REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

ELRC APPEAL NO. E149 OF 2025

MINI BAKERIES (MSA) LIMITED. ……..

…..APPELLANT

VERSUS

KENNEDY DZUYA CHIVILA.

……RESPONDENT

(Being an appeal from the judgment and resultant decree of the Chief Magistrate's Court at Mombasa (Hon. Segomo PM) delivered on 18th July 2025 in Mombasa CMELRC Cause No. E256 of 2024)

JUDGMENT

Background

1. By a Memorandum of Claim dated 11th April, 2024, the Respondent sued the Appellant in the above-mentioned suit seeking the following reliefs;

a) Payment of his terminal and contractual dues amounting to KShs. 602,000.00/=.

b) Costs and Interests of this suit.

c) Any other relief that the Court may deem fit to grant.

2. The Appellant resisted the Respondent's claim through a Statement of Response dated 31st October, 2024, denying the Respondent's cause of action and the reliefs sought. Principally, they contended that at all material times, the Respondent was a casual worker who only worked for them as and when there was a need.

3. After hearing the parties on their respective cases and considering their evidence, the Learned trial Magistrate found for the Respondent, awarding him a cumulative amount of KShs. 103,154 under various heads of the Respondent's pleadings, namely one month's salary in lieu of notice, house allowance, compensation for unfair

termination, two months' gross salary, and service pay. The judgment is the subject matter of this appeal.

Respondent’s case in the lower court

4. It was the Respondent’s case that he was employed by the Appellant on 1st June 2011 as a Baker in the Production Department and worked continuously until 16th May 2023, when his employment was terminated. He further stated that his contract of employment was oral and his monthly salary was KShs. 30,000.
5. On 16th May 2023, he arrived for his afternoon shift at 2:00 p.m. but was verbally informed by the Appellant’s manager, Mr. Mohammed Nyota, that his services were no longer required. The manager instructed him to surrender the Appellant’s property and leave the premises. He was given no reason for the action or an opportunity to be heard.

6. The Respondent contended that the termination amounted to redundancy, yet the Appellant failed to comply with the

mandatory statutory requirements, including giving notice and paying severance pay.

7. The Respondent further contended that the Appellant failed to comply with the procedural requirements under section 41 of the Employment Act and Article 41(1) of the Constitution, which guarantee the right to fair labour practices.

8. He stated that the Appellant's action was in violation of the stipulations of Sections 40, 43, and 45 of the Employment Act.

9. He stated that during his employment, he was never allowed to take annual leave and was not given a house allowance as required by law. He also worked overtime without any pay.

10. The Respondent further alleged that the Appellant failed to remit statutory deductions, including NHIF and NSSF, on his behalf to the relevant authorities.

11. The Respondent contended that the termination was unfair, wrongful, and unprocedural, having been carried out

in breach of the Employment Act and the rules of natural justice.

Appellant's case

12. The Appellant's case was that the Respondent was never a permanent or regular employee, but a casual labourer engaged on an intermittent, day-to-day basis. According to the Appellant's witness, Bellamine Nabwire Akide, the nature of the Appellant's business requires the engagement of casual workers who are paid daily wages, are free to report to work when they choose, and are free to work for other employers when not engaged by the Appellant.

13. They stated that the Respondent first worked with it sometime in 2014, but was never consistently at work. Further, the Appellant operates three eight-hour daily shifts and maintains a muster roll for attendance tracking. On the basis of muster rolls for the period between January and May 2023, the Appellant contended that the Respondent worked

sporadically, reporting to work for as few as eight days in some months, and never more than thirteen days in any month, in contrast to regular employees who work twenty-six days per month.

14. The Appellant additionally claimed that on days the Respondent was absent from work, he was not questioned, reprimanded, or disciplined, since his engagement was casual and his attendance was voluntary. They stated that the Respondent received a daily wage of KShs. 1,096, rather than a monthly salary of KShs. 30,000 as alleged. The Appellant supported this by referencing daily payment vouchers that show compensation for days actually worked.

15. The Appellant further stated that whenever the Respondent reported to work in a given month, even if only for a few days, the Appellant remitted his NHIF and NSSF contributions in compliance with statutory requirements. The Appellant further avers that the Respondent was free to, and did, work for other employers, citing NHIF records indicating concurrent engagement with another employer.

16. Finally, the Appellant maintained that the Respondent last reported to work on 17th May 2023, and that his engagement simply ceased thereafter without any termination by the Appellant. As the Respondent was a casual worker, the Appellant asserts that it had no obligation to issue notice, follow up on attendance, or pay terminal dues. On this basis, the Appellant denies any unlawful termination and prays that the Claim be dismissed with costs.

Judgement

17. The Learned trial found that the Respondent's assertion that he continuously worked for the Appellant was not controverted. By virtue of his continuous employment, his employment was converted to term employment under Section 37 of the Employment Act. The rights and protections afforded by the law were available to him.

18. The trial Court concluded that the Respondent's employment was terminated at the Appellant's initiative.

Further, the termination was procedurally and substantively unfair. Consequently, he awarded the Respondent the amount stated herein before.

The Appeal

19. Dissatisfied with the judgment of the lower court, the Appellant filed the instant appeal, setting out the following grounds.

I. The learned magistrate erred in law and fact by concluding that the Respondent's employment had been converted to permanent.

II. The learned magistrate erred in law and fact by failing to determine whether a termination of employment had in fact been proven.

III. The learned magistrate erred in law and fact in awarding house allowance despite section 31(2) of the Employment Act 2007.

IV. The learned magistrate erred in law in awarding service pay after finding that NSSF deductions had been made.

Analysis and determination

20. Before I delve further into considering the merits or otherwise of the appeal herein, I find it imperative to appreciate the role of this court as a first appellant Court in this appeal.

21. In the case of **Prudential Assurance Company of Kenya Limited vs Sukhinder Singh Jutley and Another [2007] eKLR,** on the role of a first Appellate Court, the Court of Appeal stated;

> ***"As a first Appellate Court, it is our duty to treat the evidence and the material tendered before the Superior Court to a fresh scrutiny and draw our own conclusion, bearing in mind that we have not seen or heard the witnesses and giving due allowance for this-See Selle v Associated Motor Boat Company Limited [1968] EA 123."***

22. It shall be with this lens that I will approach the Appellant's appeal herein.

23. I have carefully considered the record, the learned trial Magistrate's judgment, and submissions by Counsel for the parties, and the following issues emerge for determination in this Appeal: -

i. Whether the trial court erred in finding that the Respondent's employment had converted from casual to permanent terms under section 37 of the Employment Act, 2007.

ii. Whether the trial court erred in finding that the Respondent had been unfairly terminated.

iii. Whether the trial court erred in awarding house allowance and service pay for the Respondent.

Whether the trial court erred in finding that the Respondent's employment had converted from casual to permanent terms under section 37 of the Employment Act, 2007.

24. There was no dispute before the learned trial Magistrate that the Respondent was engaged by the Appellant. However, there was a dispute, as the parties took

diametrically opposed positions regarding how the engagement was executed and the form of employment. A careful consideration of the Respondent's pleadings reveals that the Respondent asserted that his engagement with the Appellant was indefinite. The Appellant's pleadings, on the other hand, reveal a different form of employment, casual worker engagement, which was intermittent in nature.

25. The learned trial magistrate appropriately identified the nature of the engagement as a matter for determination. An issue for determination is a specific, definite, and material point that arises from the parties' allegations and arguments, maintained by one side and contested by the other.

26. Having said this, I find no difficulty in concluding that I am not persuaded by the Appellant's contention that the issue of casual employment was not pleaded by the Appellant, and as such, he erred in making a finding on the fact that the casual engagement pleaded by the converted into an indefinite form of employment. The decision in

Angeline Musali Mutua v Vegpro [K] Ltd [2020] KEELR 1189 [KLR], in the circumstances of the instant matter, cannot be helpful to support the Appellant's position.

27. Without forgetting that the matter before the trial court proceeded on the basis of pleadings and witness statements, an approach which, in my view, should be engaged in suits where issues are not heavily contested, which the suit before the learned trial Magistrate wasn't, this Court notes that Counsel for the parties, in their submissions, substantially submitted on the applicability of section 37 of the Employment Act, 2007, on the relationship between the Appellant and the Respondent. The issue of conversion was expressly left to the trial Court by the parties to determine, even if it were assumed, for the moment, that it was not pleaded. And it is here that the principle in the **Odd Jobs v Mubia [1970] E. A 476,** set in. A court may decide an issue even if it wasn't pleaded, where the evidence and course of trial leave the matter open for determination.

28. Where an employee engaged on a daily or casual basis works sufficiently consistently to meet the legal thresholds stipulated in section 37(1), their employment shall be regarded as having transitioned into a contract of service with monthly terms, thereby providing protections against unfair termination or dismissal.

29. In **Otieno v University of Nairobi [2023] KEELRC 2012 (KLR),** the Court held that,

> ***"The appellant pleaded that her casual employment be deemed to have converted to one subject to statutory minimum terms and conditions per section 37 of the Employment Act, 2007. The test is if the casual employee works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or, performs work which cannot reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract***

of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service."

30. In the case of **ISL Kenya Limited v Nzau [2025] KEELRC 904 (KLR**), the Court held that,

"From the foregoing, it is clear that the Respondent was no longer a casual employee having worked continuously for more than a year."

31. In the case of Nanyuki Water & Sewage Company Limited v Benson Mwiti Ntiritu & four others [2018] KECA 196 (KLR), the court held that Section 37 automatically transforms casual employment into a regular (term) contract by operation of law once the statutory criteria are satisfied. This process is non-discretionary and results in the employee being treated as if they had never been employed on a casual basis, particularly for purposes of notice and employment protections. The Court held;

"Consequently, we find and hold, as the trial court did, that the contracts of service of the respondents assumed permanency and were "deemed to be ones where wages are paid monthly, and section 35 (1) (c) shall apply to that contract of service" in terms of section 37."

32. The trial Court was convinced that the Respondent's assertion that he had continuously worked for a number of years for the Appellant before his employment was terminated was not sufficiently rebutted. The muster rolls they tendered in evidence didn't support their defence. Statutory deductions were remitted regularly, denoting continuous employment.

33. Having pleaded that the Respondent didn't work for them continuously but intermittently, as and when there was need, it fell on the Appellant to produce the muster rolls, not selectively but for the entire period in issue. Inexplicably, the Appellant placed before the trial Court muster rolls for a very

insignificant period of the period in issue. Furthermore, I have thoroughly reviewed the submitted muster roll; although there is a designated space for employee signatures, they have not been signed. The Respondent categorically denied signing the Payment vouchers that were presented in evidence by the Appellant. The signatures attributed to the Respondent differ across all four vouchers, which is readily apparent to the naked eye.

34. By reason of the foregoing premises, I hold that the learned trial Magistrate did not err in finding that the employment relationship between the Appellant and the Respondent, which the Appellant asserted was casual work and intermittent, was converted into an indefinite employment by operation of the law.

Whether the trial court erred in finding that the Respondent had been unfairly terminated

35. Under Section 45 of the Employment Act, the termination of an employee's employment shall be deemed unfair if the employer fails to demonstrate valid and

justifiable reasons for such termination, and if procedural fairness, as required by the law, is not duly observed during the process leading to the termination.

36. However, it is important to point out that the burden under the above-stated provision only falls on the employer in situations where the employee satisfies the burden imposed on them by section 47[5] of the Employment Act, to *prima facie* demonstrate that an unlawful termination or wrongful summary dismissal occurred. The demonstration would entail showing*, prima facie,* that the termination or summary dismissal lacked procedural and substantive fairness. In **Josephine M. Ndungu & Another v Plan International Inc [2019] eKLR,** the Court stated;

> ***"Under Section 47 [5] of the Employment 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. The said provision bars employers from terminating an employee's contract except for a valid and fair reason and through a fair procedure."

37. I have carefully considered the Respondent's evidence, pleadings, and witness statement placed before the trial Court. I find that he discharged his burden under section 47[5] of the Employment Act.

38. In the case of **Pius Isindu Machafu vs Lavington Security Guards Limited [2017] eKLR**, the Court of Appeal stated;

" ***13. There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligation on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of employment contract and unfair termination involving breach of statutory law. The employer must prove reasons for termination/dismissal***

[section 43]; prove the reasons are valid and fair[section 45]; prove that the grounds are justified[section 47[5]; amongst other provisions……..”

39. Blurred by the firm stance that the Respondent did not prove termination—which, based on the preceding reasoning, I find to be incorrect—the Appellant did not present any evidence to the trial Court showing the reason for the termination, that the reason was valid and fair, or that it was justified. Therefore, in the absence of such evidence, the trial Magistrate did not err in concluding that termination occurred and that it was unfair.

40. The Appellant argued that the learned trial Magistrate improperly permitted the Respondent’s claim for house allowance, asserting that the daily salary of KShs. 1,096.00 already encompassed the house allowance. House allowance is a statutory entitlement for an employee and a corresponding obligation on the employer to remunerate, in accordance with section 31 of the Employment Act. The

Appellant did not place any evidence before the learned trial Court to demonstrate that the amount was a consolidated amount. The assertion in submissions that it did, in my view, isn't helpful, as submissions are never a substitute for evidence. The learned trial Magistrate didn't err in awarding house allowance.

41. Given the tone of the Respondent's pleadings and witness statement, it is clear that he was a member of the National Social Security Fund. His grievance was that the Appellant failed to remit contributions to the relevant authority on his account as required by law. As such, he was entitled to service pay. Section 35 of the Employment Act, 2007, expressly sets out categories of employees who are not entitled to service pay, including members of the National Social Security Fund. My understanding of the provision is that the employer's failure to dutifully remit contributions to the relevant authority does not exempt the affected employee [who is a member of NSSF] from the category of employees who, by operation of law, are

prohibited from alleging or pursuing entitlement to service pay.

42. I say this because the relevant statute has provided mechanisms for remedying and punishing the default. Exempting the provision under Section 35 of the Employment Act isn't one of them.

43. Having said this, I come to the inevitable conclusion that the relief, service pay, was not available to the Respondents in the circumstances of the matter. The learned trial Magistrate erred in awarding the same.

44. In the upshot, the appeal herein succeeds to a very limited extent. The award of service pay is hereby set aside. As the success is minimal, each party shall bear its own costs.

Read Signed and Delivered this 12th Day of February 2026.

OCHARO KEBIRA

JUDGE