

REPUBLIC OF KENYA

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT
MOMBASA**

APPEAL NO. E179 OF 2025

CYKA MANPOWVER SERVICES LIMITED APPELLANT

VERSUS

STANLEY MKARE MLEWA RESPONDNT

**[Being an appeal from the judgment of Hon. Gathogo Sogomo delivered on 1 August
2025 in Mombasa CMELRC No. E736 of 2021]**

JUDGMENT

The appeal arises from the judgment delivered on 1 August 2025 in Mombasa CMELRC No. E736 of 2021. The appellant seeks that the judgment be set aside because the learned trial magistrate erred in finding that there was unfair termination of employment and, in error, awarded compensation for 5 months and notice pay. The award of leave pay and house allowances, including costs and interest, was not justified. The judgment should be set aside and the claims dismissed with costs.

The background to the appeal is the respondent's claim. His case was that he was employed by the appellant as a housekeeper on 16 March 2016. He worked until 31 March 2021, when his employment was terminated on the grounds of redundancy without following due process. At the time, he was earning Ksh. 20,105 per month. His case was that on 27 February 2021, the respondent was served with a one-month notice taking effect on 31 March 2021. The appellant stated that its contract with a third party, Tata Chemicals Magadi Limited, had terminated and hence would no longer need the services of the respondent. The claim was that there was no adherence to the provisions of section 40 of the Employment Act or to the payment of his terminal dues, including the following: compensation for unfair termination of employment, redundancy dues, prorated annual leave, notice pay, house allowance, severance pay, and NSSF remittances.

The claim was in 2021, and the respondent was not allowed his annual leave at Ksh. 8,795;

NSSF dues for 2016 to 2018 were not remitted at Ksh. 34,982.70;

Non-provision of house allowance at Ksh. 180,945;

Severance pay for years worked Ksh. 50,262;

Notice pay Ksh. 20,105;

12 months' compensation Ksh. 241,105.

In reply, the appellant submitted that it had 3-year renewable contracts with Tata Chemicals Magadi Limited, which ended on 31 March 2021. Tata Magadi's operations were planned so that activities were carried out on a task basis. The respondent was engaged, not on a continuous or permanent basis, but on casual terms as a piece-rate worker, meaning employed daily depending on the availability of work. He did not report to work daily. Whenever he worked, he signed the daily terms and conditions of employment, which provided for casual employment daily. He was paid his wages based on the days worked, with payments accumulated fortnightly. The payslips do not show a monthly salary; instead, they show varying salaries paid every two weeks. The respondent's employment was subject to the appellant retaining its contract with Tata Magadi, which was terminated, and notice was issued. Being a casual employee and engaged on a needs basis, the claims made are without merit.

The learned magistrate heard the parties and held that there was continuous employment of the respondent by the appellant for a period of over 5 years and in the termination notice, it demonstrated there was an employment relationship the due process was not adhered to hence leading to unlawful and unfair termination of employment contrary to section 40(1) of the Employment Act (the Act). The court awarded the following:

- a) Prorated leave Ksh. 8,795.93
- b) Notice pay Ksh. 20,105.
- c) House allowances Ksh. 180,945.
- d) Severance pay for 5 years Ksh. 57,995.19.
- e) 5 months' compensation Ksh. 100,525.
- f) Certificate of service.
- g) Costs plus interests.

On the appeal, the appellant submitted that it had a 3-year renewable service contract with Tata Chemicals Magadi Limited, which ended on 31 March 2021. The contract provided for the supply of manpower on a task basis. The appellant contends that the respondent and others were engaged strictly as piece-rate workers on a casual and intermittent basis, depending on the availability of work, and did not report daily. They were paid daily wages calculated on the work done, with payments made fortnightly. The appellant maintains that there was no continuous contract of employment and that the engagement was dependent on the availability of work. Upon expiry of the service contract with Tata Chemicals Magadi Limited, the engagement ceased by operation of law rather than by termination.

Regarding unfair termination, the appellant submitted that the trial court misclassified the respondent's employment, thereby imposing obligations inconsistent with the Employment Act. It argues that the respondent was a casual, piece-rate worker engaged as and when work was available, and that this engagement did not create an expectation of continuous employment. The appellant relies on **Rashid Mazuri Ramadhan & 10 others v Doshi & Co**

(Hardwares) Ltd & another, Cause No. 96 of 2016, eKLR, where the court held that casual employment converts to regular terms only where the statutory thresholds under section 37 of the Act are met and continuous service is proved. The appellant contends that the respondent did not demonstrate continuous service sufficient to trigger conversion under section 37 and therefore remained a casual employee. It further invokes section 47(5) of the Act, submitting that the burden of proving wrongful dismissal lay with the respondent and was not discharged.

Regarding notice pay, the appellant argues that piece-rated employees engaged on a task or availability basis are not entitled to notice upon the lapse of work, as there is no subsisting contract requiring notice. It submits that the engagement ceased automatically upon the non-availability of work and that there was no evidence of dismissal from ongoing employment. The trial court is said to have erred by applying the notice requirements under section 35(1) to a casual arrangement, despite the statutory position that casual employees are terminable without notice and are not protected under sections 35, 40 and 45 of the Act.

Regarding leave pay, the appellant submits that annual leave under section 28 of the Act accrues on the basis of continuous service. It contends that, as intermittent piece-rate workers, the respondent failed to establish continuous service or prove any outstanding leave. The trial court is faulted for presuming entitlement without strict proof.

Regarding house allowance, the appellant maintains that the daily wage paid to the respondent was all-inclusive and that there was no basic monthly salary upon which a separate house allowance could accrue. It further argues that the trial court erred in treating the respondent as a salaried employee and in awarding house allowance contrary to section 31 of the Act and the evidence on record.

Finally, on costs and interest, the appellant submits that these arose from the alleged erroneous findings on liability and remedies. It contends that costs and interest are discretionary and, since the claim ought to have been dismissed, there was no basis for awarding them against the appellant. The appellant therefore prays that the appeal be allowed on the basis that the respondent's engagement was casual, task-based and contingent upon the subsisting service contract, which lawfully ended on 31 March 2021, and that there was no unfair or unlawful termination.

The respondent maintains that he was employed by the appellant as a housekeeper from 16 March 2016 until 31 March 2021, when he was declared redundant without compliance with

the laid-down procedure. At the time of termination, he was earning a monthly salary of Kshs. 20,105.

Although the appellant contended that the respondent was merely a daily piece-rate worker paid fortnightly based on work done, the respondent submits that he was initially engaged as a casual employee on or about 16 March 2016, but his employment converted by operation of law under sections 2 and 37 of the Employment Act into regular employment, having worked continuously for five years up to the date of termination.

He relies on payslips, which reflect monthly salary payments, contradicting the appellant's assertion of daily or fortnightly wages. He further submits that the appellant failed to produce comprehensive employment records to prove casual engagement, producing documents covering only a few months between 2018 and 2019, despite the termination notice dated 27 February 2021 confirming that he remained in employment in 2021. Invoking section 10(7) of the Act, the respondent argues that the burden of disproving the alleged terms of employment lay with the appellant and was not discharged.

The respondent relies on **Mkoba v Coast Agency Limited (Appeal E007 of 2022) [2023] KEELRC 1199 (KLR) (18 May 2023) (Judgment)**, in which the court held that where employment is undertaken continuously, and wages are paid weekly or monthly for duties not likely to end, such an employee becomes protected under section 37 of the Act. In that decision, the court was persuaded by **Rashid Mazuri Ramadhani & 10 others v Doshi & Company (Hardware) Limited & another [2018] eKLR**, which interpreted section 37 of the Act as requiring proof of engagement as a casual employee and of service aggregating to more than one month for conversion to occur.

The respondent also cites **Nanyuki Water & Sewage Company Limited v Benson Mwititi Ntiritu & 4 others [2018] eKLR**, in which the court held that casual employment becomes a contract of service when wages are paid monthly and that section 35(1)(c) applies. Further reliance is placed on **Esther Njeri Maina v Kenyatta University [2020] eKLR**, where the court held that retaining an employee as a casual for over three months while performing continuous duties is unlawful and entitles the employee to statutory protections.

Regarding the alleged relationship with Tata Chemicals Magadi Limited, the respondent submits that no evidence was adduced to establish an employment relationship between him and that entity. The only contract produced was between the appellant and Tata Chemicals Magadi Limited. The respondent's payslips and a termination letter dated 27 February 2021,

printed on the appellant's letterhead and signed by its Human Resource Manager, established the employer-employee relationship between the parties. The termination letter expressly referred to the termination of "your employment contract" and bound the respondent to the appellant's confidentiality and data protection policies as an employee. The respondent invokes the doctrine of privity of contract as stated in **Dunlop Pneumatic Tyre v Selfridge and Co. Ltd [1915] AC 847**, submitting that he was not privy to any contract between the appellant and Tata Chemicals and cannot be bound by it.

Regarding redundancy, the respondent submits that the appellant failed to comply with section 40 of the Act. He contends that there was no proper notification to him or the labour officer, no evidence of the application of selection criteria, no payment of leave in cash, no severance pay, and no proper remittance of statutory dues. Consequently, the termination was unfair within the meaning of section 45(2) of the Act. He relies on **Faiza Mayabi v First Community Bank (2019) eKLR (Cause 1941 of 2015)**, where failure to comply with section 40 rendered a redundancy unfair, and on **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR**, where the Court of Appeal emphasised the mandatory nature of the notices required under section 40(1)(b).

Regarding the specific reliefs, the respondent submits that the award of one month's salary in lieu of notice was proper, as he was a permanent employee paid monthly, and section 40(1)(f) of the Act requires at least one month's notice. Although he sought twelve months' compensation for unfair termination, the trial court awarded five months, which he considers fair. On leave pay, he relies on sections 28, 40(1)(e), and 74(f) of the Act, submitting that the appellant failed to produce the required leave records and that he was therefore entitled to payment for accrued leave. On the house allowance, he contends that his salary was not consolidated and that no evidence was produced to show that the house allowance was included in his pay, thereby entitling him to the award granted.

Regarding costs and interest, the respondent invokes the principle that costs follow the event, as stated by the Supreme Court in **Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2014] eKLR**, and submits that, having successfully proved his case before the trial court, the award of costs and interest was proper. He urges the Court to dismiss the appeal and award him the costs of both the lower court and the appeal.

Determination

This being a first appeal, the court is under a duty to review the record, reassess the findings and make its conclusions. However, consider that the trial court has the opportunity to see and hear the witnesses and, accordingly, grant such an allowance.

The respondent asserts that there was continuous and long employment with the appellant from 2016 to 2021, when a notice dated 27 February 2021 was issued indicating that the third-party contract with Tata Magadi would lapse on 31 March 2021; hence, his employment would be terminated. This was a 30-day notice.

The appellant asserts that the respondent was a casual employee and that no piecework was available. There are no work records filed for casual employees, piece-rate work, or any other records of payments to confirm such assertions. Indeed, under sections 10(6) and (7) and 74 of the Act, the employer has the duty to produce work records. The evidence of causal employment is not supported by the evidence of the parties.

Under section 2 of the Act, a casual employee is one employed each day and paid at the end of the day. In this case, the applicant admitted that payments would accumulate for 2 weeks and paid them. There were NSSF payments. The work was performed under a continuous 3-year contract with the third party. Hence, the work performed by the respondents could not end at the end of each day. It was continuous; hence, his engagement was protected under section 37 of the Act. He acquired rights and benefits under the Act. See **Humphrey Nyaga Thomas & 25 others v Kenyatta University [2021] KEELRC 18 (KLR)** and in **Kenyatta University v. Esther Njeri Maina (Civil Appeal 261 of 2020) [2022] KECA 120**. The courts have emphasized that it is a violation of employment rights when an employer keeps an employee on the shop floor as a casual for many years under the guise that the work is seasonal. Such practice amounts to unfair labour practices, since the employer is at liberty to issue a term contract, a piece-rate contract, or to ensure a daily wage is paid at the end of each day.

The respondent admitted that he was issued a notice dated 27 February 2021. His employment would terminate for operational reasons following the expiration of the third-party contract held by the appellant, which had a negative impact on his employment. He defined this scenario as a redundancy.

Indeed, under section 40 of the Act, an employer may lawfully terminate employment for operational reasons. In **G4S Security Services (K) Ltd v Ongori [2025] KECA 1950 (KLR)** and **Mathai v Keroche Breweries Limited [2024] KECA 1697 (KLR)**, the courts have held that where there exist operational reasons, the employer is justified in declaring a redundancy.

In this case, notice was issued with reasons relating to operational matters and lapse of the third-party contract. The respondent was allowed to serve notice. This is an allowed mode of termination of employment under section 40(1) (f) of the Act, as held in **The German School Society & another v Ohany & another [2023] KECA 894 (KLR)** and in **Cargill Kenya**

Limited v Mwaka & 3 Others [2021] KECA 115 (KLR), where the court addressed redundancy as follows:

It is thus our finding that the above interpretative factors discount a construction that a notice of termination is required by subsection (1) (f), or within the timelines held by the learned judge of the trial court. While such a notice may eventually be required to be given in a termination on account of redundancy, it is definitely not one of the conditions to be met under section 40 subsection 1(f) of the Employment Act before the redundancy. In our view, the learned judge in the trial court appears to have conflated the payment in lieu of notice under section 40 subsection (1)(f), with the final declaration of termination by redundancy, and erred in finding that there is a requirement to issue a notice of termination before the redundancy under section 40(1)(f) of the Employment Act.

The trial judge also held that the termination was unlawful for reasons that the Appellant used the notices of intended redundancy as notices of termination under section 40(1)(f). This finding was in error for two reasons. Firstly, as we have found, no notice of termination is required to be given before redundancy under section 40(1) (f) of the Employment Act. Secondly, an examination of the letters issued by the appellant lead us to a conclusion that they indeed were notices of intended redundancy required by section 40(1) (a) of the Employment Act.

Where the employer allows the employee to serve notice, payment for the same is not justified.

In this case, there was a lawful cause for termination of employment. Notice was issued, and the respondent worked during that period.

Regarding the findings that employment was terminated unfairly, such findings were in error. The reasons for the reduction were communicated under the notice dated 27 February 2021 as required under sections 43 and 45 of the Act.

As a protected employee under section 37 of the Act, the respondent accrued rights under section 28 of the Act, entitling him to 21 annual leave days. As a casual employee, I did not have such a right. The claim and award of his annual leave at Ksh. 8,795 is justified.

The claim for statutory payments to NSSF for 2016 to 2018 is due to the statutory body and not the employee.

On the claim for a house allowance, the respondent was paid Ksh. 21,105 per month. This exceeds the legal minimum required under the Minister's Wage Orders. The basic wage for 2021 was KSh. 13,572.90adn 15% house allowance once gross wage is Ksh. 15,608.85, and the respondent was paid Ksh. 21,105 above the minimum.

The reasons for termination of employment are operational and, hence, constitute redundancy; severance pay is due. Severance pay for years worked Ksh. 50,262 is justified.

On costs, the learned magistrate applied discretion required under section 12(4) of the Employment and Labour Relations Court Act and allowed costs and interest. This position

being discretionary, the court can only interfere if the same is not applied judicially. The costs awarded are justified.

Accordingly, judgment in Mombasa CMELRC No. E736 of 2021 is reviewed in the following terms:

- a) Employment terminated lawfully and fairly.**
- b) Severance pay Ksh. 50,262.**
- c) Leave pay Ksh. 8,795.**
- d) Certificate of service.**
- e) Costs and interests as awarded by the trial court.**
- f) For the appeal, each party to bear its costs.**

Delivered in open court at Mombasa, this 12th day of March 2026.

M. MBARŪ
JUDGE

In the presence of:

Court Assistant: Omar

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