REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

APPEAL NO. E007 OF 2025

WHITESANDS SAROVA HOTEL LIMITED……. APPELLANT

VERSUS

CAMLUS OCHIENG OMBURO ……..… RESPONDENT

[Being an appeal from the judgment of Hon. J. B. Kalo delivered on 3 December 2024 in Mombasa CMELRC No. 4823 of 2001]

JUDGMENT

The appeal arises from the judgment delivered on 3 December 2024 in Mombasa CMELRC No. 4823 of 2001. The appellant is seeking that the judgment be set aside and the claim dismissed with costs.

The appeal is based on the grounds that the learned magistrate erred in law and fact by finding that the appellant had permanently employed the respondent and that the appellant unlawfully terminated his employment. The trial court failed to analyse the evidence and the fact that the respondent was taken through the internal disciplinary procedures in the handling of medical expenses, and hence wrongly awarded him a medical refund.

Other grounds of appeal are that the trial court misapplied the law and awarded exorbitant damages for wrongful termination of employment. The award of costs and interest from the date of filing the suit was not justified, considering the judgment delivered on 12 June 2018 in **Civil Appeal No. 95 of 2002**, which set aside the ex parte judgment entered against the appellant. Hence, the respondent cannot benefit from its own irregularity by claiming costs.

The claim was that the appellant employed the respondent as a storekeeper at a wage of Ksh. 12,000 plus a house allowance of Ksh. 2,000. He claimed that he was permanently employed and his employment was unlawfully terminated.

The respondent hence claimed the following:

a) A finding that the appellant permanently employed him.
b) Terminal benefits Ksh. 460,238.

c) Damages for wrongful termination.
d) Service charge from December 1998 to October 1999.
e) Costs and interests

In response, the applicant's case was that the claim by the respondent was defective for want of compliance with Order VII of the Civil Procedure Rules and ought to be struck out. It was admitted that the respondent was an employee as a storekeeper at a monthly wage of Ksh. 4,923 and a house allowance of Ksh. 1,902 and not Ksh. 12,000 and Ksh. 2,000, respectively, as alleged. The employment relationship was governed under a collective agreement (CBA) between the Kenya Association of Hotelkeepers and Caterers and KUDHEIHA. Employment was terminated on 21 July 2001, and there was payment of all terminal dues as required under the CBA. Termination of employment was procedural and not unlawful as alleged, and notice was issued. The claims made are without merit and should be dismissed.

The learned magistrate heard the parties and held that the respondent was a permanent employee of the appellant and hence protected under section 37 of the Employment Act. He was entitled to notice pay due to the unlawful termination of employment.

The wages included a basic pay of Ksh.4,923 plus a house allowance of Ksh. 1,902 as evidenced by the pay slips produced. The respondent also earned a service charge on average of Ksh.5,695, making a gross pay of Ksh. 12,520 per month. Employment terminated through notice dated 25 July 2001 with effect from 31 July 2001, and no reasons were given; hence, this was unfair and unlawful. On this basis, the learned magistrate analysed the claims and made the following awards:

a) Notice pay Ksh. 12,520.
b) Leave pay Ksh. 25,040.
c) Damages for wrongful termination Ksh. 125,200.
d) Medical refund Ksh. 41,955.

On the appeal, the appellant submitted that the respondent filed his claim before the trial court on 7 December 2001. He claimed that, as an employee of the appellant, his employment was unlawfully terminated. There was an ex parte judgment entered. The appellant filed an appeal which overturned the judgment. The matter was heard afresh, resulting in the judgment delivered on 3 December 2024, which led to this appeal.

The appellant submitted that the respondent claimed to have been employed by the appellant permanently. He was a casual employee, serving as a storekeeper when the hotel had a workload. The employment could not be terminated as claimed, as there was no permanent employment.

The respondent claimed to be a member of the Kenya Union of Domestic Hotels, Educational Institutions, Hospitals, and Allied Workers (KUDHEIHA); however, he did not produce any documentary evidence to substantiate his membership. He had no right or claim under the CBA entered into by the appellant and the union.

The respondent was earning a basic wage of Ksh. 4,923 and a house allowance of Ksh. 1,902.

The applicant submitted that the nature of employment was casual and not permanent. Employment commenced with an application dated 30 October 1998 for the position of storekeeper, as evidenced by pay slips, NSSF, and NHIF records. The respondent failed to prove when he was employed after his job application to the appellant. The records of work are held by the appellant, the employer, as held in **Peter Ngunjiri Kariuki v Board of Management Magomano Secondary School [2022] eKLR.**

Under the Evidence Act, the respondent bore the burden of proving his employment status. He failed to discharge this burden. In the letter dated 18 February 1999, the respondent protested union dues deductions and described himself as a frustrated casual employee who had worked for only 3 months. The pay slips issued to the respondent indicated he was a casual employee.

The appellant produced records showing the respondent's employment status from December 1998 to December 1999 and from January 2000 to July 2001.

i) In the letter dated 7 December 1998, a response to the application for employment.
ii) Petty cash voucher payment for 5 March to 30 June 1999.
iii) Protest letter of 18 February 1999 to KUDHEIHA that he was not due for union dues deductions.
iv) Termination letter dated 28 June 1999.

The appeal is that the respondent was employed on a 6-month term contract and, when work was available, as a casual employee. Records evidence this.

i) Pay slips December 1999, May 2000, June 2000, and January 2001.

ii) Termination letter dated 25 July 2001.

The appellant submitted that section 37 of the Employment Act applies to casual employees who work for periods exceeding one month or whose tasks extend beyond three months. The records submitted demonstrate that there was no continuous service. The respondent did not plead that his employment was converted under the law to permanent terms.

The appellant submitted that termination for employment was for fair and reasonable cause. In **Kenya Revenue Authority v Reuwel Waithaka Gitah & others [2019] eKLR,** the court held that an employer's duty is discharged once it demonstrates fair reasons and compliance with the CBA or contract of service. The respondent was on a short-term contract and was not entitled to protection beyond the term of his contract.

The trial court erred in applying **Evans Ketiezo Aligutah v Eldomatt Wholesale & Supermarket Ltd [2014] eKLR,** in which the court held that casual employment had converted into permanent employment upon long and continuous employment. This was not the case with the respondent.

The trial court awarded the respondent Ksh. 41,955 for medical treatment due to the respondent being denied access to the staff clinic. There was no evidence that he was entitled to such access under the contract or CBA. The respondent only worked for the respondent in May 2000; therefore, the receipts dated 23 February 2000, 17 July 2000, 21 September 1999, 9 November 2000, 13 December 2000, and 11 December 2000 for treatment notes were for periods outside employment. The respondent cannot benefit from a period outside his casual employment under a short-term contract.

On the award of damages ksh. 125,200 for 10 months' salary for the alleged wrongful termination of employment, which had no legal basis. Under section 49 of the Employment Act, compensation awarded should be justified and consider the parameters of section 49(4) thereof. In this case, there is no basis for awarding compensation.

The award of costs and interests from the date of filing suit has no legal basis or justification. The ex parte judgment was set aside upon appeal. The matter was heard afresh, and the respondent cannot benefit from a period that the Court of Appeal has since addressed in Civil Appeal No. 95 of 2002, delivered on 12 June 2018. The judgment binds the trial court.

The appeal should be allowed with costs.

The respondent submitted that on 30 October 1998, he applied for employment with the appellant as a storekeeper and, through a letter dated 7 December 1998, was invited for a job interview. He was successful but was not issued a letter of appointment as required under the CBA. The salary was negotiated at ksh. 12,000 per month plus a house allowance of Ksh. 2,000.

The respondent submitted that on 7 April 1999, he fell sick and went to the appellant's doctor for treatment. The doctor refused to attend to him based on the instructions of the respondent that he was a casual employee. The respondent complained to the human resource office and was warned that if he continued to do so, he would be dismissed from his employment.

On 30 June 1999, the respondent terminated the respondent's employment through notice dated 28 June 199. The respondent escalated the matter to the general manager, who intervened, and there was a reintegration.

The respondent submitted that his first pay slip was issued in October 1999 for the position of clerk grade 6 instead of the storekeeper grade 7. He wrote a letter dated 5 November 1999 complaining about the anomaly, but the human resource office did not address. The respondent served diligently until 31 July 2001, when his employment was terminated without any notice or valid reasons as per the CBA requirements. There were 2 CBAs regulating employment from 1995 to 1998 and from 1999 to 2001. The termination of employment was escalated to the union through the shop steward, and a claim, Mombasa 4323 of 2001, was filed seeking payment of terminal dues.

The respondent submitted that he was a permanent employee of the appellant and that his employment was governed by the CBA. Evidence was called to confirm continuous service from December 1998 to 31 July 2001, a period of 2 years and 8 months. In the case of **James Nyaenga & 2 others (suing on their behalf and on behalf of others and employees of Auto Spring Manufacturers Limited) v Auto Spring Manufacturers Limited [2007] eKLR,** the court held that the employees demonstrated continuous service to the employer. Thus, as a member of the union, KUDHEIHA, the respondent was entitled to the benefits under the CBA, including permanent employment.

There was unlawful termination of employment contrary to the principles addressed in the case of **Pius Machafu Isindu v Lavington Security Guards [2017] eKLR** that under section 45(5) of the Employment Act, the employer has the burden of proving the reasons for termination of employment and that there was procedural justice. These are lacking in this

case. The termination letter dated 25 July 2001 did not give reasons or notice, to allow the respondent the opportunity to defend his case.

The claims for medical treatment are justified since the respondent was a permanent employee of the appellant. Damages awarded are justified due to the unlawful and unfair termination of employment. The costs and interests awarded are discretionary and due in this case.

The appeal lacks merit and should be dismissed with costs.

Determination

As this is a first appeal, the court is required to review the record, reassess the findings, and reach a conclusion. However, take into account that the trial court had the chance to see and hear the witnesses testify in court under the principles addressed in the case of **Gitobu Imanyara & 2 Others v Attorney General [2016] KECA 557 (KLR),**

> *This Court is not bound necessarily to accept the findings of fact by the court below, and that an appeal to this Court from a trial by the High Court is by way of retrial and the 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 allowances in this respect. See Selle and Another v. Associated Motor Boat Company Limited and others [1968] EA 123 and Williamson Diamonds Ltd. v. Brown [1970] E.A.L*

The issues which emerge for determination in this appeal are the nature of the employment relationship between the parties, and from it, whether there was an unlawful termination of the employment; and whether the reliefs sought are meritorious with the award of costs plus interests from the date of filing suit.

It is common cause that through a letter dated 25 July 2001, the appellant terminated the respondent’s employment with effect from 31 July 2001. No reason is assigned to the letter.

The parties have also admitted that the shop-floor relations were regulated by a CBA between KUDHEIHA and the Kenya Association of Hotelkeepers and Caterers.

Through a letter and demand dated 3 August 2001, KUDHEIHA, representing the respondent, sought to challenge the decision to terminate the employment of the respondent.

To begin with, employment terminated with effect from 31 July 2001. The operative law is the Employment Act (repealed) and not the Employment Act, 2007. Under the relevant law, the employer was at liberty to terminate employment subject to payment of notice pay as agreed under the written contract or in accordance with the CBA in place.

The application of section 37 of the Employment Act, 2007, to the employment status of the respondent did not apply. Whether he was casual or not, the records filed after his employment interview on 7 December 1999 show that he was a casual employee of the appellant. Under such employment, whether unionised or not, the respondent could not claim the protections of section 37 of the Employment Act, 2007, as held in **Mwau & 9 others v Excel Chemicals Limited [2026] KEELRC 142 (KLR)**

In **Rashid Odhiambo Ologgoh & 245 others v Haco Industries Limited [2007] eKLR**, the court emphasised that casual employment is permissible under the law. This was more so in a case premised on the repealed Employment Act. See **Were v Staffing Africa Limited & another [2025] KEELRC 3544 (KLR)** and **Rashid Odhiambo Allogoh & 245 others v Haco Industries Limited [2015] KECA 376 (KLR).**

The concept of unfair termination of employment came into effect only in 2007, with the enactment of the Employment Act, 2007. Such a concept does not apply retrospectively back to 31 July 2001 when employment was terminated between the parties. Despite the trial court's judgment being delivered on 3 December 2024, the applicable legislation remains the repealed Employment Act, as in force in July 2001.

Indeed, as admitted by the parties, at the time the employment relationship subsisted, the law that applied to employment contracts or casual employment was the repealed *Employment Act*, No. 2 of 1976. Under the Act, an employee was a servant who served at the pleasure of his employer, who was deemed to be his master. All that was required of an employer in the event of termination of employment was to give notice or pay in lieu of notice. The employer was further entitled to summarily dismiss an employee for gross misconduct, a determination made solely by the employer, as there was no requirement for a hearing prior to dismissal, as held in **Tanui v National Police Service Commission & 2 others [2026] KEELRC 349 (KLR)**

Upon admission of the applicable CBA, the cadre under which the respondent was employed as a stores keeper, grade, was a protected cadre. This is confirmed under the payment statement issued to him by the appellant. There were remittances to his trade union of choice,

KUDHEIHA and a percentage to COTU. Notwithstanding the respondent's protests that he was not benefiting under the CBA, his unionisation was secured.

The CBA document thus regulated the employment relationship to the extent that under clause 9, parties agreed that before terminating employment, an employee who had served under 5 years would be issued with 2 months' notice or a payment. An employee who had served up to 10 years, 3 months' notice or payment. An employee who had served for more than 10 years would get 4 months' notice or a payment thereof.

In this case, the respondent does not challenge that he worked for the appellant intermittently and therefore sought protection under section 37 of the Employment Act, 2007. Even where he was to claim employment, his employment was terminated on 28 June 1999. He was later reinstated, thereby constituting a breach of the employment relationship.

The only continuous period of service is thus from June 1999 to 31 July 2001, a period of 2 years. Under clause 9 of the subject CBA, the respondent is only entitled to notice pay of two months. This is the protection offered under the document regulating his employment in the absence of a written contract of service.

The respondent asserts that his wage was ksh. 12,000 per month. However, wages comprise the basic pay plus the housing allowance. The additional benefit of the service charge, although a benefit under the CBA, was not a constant income. In tabulating the due wage under the payment statement, the constant dues are basic pay at ksh. 4,923 plus house allowance Ksh. 1,902. The hotel service charge is the average amount earned per month.

The due wage is Ksh. 6,825. The 2 months' notice is Ksh. 13,560.

On the award of notice pay, unlike the case under the Employment Act, 2007, the repealed Employment Act was not as generous. However, under the CBA, clause 12 allowed 26 leave days for every full year served. The respondent served two years and a month. On the basic wage applicable to the calculation of leave pay at Ksh. 4,923 he had 46 leave days all at Ksh. 7,548.60.

The award of damages on the finding that there was unfair and unlawful termination of employment, although allocated as for wrongful termination of employment, does not accrue under the repealed law. Such only arise under section 12 of the Employment and Labour Relations Court Act, as held in **Kenya Ports Authority v Munyao & 4 others (Petition E008 of 2023) [2023] KESC.**

As an employee of the appellant, governed by the CBA, the respondent was entitled to the benefits thereunder. The fact of the appellant making a union deduction and remitting to his trade union and COTU gave the respondent the protections therefrom. To deny him the medical treatment at the medical facility of the appellant as the employer on the basis that he was a casual employee and hence not insured was discriminatory. The respondent's sole claim is for a refund of medical expenses. He submitted records to this effect. The award of a medical refund at Ksh. 41,955 is justified.

In the penultimate, the award of costs in employment and labour relations disputes has, since the Industrial Court, been discretionary. It can only be awarded on justified basis and with a justification thereof. None issued by the trial court. This court finds no basis or justification for the award of costs, despite the matter having been litigated repeatedly.

Each party bears its costs.

Accordingly, judgment in Mombasa CMCC No. 4823 of 2001 is hereby reviewed in the following terms:

a) **Notice pay Ksh. 13,560.**
b) **Leave pay Ksh. 7,548.60.**
c) **Medical refund Ksh. 41,955.**
d) **Each party to bear its costs for the trial court and this appeal.**

Delivered in open court at Mombasa, this 19th day of February 2026.

M. MBARŨ

JUDGE

In the presence of:
Court Assistant: Omar
………… and ……..……..