

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

APPEAL NUMBER E330 OF 2024

CYKA MANPOWER LIMITED.....APPELLANT

VERSUS

KIPROTICH ENOCH.....1<sup>ST</sup> RESPONDENT

DERRICK SHIKUKU TENDWA.....2<sup>ND</sup> RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Hon. D. O. Mbeja (PM)  
delivered on 30<sup>th</sup> October 2024 in Nairobi MCELRC No. E1058 of 2021)*

CORAM

*Before Lady Justice J. W. Keli*

*C/A Otieno*

JUDGMENT

1. The Appellant herein, being dissatisfied with the entire Judgment and Decree of the Hon. D. O. Mbeja (PM) delivered on 30<sup>th</sup> October 2024 in Nairobi MCELRC No. E1058 of 2021 filed a Memorandum of Appeal dated the 12<sup>th</sup> of November 2024.

Grounds of the appeal

2. The Honourable Magistrate erred in fact and in law by holding that the Respondents were unfairly terminated.

3. The Honourable Magistrate erred in fact and in law in finding that the Respondents were entitled to compensation for wrongful, unfair and unlawful termination while failing to consider the timelines of the fixed term contract which had expired.
4. The Honourable Magistrate erred in fact and in law in failing to consider the overwhelming evidence provided by the Appellant that the Respondents were employed on a fixed term contract which had been brought to an end by its expiry thereby conferring unmerited awards to the Respondents.
5. The Honourable Magistrate erred in fact and in law in holding that the Appellant failed to follow due procedure for terminating Respondents' employment.
6. The Honourable Magistrate erred in fact and in law in failing to consider that an expiry of a contract cannot be termed as unfair termination.
7. The Honourable Magistrate erred in fact and in law by holding that the claimants were entitled to house allowance, one month pay in lieu of notice and compensation.
8. The Honourable Magistrate erred in fact and in law by finding that the Respondents were entitled to house allowance yet the same was included in their consolidated salary provided in their contract of employment.
9. The Honourable Magistrate erred in fact and in law by finding that the Respondents were entitled to one month notice while failing to consider that the Respondents were on fixed term contract, which they knew their expiry date and termination notice was not applicable to them.

10. The Honourable Magistrate erred in fact and in law by awarding the Respondents extremely unreasonable costs of the suits plus interest at court rates from the date of filing rather than considering the aspect of costs follow the conclusion of the suit.
  
11. The Honourable Magistrate erred in fact and in law by failing to critically analyze and consider the overwhelming evidence and submissions presented by the Appellants and consequently proceeded to award compensation to the Respondents for unfair termination.

#### BACKGROUND TO THE APPEAL

12. The Respondents filed a suit against the Appellant vide a statement of claim dated 9<sup>th</sup> June 2021 seeking the following orders: -
  - a) A declaration that the Respondent's action in dismissing the Claimants from employment was unlawful and unfair.
  - b) The sum of Kshs. 696,527.75 particularized in paragraph 23 above.
  - c) Certificate of Service.
  - d) Costs of this suit.
  - e) Interest on the amount awarded at court rates.(pages 88-92 of Appellant's ROA dated 9<sup>th</sup> September 2025).
  
14. The Respondents filed their list of witnesses dated 9<sup>th</sup> June 2021; individual witness statements of each Respondent, both dated 9<sup>th</sup> June 2021; and list of documents of even date with the bundle of documents attached (pages 95-113 of ROA).

15. The claim was opposed by the Appellant who entered appearance and filed a response to the claim dated 6<sup>th</sup> December 2021 (pages 85-87 of ROA). In support of their response, the Appellant filed a list of witnesses dated 11<sup>th</sup> April 2024; witness statement of SIMON NDUNG’U dated 4<sup>th</sup> April 2024; and a list of documents dated 11<sup>th</sup> April 2024 with the bundle of documents attached (pages 60-80 of ROA).
16. The Claimants/Respondents’ case was heard on the 24<sup>th</sup> of April 2024 with the 2<sup>nd</sup> Claimant/Respondent testifying. He relied on his filed witness statement as his evidence in chief and produced the documents attached to the Claimants’ list of documents as exhibits. He was cross-examined by counsel for the Appellant, Ms. Wandera. By consent, the 1<sup>st</sup> Claimant/Respondent’s witness statement was adopted as his evidence (pages 22-23 of ROA).
17. The Appellant’s case was heard on 10<sup>th</sup> July 2024 with the Appellant calling one witness: SIMON NDUNG’U as DW1. He relied on his filed witness statements as his evidence in chief, and produced the Appellant’s documents attached to their list of documents as aforesaid. The witness was cross-examined by counsel for the Respondents Ms. Malombo (pages 23-24 of ROA).
18. The parties took directions on filing of written submissions after the hearing, and complied.
19. The Trial Magistrate Court delivered its judgment on the 30<sup>th</sup> of October 2024 allowing the Claimants/Respondent’s claims to the tune of Kshs. 293,097/- and Kshs. 355,525/- respectively, save for the claim for annual leave; plus costs and interest (judgment at pages 6-17 of ROA dated 9<sup>th</sup> September 2025).

## DETERMINATION

20. The appeal was canvassed by way of written submissions. Both parties complied.

### Issues for determination

21. The court on perusal of the grounds of appeal discerned the issues of determination in the appeal to be:

- a) Whether there was unfair termination,
- b) Whether the Respondent was entitled to the relief awarded.

### Whether there was unfair termination.

22. The court proceeded to re-evaluate the evidence before the trial court. The 1<sup>st</sup> Respondent (Claimant) pleaded he was employed as casual on 10<sup>th</sup> January 2020 on basis salary of KShs.14,800/- per month, exclusive of house allowance. The 2<sup>nd</sup> Respondent stated he was employed on 17<sup>th</sup> September 2017 as a loader on a basic salary of KShs.12,955/- per month exclusive of house allowance. Increased to kshs.13,315/- in October 2017. Both respondents stated they worked 5 days a week and did not take leave. On 18<sup>th</sup> December 2020, they reported to work at 8.00 a.m. Upon arrival, they asked about their salaries together with other colleagues. That they were unable to agree and proceeded to labour but were summoned to report back to work, to which they reported on 19th December 2020, and were introduced to other 4 new workers to replace them. The 1<sup>st</sup> Claimant was paid his September salary in his bank account, and the 2<sup>nd</sup> Claimant his November salary.

23. They sought relief of salary arrears, house allowance, annual leave compensation, and certificate of service (Joint statement of claim at pages 88-92 of the ROA). The response by Appellant was to effect a denial where statements without prejudice were made as follows: that the contracts were fixed-term and expired, the Respondents were paid, if termination occurred, due process was followed, and the Claimants left without notice. The court found the defence statement to be tainted by contradictory reasons of termination (pages 85 -86 of ROA).

#### Evidence re-evaluation

24. The respondents produced their NSSF statements, payslips, demand letters, accompanied by certificate of posting (pages 100 – 108 of ROA). The Appellant produced the fixed-term contracts for the period from 30th June 2018 and extension to 2020, and the 1<sup>st</sup> Claimant's payslips for October and November 2020.

#### Cross-examination evidence

25. The 1<sup>st</sup> Respondent began work in September 2017. Had no contract of service. He was engaged as a casual. He was given a contract in 2018. It was for a 12-month term. He was given a 9-month contract for 2019. He continued to work on the expiry of the contract on December 2019, 19<sup>th</sup>. He was paid his October and November salaries later. On re-examination, the 1<sup>st</sup> respondent said he was paid up to November 2019.

26. The 2<sup>nd</sup> Respondent was not cross-examined and by consent his witness statement was adopted. The court concluded the salary due for both respondents was only for days worked in December 2020.

27. Conversely, the Appellant called as its witness Nguo who was the operations manager. He produced the appellant's documents and adopted his witness statement. On cross-examination, Nguo told the court both respondents were employed in 2018 and paid a minimum wage of KShs. 14,864. They were issued with an itemized payslip. The witness said the salary was consolidated. He confirmed in the payslip there was no items of house allowance. The witness said the respondents went on a 10-day annual leave, and no forms were submitted. The last extension of the contract was in August 2020 to last up to 14<sup>th</sup> November 2020. He said post November the Claimants were not working.
28. The trial court held there was unlawful and unfair termination. The trial court awarded all reliefs sought some for leave. There was no cross appeal. The court, having re-evaluated the evidence before the trial court, found that the judgment on unfair termination was supported by the evidence at cross-examination, where it was established that on expiry of the last contract on 14<sup>th</sup> November 2019, the Claimants continued working and were paid their entire salary for November 2020.
29. The court finds that the Respondent's position that they were unfairly dismissed from service on 19<sup>th</sup> December 2020 was proved on a balance of probabilities. Having been allowed to work past 14<sup>th</sup> November 2020, it was deemed the expired contract was automatically renewed, and termination ought to have been in compliance with the procedure stated in section 41 of the Employment Act, and for reasons related to either capability, conduct, or operational requirements(section 45(2)). That was not the case. The court upheld the trial court's finding of unfair termination.

Whether the Respondents were entitled to reliefs sought.

30. Notice pay – the appeal was on the basis of an expired contract. The court upheld the unfair termination finding. Notice pay was due under section 35 of the Employment Act. The appeal on notice pay has no merit.
31. Compensation for unfair termination – the court, on upholding unfair termination, found that compensation was due under section 49 of the Employment Act. The court faults the trial court for not explaining the basis of the compensation and for failure to apply its mind to section 49(4) of the Employment which states as follows- *‘(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—*
- (a) the wishes of the employee;*
  - (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and*
  - (c) the practicability of recommending reinstatement or re-engagement;*
  - (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;*
  - (e) the employee’s length of service with the employer;*
  - (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;*
  - (g) the opportunities available to the employee for securing comparable or suitable employment with another employer;*
  - (h) the value of any severance payable by law;*

- (i) *the right to press claims or any unpaid wages, expenses or other claims owing to the employee;*
- (j) *any expenses reasonably incurred by the employee as a consequence of the termination;*
- (k) *any conduct of the employee which to any extent caused or contributed to the termination;*
- (l) *any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and..”* The Supreme court in Ken freight (E.A) Limited v Benson K. Nguti SC Pet. No. 37 of 2018 [2019] eKLR explained the applicability of the provisions of Section 49 as hereunder;

*“.....What then should be the correct award on damages be based on? Having keenly perused the provisions of Section 49 of the Employment Act, we have no doubt that once a trial court finds*

*that a termination of employment as wrongful or unfair, it is only left with one question to determine, namely, what is the appropriate remedy? The Act does provide for a number of remedies for unlawful or wrongful termination under Section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder. To us, it does not matter how the termination was done, provided the same was challenged in a Court of law, and where a Court found the same to be unfair or wrongful, Section 49 applies....”*The exercise of the discretion of the court is not capricious or whimsical and the court should justify the award ( *Olpejeta Ranching Limited v David Wanjau Muhoro (2017)e KLR*. The trial court erred in failing to justify the award. The evidence before the court was that the respondents had worked for approximately 3 years. The Claimants did not contribute to the termination. The contract was deemed as automatically renewed for 1 year. The award of maximum

compensation as sought was excessive. The compensation award is reduced to 3 months for each respondents.

32. Salary arrears -At cross-examination, the 1<sup>st</sup> respondent confirmed he was paid up to November salary; thus, the outstanding salary was for 18 days worked in December, and the same applied to the 2<sup>nd</sup> Respondent. Salary arrears for 18 days is awarded to each of the respondents.

33. House allowance- The Appellant's witness statement told the court the Respondents were paid minimum monthly wages. As per the Regulation of wages orders the minimum monthly wages are exclusive of housing. The award of housing is upheld.

### Conclusion

34. The appeal is allowed partially. The Judgment and Decree of Hon. Mbeja dated 30<sup>th</sup> October 2024 in Milimani Court ELRC 1058 of 2021 between the parties is set aside and substituted as follows:-

a) The termination of the 1st and 2nd Respondents'2 employment is held as unfair.

#### 1<sup>st</sup> Respondent

(a) Notice pay Kshs.17,094/=

(b) Compensation equivalent of 3 months salary Kshs,51,282/-

(c) Unpaid salary December 2020 (18 days) KShs.8,919/-

(d) Unpaid house allowance -The 1<sup>st</sup> Respondent was entitled to house allowance for the entire period of employment, September 2017 to December 2020 thus Kshs. 87,162.15 is awarded.

(e) The 1st respondent is awarded a total sum of Kshs. 164,457.15 with interest at the court rate from the date of filing the suit.

2<sup>nd</sup> Respondent

a) Notice pay Kshs.18,975/-

b) Compensation equivalent of 3 months Kshs.56,925/-

c) Housing allowance September 2017 – 18<sup>th</sup> December 2020 Kshs.98,010/-

d) 18 unpaid days salary Kshs.9,900/-

e) The 2<sup>nd</sup> respondent is awarded total sum of Kshs.183,810/- with interest at court rate from date of filing suit.

33. The Appellant is awarded ½ costs in the appeal.

35. Stay of 30 days granted.

36. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2026.

J.W. KELI,  
JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – absent

Respondent – Ms Awuor h/b Mr. Gumba