



**Kensalt Limited v Abukuse (Appeal E046 of 2025)  
[2026] KEELRC 336 (KLR) (5 February 2026) (Judgment)**

Neutral citation: [2026] KEELRC 336 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E046 OF 2025  
K OCHARO, J  
FEBRUARY 5, 2026**

**BETWEEN**

**KENSALT LIMITED ..... APPELLANT**

**AND**

**JAMES OMULOBOLE ABUKUSE ..... RESPONDENT**

*(Being an Appeal against the judgment of Hon J.B Kalo, Chief Magistrate,  
delivered on 20th February 2025 in Mombasa CMELRC E021 of 2024)*

**JUDGMENT**

**Background**

1. Asserting that at all material times, he was an employee of the Appellant, and that his employment was terminated unlawfully and unfairly, the Respondent sued them in the above stated suit, seeking various reliefs, thus;
  - a. Payment of her terminal and contractual dues amounting to Kshs.2,846,244.00.
  - b. Costs and Interests of this suit.
  - c. Any other relief that the Court may deem fit to grant.
2. Tabulated as;
  - a. One month pay in lieu of notice .....72,000.00
  - b. Unpaid leave days 18 days x 2571 x 17 years ..786,857.00
  - c. Compensation for unlawful termination  
.....72,000 x 12 =864,000.00



- d. Unpaid overtime (107.12x1hr x 15 days x 204 months. .... 327,787.00
  - e. Unpaid NHIF 500 X 204 Months.....102,000.00
  - f. Unpaid NSSF 400x204 months = .....81,600.00
  - g. Service pay KShs. 72,000/2 x 17 years .....612,000.00
3. The Appellant resisted the Respondent's claim by filing a Response to the Memorandum of Claim dated 19th February 2024, contending that the Respondent was not its employee but a piece-rate worker engaged intermittently during production periods, and that no contract of service existed between them. It argued that the Respondent's engagement ended naturally and was not terminated at the Respondent's initiative. Given the form of employment and the absence of termination by the Respondent, the reliefs were unavailable to the Respondent.
  4. After hearing the parties and considering their respective evidence, the learned trial Magistrate, by her impugned Judgment, found for the Respondent, declaring that his employment had been unfairly terminated and granting him compensation under various heads of his claim.

**The Respondent's case before the trial court**

5. The Respondent pleaded and testified that he was employed by the Appellant, Kensalt Limited, in 2006 as a conveyor staker/casual labourer, earning KShs. 18,000 per week, equivalent to approximately KShs. 72,000 per month, which was paid in cash. He averred that he served the Appellant continuously for about seventeen (17) years until September 2023.
6. He asserted that in September 2023, his employment was suddenly and without proper procedure terminated when he was merely informed that there was no longer any work available, without receiving any notice, explanation for the termination, or a formal termination letter. Subsequently, he was prohibited from accessing the Respondent's premises.
7. The Respondent also claimed that during his extended service, the Appellant intentionally kept him as a casual worker to lower his wages and deny him statutory and contractual employment benefits, despite the nature and length of his employment.
8. He stated that he was never allowed to take annual leave for the entire duration of his employment, worked continuously without rest days, including overtime hours, and was not compensated for extra hours worked.
9. It was also his case that the Appellant failed to pay him house allowance and did not remit statutory deductions, including NSSF and NHIF contributions, contrary to the law.
10. The Respondent maintained that his termination was unfair, unlawful, and in breach of the *Employment Act*, as he was neither accorded a fair hearing, paid terminal dues, gratuity, or service pay, nor issued a certificate of service.
11. He therefore asserted that the manner of termination violated his employment rights and the rules of natural justice, and amounted to an unfair labour practice, and prayed for compensation for unlawful termination and payment of all outstanding terminal benefits.



### **Appellant's case in the lower court**

12. The Appellant, Kensalt Limited, denied that the Respondent was its employee from 2006 or that he earned a weekly wage of Kshs. 18,000, as alleged. It maintained that it is a seasonal salt manufacturer and that it engages only conveyor packers and stackers on a piece-rate basis during production periods, paying them according to the quantity of salt packed or stacked per shift.
13. The Appellant averred that the Respondent was only occasionally engaged as a piece-rated conveyor stacker and, in 2023, worked on 21st, 22nd, and 23rd September 2023, for which he was fully paid Kshs. 1,569.45, Kshs. 1,542.40, and Kshs. 1,578.15, respectively.
14. It was the Appellant's case that no contract of employment existed between the parties, and that the provisions of the *Employment Act* 2007 did not apply. The Appellant denied any underpayment, stating that all payments were made in accordance with standard piece-rate terms.
15. The Appellant further contended that leave, house allowance, overtime pay, statutory deductions, gratuity, and service pay did not apply to piece-rated workers who were engaged only during production and paid per shift.
16. In September 2023, the Appellant reported rampant theft of customised cello tapes at its Changamwe factory to Kwa Hola Police Station, prompting investigations and the arrest of several suspects, including the Respondent, following information provided by a buyer of the stolen items.
17. It maintained that after the Respondent's arrest on 30th September 2023 in connection with the alleged theft, he was not engaged again for piece-rated stacking. It denied barring him from its premises or terminating his employment, asserting that there was no employment relationship capable of termination.
18. The Appellant therefore denied liability for the sum of Kshs. 2,846,244 claimed, contended that the memorandum of claim disclosed no reasonable cause of action, and prayed for the claim to be dismissed with costs.

### **Judgment of the Lower Court**

19. Upon review of the pleadings, evidence, and submissions presented by the parties, the trial court delineated the issues for determination: the claimant's salary, his status as a permanent employee, the fairness of his termination, and his entitlement to the relief sought. The court concluded that, pursuant to the evidence, the claimant's average daily earnings were Kshs. 1,560, resulting in a monthly salary of Kshs. 39,000.
20. Regarding the nature of employment, the court held that although the respondent alleged that the claimant was a piece-rate worker engaged intermittently, it failed to produce complete employment records. Applying section 37 of the *Employment Act*, the court found that the claimant's continuous daily work converted his engagement into permanent employment by operation of law, thereby making section 35(1)(c) applicable.
21. Regarding termination, the court observed that the respondent neither pleaded nor proved any valid reason for terminating the claimant's employment, asserting instead that no termination had taken place. In the absence of justification and adherence to due process, the court determined that the termination was unjust and unfair.
22. On remedies, the court awarded the claimant one month's salary in lieu of notice (Kshs. 39,000), compensation for leave earned but untaken (Kshs. 58,500), and ten months' gross salary as



compensation for unfair termination (Kshs. 390,000), citing the casual and callous manner in which the termination was handled. The court rejected claims for unpaid NSSF and NHIF deductions but awarded service pay at half a month's salary for each completed year, amounting to Kshs. 331,500.

23. In conclusion, the court found that the claimant had proved his case on a balance of probabilities and entered judgment in his favour in the total sum of Kshs. 819,000, payable within 45 days, together with costs and interest, and ordered the respondent to issue a certificate of service.

### **The Appeal**

24. Dissatisfied with the Judgment of the lower Court, the Appellant filed the instant appeal, setting forth the following grounds;
1. That the Learned Magistrate erred in law and fact in finding that the Respondent was a permanent employee without any legal and/or factual basis.
  2. That the Learned Magistrate erred in law and fact in finding that the Respondent's termination of employment was unfair and unjust.
  3. That the Learned Magistrate erred in law and fact in finding that the Respondent was earning Kshs.39,000/=month and awarding him one month's salary at Kshs.39,000/=.
  4. That the Learned Magistrate erred in law and fact in awarding the Respondent leave at Kshs.58,500/=.
  5. That the Learned Magistrate erred in law and fact in awarding the Respondent Kshs.331,500/=as service pay.
  6. That the Learned Magistrate erred in law and fact in awarding the Respondent Kshs.390,000/=as compensatory damages for unfair termination.
  7. That the Learned Magistrate erred in Law and in fact by failing to consider the Appellant's evidence on record.
  8. That the Learned Magistrate erred in Law and in fact by failing to consider the submissions of the Appellant.

### **Appellant submissions**

25. The Appellant challenged the entire judgment of the trial court, submitting that the Learned Magistrate erred in finding that the Respondent was a permanent employee. It was argued that the Respondent was engaged only from time to time as a piece-rated conveyor stacker, paid according to output rather than time worked, and therefore fell outside the definition of an employee under the [Employment Act](#).
26. The Appellant relied on the Respondent's work identification card, which described him as a "contracted employee", and contended that the trial court wrongly applied section 37 of the [Employment Act](#) by limiting its analysis to casual and permanent employment, while ignoring the category of independent contractors.
27. The Appellant further asserted that, as a piece-rated worker and independent contractor, the Respondent was not eligible for the statutory protections and remedies granted by the trial court. Reference was made to *Shayona Timber Limited v Ochieng* [2025] KEELRC 844 (KLR) to substantiate the argument that the [Employment Act](#) does not pertain to such engagements, and that the Respondent's claim ought to have been entirely dismissed.



28. The Appellant further argued that the awards were unsupported by evidence and excessive. It claimed there was no basis for the finding that the Respondent earned a monthly salary of Kshs. 39,000 and argued that the awards for notice pay, service pay, and unfair termination compensation were therefore incorrect. Specifically, the Appellant contended that service pay under section 35 of the *Employment Act* did not apply, and that the ten months' gross salary award as compensation under section 49(1)(c) failed to consider the Respondent's conduct, which allegedly contributed to the separation.
29. Finally, the Appellant submitted that the trial court erred in holding that the Respondent's engagement was unfairly terminated, arguing that the evidence instead demonstrated a contractual, output-based relationship that came to an end following allegations of misconduct. On these grounds, the Appellant urged the appellate court to set aside the impugned judgment and substitute it with an order dismissing the claim with costs.

### **Respondent's Submissions**

30. The Respondent submitted that the Learned trial Magistrate correctly found that he was an employee of the Appellant, not an independent contractor. He maintained that he had served continuously as a conveyor staker for seventeen (17) years, reporting to work daily, performing duties integral to the Appellant's core business, working under its supervision, and using its tools.
31. The Respondent argued that payment on a piece-rate basis did not negate an employment relationship, as the *Employment Act* expressly recognises piece-rate workers as employees, and that the Appellant failed to produce any written contract or evidence to support the alleged independent contractor arrangement.
32. The Respondent further submitted that the Appellant breached its statutory obligations by failing to keep or produce employment records, including leave, attendance, disciplinary, termination, or NSSF records, contrary to Sections 10, 20, and 74 of the *Employment Act*.
33. He contended that the Trial Court was therefore entitled to draw adverse inferences against the Appellant and to rely on the Respondent's evidence. On this basis, the Magistrate properly found that the termination was both substantively and procedurally unfair, as no valid reason or due process under Sections 41 and 43 of the Act was demonstrated.
34. Regarding remedies, the Respondent asserted that the awards for notice pay, service pay, and unfair termination compensation were lawful and justified. He contended that a one-month notice pay was rightly granted under Section 35(1)(c) because no notice or payment in lieu of notice was provided. Additionally, he argued that service pay under Section 35(5) was applicable since the Appellant failed to demonstrate NSSF registration or contributions. The compensation under Section 49(1)(c) was considered moderate and proportional, given his seventeen years of continuous service, the absence of a valid reason for termination, and procedural violations committed by the Appellant.
35. Finally, the Respondent submitted that the allegation that the quantum awarded was excessive was unsupported, as the Appellant offered no alternative computations or records. He contended that the awards were purely statutory, properly calculated, and well within the Trial Court's discretion. The Respondent therefore urged the appellate court to find that the appeal lacked merit, uphold the Trial Court's judgment in its entirety, and dismiss the appeal with costs.



## Analysis and determination

36. 6. In the case of *Selle & Another vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123, the court held as follows: -

“...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...”

37. I will consider this appeal using the lens.

38. Having carefully considered the record, the grounds of appeal, and submissions, the instant appeal revolves around three principal issues:

- a. What was the form of the Respondent’s engagement with the Appellant?
- b. Whether the Learned Magistrate erred in finding that the Respondent’s employment was unfairly terminated; and
- c. Whether the Respondent was entitled to the remedies granted.

### What was the form of the Respondent’s engagement with the Appellant?

39. It bears repeating that the label parties accord to their relationship matters not. Whenever there is a dispute regarding the termination of an employee’s employment, and there is no clarity about the form of their engagement, the Court must cut through the label and determine the exact nature. Such an exercise is essential, as the *Employment Act* 2007 protects and extends rights to employees engaged in different forms of employment differently.

40. This Court notes that throughout their Response to the Memorandum of Claim, the Appellant averred that at all material times the Respondent was engaged as a piece-rate worker, who could be engaged occasionally and was paid only on the basis of the quantity of salt staked during the shift. This was maintained by their witness in his witness statement [turned evidence].

41. It is at this juncture that this court must emphasise that the parties are singularly bound by their respective pleadings. Any evidence or position adopted by a party which deviates from its pleadings would not assist its case.

42. The Appellant’s Counsel argued that the Respondent was, at all relevant times, a piece-rate worker and consequently not an employee of the Appellant, but rather an independent contractor. This assertion is entirely incorrect. Working on a piece-rate basis does not constitute a contract for services. The two concepts are fundamentally distinct. This Court has not lost sight of the Respondent’s position that, at all material times, he was engaged as a casual worker, whose status morphed to a term employee by operation of the law.

43. Section 2 of the *Employment Act* defines piece work as;

“Any work the pay for which is ascertained by the amount of work performed, irrespective of the time occupied in its performance.”



44. Section 18 of the *Employment Act* provides for when wages and salaries for various categories become due. It provides in part that;
- “ 1. Where a contract of service is entered into under which a task or piece-work is to be performed by an employee, the employee shall;
    - a. When the task has not been completed, at the option of his employer, to be paid by his employer at the end of the day in proportion to the amount of the task which has been performed, or to complete the task on the following day, in which case he shall be entitled to be paid on completion of the task; or
    - b. In the case of piecework, to be paid by his employer at the end of each month in proportion to the amount which he has performed during the month, or on completion of the work, whichever date is earlier.”
45. Undoubtedly, the *Employment Act* 2007 categorises piece rate work arrangements as contracts of service, and not contracts for service, as the Appellant wants this Court to hold.
46. I find it imperative to point out that in order to determine whether a worker is an independent contractor or an employee, courts need to look at the circumstances of each case. See the Canadian Supreme Court decision in *Ontario v Sagaz Industries Canada Inc.* [2001] 2 SCR 983; 2001 SCC 59.
47. In *Ready Mixed Concrete [South East] Limited v Minister of Pensions and National Insurance* [2010] BTC 49, the Court addressed some of the factors to consider in determining whether one was an employee and therefore under a contract of service. The factors are;
- a. The servant agrees to provide his work and skill by providing for this matter, in consideration of wages or other remuneration.
  - b. The servant agrees that in the performance of that service, they will be subject to the master’s control. Control includes the power of deciding the things to be done, the way in which it shall be done, the means to be employed and in deciding it, the time and place where it shall be done.
  - c. The contract of service complies with the terms of the employment agreement. This entails compliance with the statutory requirements under the *Employment Act*, including the minimum wage, leave provisions, and the payment of income tax.
48. At this point, it must be stated that the Appellant’s position is that the Respondent was not its employee, a result of a misguided characterisation of piece-rate work as a contract for service engagement.
49. Section 2 of the *Employment Act* defines a casual employee as a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.
50. This Court notes that despite the Respondent’s express plea that he was first engaged as a casual labourer and had continuously worked as such for approximately 17 years, the Appellant, having taken the counter position that he was a piece-rate worker, didn’t tender sufficient evidence to support this position. The evidence would include documents demonstrating attendance registers, as these could particularly discount the Respondent’s assertion that he continuously worked for approximately 17 years, and would show how and when work was done and the character of payments made.



51. The Appellant, having failed to substantiate that the relationship between it and the Respondent was as it purported, I have no reason to doubt the Respondent's account that he was initially employed as a casual labourer and continued in that capacity for approximately seventeen years. As his testimony on this matter was not sufficiently challenged, I am also convinced that, by operation of law, specifically section 37 of the *Employment Act*, his employment transformed into an indefinite contract of employment, thereby entitling him to the protections and rights provided under the *Employment Act*.
52. By reason of these premises, I hold that the learned trial Magistrate's finding that the Respondent was at all material times an employee of the Appellant, and to whom the protections and rights under the *Employment Act* applied.

#### **Whether the termination was unfair**

53. Invited to consider whether the termination of a san employee's employment meets the fairness test. Substantive justification and procedural fairness are the two statutory pillars that a Court must consider. The learned trial Magistrate appreciated this.
54. Section 43 of the *Employment Act*, 2007, places a legal burden on the employer in a dispute regarding termination of an employee's employment to prove the reason for the termination. It is important to point out that where the employer does not discharge this burden, the termination shall be deemed unfair by dint of the provisions of section 45 of the Act. Blurred by the position they took, to the effect that the Respondent was not their employee, the Appellant did not plead, nor present any evidence regarding the reasons for the termination. It isn't difficult to conclude, therefore, that the Appellant did not discharge the legal burden under the stated section. The learned trial Magistrate didn't err in finding that the termination of the Respondent's employment was unfair.

#### **Whether the Respondent was entitled to the reliefs awarded.**

55. Having found as I have herein above, that the Respondent's engagement was indefinite, I take the view that it was terminable by notice under section 35(1)(c) of the *Employment Act*. It is undisputed that the notice was not issued. There was no payment in lieu. The relief was deservedly granted.
56. Section 35(5) of the Act provides for the benefit of service pay. However, this Court hasn't lost sight of the fact that the provision has set out categories of employees who are not eligible for the benefit. There was no evidence presented before the trial Court to show that the Respondent fell under any of the exempted categories of employees. The learned trial Magistrate did not err in granting the relief.
57. It is imperative to point out that section 49[1][c] of the *Employment Act* bestows upon the courts the power to grant compensatory relief for unfair termination. However, it is essential to note that the power is discretionary and is exercised in light of the circumstances of each case. In awarding the Respondent ten months' gross salary, the learned Magistrate exercised discretion and gave reasons for the exercise.
58. I have carefully considered the foregoing premise, the specific reasons the learned trial Magistrate advanced for the award, and the principle that a finding arrived at after an exercise of judicial discretion can be disturbed only where certain specific factors are present, namely that the Court misdirected itself in law, misapprehended the facts, took into account matters of which it should not have taken into account, and failed to take into account matters of which it should have taken into account. Further, the decision, albeit discretionary, is plainly wrong. See also *Mbogo and another v- Shah* [1968] EA 93.



59. I am not persuaded that the Appellant has demonstrated any of the factors that would warrant this court to disturb the compensatory award.

60. In the upshot, I find the Appeal herein lacking in merit. It is hereby dismissed with costs.

**READ SIGNED AND DELIVERED THIS 5<sup>TH</sup> DAY OF FEBRUARY 2026.**

**OCHARO KEBIRA**

**JUDGE**

