provided for employee accommodation. He was, however, paid a one-off house allowance, plus allocated accommodation.
  14. In response, the respondent admitted that the claimant applied for employment and on 30 November 2021 was employed as a waiter on a 3-month fixed-term contract from 1 December 2021 to 28 February 2022. He was earning Ksh. 14,892 and a house allowance of Ksh. 9,178 per month.  
For the first two months, the claimant was on probation.  
On 28 February 2022, the contract was extended to 30 April 2022.  
On 30 April 2022, a notice of termination of the contract was issued.  
In May 2022, the claimant was not employed by the respondent.
  15. On 30 September 2022, the claimant was employed as a waiter on a 4-month fixed-term contract from 1 October 2022 to 31 January 2023 at a wage of Ksh. 14,891.52 and a house allowance of Ksh. 9,177.84.
  16. On 1 February 2023, the contract was extended from 1 February 2023 to 30 April 2023.
  17. On 1 December 2023, the claimant was employed on a 3-month fixed-term contract from 1 December 2023 to 28 February 2024, with a wage of Ksh. 16,381.20 and a house allowance of Ksh. 10,095.80.
  18. On 30 March 2024, the respondent issued notice that the contract would lapse and the claimant should clear and be issued with a certificate of service. His terminal dues were paid, including:
    - a. Notice pay,
    - b. Service charge,
    - c. Accrued leave days,
    - d. Pending off days,
    - e. Public holidays,
    - f. Leave travelling allowance.
  19. During each contract term, the claimant was paid the due wage and house allowances. He was also allocated company accommodation. At the end of the contract, the claimant failed to hand over the allocated house key for over 4 months. From April 2024, he did not work for the respondent until June 2024, when he was engaged on a casual basis for two weeks. He was accorded all benefits under the law and issued a certificate of service.
  20. The response is that upon the last fixed-term contract ending on 31 March 2024, the claimant failed to clear with the respondent, and there was no obligation to employ him on a permanent basis. In 2015, the claimant resigned from his employment with the respondent to work with Nairobi Airport Service (NAS) for 3 years and returned on contract in 2021. The claims made are without merit and should be dismissed.
  21. In evidence, the respondent called Louis Nambiro, the human resources manager, who testified that the claimant was employed as a waiter on a fixed-term contract renewed on a needs basis. In 2015,



he resigned from NAS to work there for 3 years. In 2012, he was issued a fixed-term contract, which ended on 31 March 2024. There was no continuous employment, so a fixed-term contract was needed. In 2020, the company closed due to the Covid pandemic, and in 2021, the employees worked on a rotation basis.

22. Nambiro testified that the claimant was paid his due wages under each contract. The last engagement in June 2024 was for 2 weeks on a casual basis. The records demanded for income tax do not emanate from the respondent. These are internet-sourced. The claims are not justified, as service pay varied from month to month. The claimant was paid a house allowance and also offered accommodation during his employment. The CBA relied upon is valid but not applicable to the claimant.
23. At the close of the hearing, both parties filed written submissions which were analyzed, and the issues which emerge for determination are:
  - a. Whether the employment was converted from casual to permanent employment.
  - b. Whether there was discriminatory treatment.
  - c. Whether there was unfair termination of employment.
  - d. Whether the remedies sought should be issued.
24. One of the issues is whether the casual employment should be converted to permanent employment. The claimant's case is that he was employed by the respondent from 2012 to 2024. The respondent contested this evidence on the basis that the claim was made under various fixed-term contracts, the last of which ended on 31 March 2024.
25. Under section 10(3) of the *Employment Act* (the Act), an employer is allowed to employ an employee under a fixed-term contract with a start and end date. Such employment is lawful and valid as held in *Middle East Bank Kenya Limited v Waseka* [2025] KECA 2113 (KLR) and the case of *Maina v Family Bank Limited* [2025] KECA 2043 (KLR).
26. In this case, the Respondent, as the employer, filed all the work records relating to the claimant as required under sections 10(6) and (7) of the *Act*. The claimant was under a written contract of service during his employment period with the respondent. The fixed-term contracts were extended from time to time, forming a legal basis of the employment relationship.
27. The last engagement of the claimant by the respondent was in June 2024 for 2 weeks. The claimant admitted that his employment was on a 2-week shift and that, upon the end of his shift, he was not recalled to work. That he should have been employed permanently. While others were recalled back, he was discriminated against and left out.
28. The claimant did not outline the other employees who received preferential treatment by the respondent, setting him aside. Discriminatory treatment in employment is addressed in *Okindi v Kenya Maritime Authority* [2025] KEELRC 2685 (KLR), where the employee alleging discrimination must demonstrate that the employer applied a distinction that set him apart from other employees similarly situated.
29. In *Law Society of Kenya v Attorney General & another* [2019] KESC 16 (KLR), the Court defined discrimination to include;

... a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or



which withholds or limits access to opportunities, benefits, and advantages available to members of society.

30. And in *Barclays Bank of Kenya Ltd & Another v Gladys Muthoni & 20 others* [2018] eKLR, the court held that:

Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions... whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.

31. In this case, the claimant, although acting in person, did not set out the grounds upon which he alleges discriminatory treatment against him by the respondent, save to urge the court that the respondent's failure to accord him permanent employment was discriminatory. As outlined above, the respondent had the practice of issuing a written contract for the entire duration of the claimant's employment. The last employment was for 2-week shifts, and the claimant was on casual terms.
32. The employment was not continuous from 2012 to 2024 as alleged. The claimant admitted to his resignation in 2015. His last term contract expired on 31 March 2024.
33. The claimant cannot justify the claim for unfair termination of his employment or discriminatory treatment. Such have no legal basis.
34. Upon termination of employment, the claimant was paid his terminal dues. There are work records to confirm payment and issuance of a Certificate of Service as required under Section 51 of the *Act*.
35. Regarding the claim for payment of terminal dues based on statutory payments, the respondent continued to pay the claimant post-employment; such payments do not constitute employment. Payment to the NSSF, NHIF, or PAYE in themselves does not confer the claimant an employment relationship. Although such arises from employment, where the fixed-term contract ceased on 31 March 2024, but the respondent continued to remit statutory dues, such payments cannot be applied to claim permanent employment. The respondent can only seek to recover the overpayments and losses to the business.
36. Regarding the claims for notice pay under the expired term contract on 31 March 2024, they are not due.
37. On the claim for unpaid leave for 6 years from 2019 to 2024, under section 28 of the *Act*, the claimant is entitled to his annual leave. However, such should not accumulate for over 18 months under section 28(4) of the *Act*. In this regard, on 31 March 2024, the term contract lapsed, and all terminal dues, including accrued leave days, were paid.
38. On the claim for house allowance due in March and April 2024, the claimant admitted that the respondent accommodated him during his employment. He was also paid a house allowance under each fixed-term contract. Under section 31 of the *Act*, upon the allocation of accommodation, house allowance paid was not necessary. Seeking payment of a house allowance over and above the paid amount, plus the benefit of housing, is seeking unjust enrichment.
39. Accordingly, the claim herein is without merit. It is dismissed with costs to the respondent.

**DELIVERED IN OPEN COURT AT MOMBASA ON THIS 29<sup>TH</sup> DAY OF JANUARY, 2026.**



**M. MBARŪ**  
**JUDGE**

