

**REPUBLIC OF KENYA**

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

**APPEAL NO. E146 OF 2025**

**NEWTIMES INTERNATIONAL LIMITED**

**T/A NEWTIMES HOTEL ..... APPELLANT**

**VERSUS**

**MICHAEL JEFWA CHARO ..... RESPONDENT**

[Being an appeal from the judgment of Hon. Gathogo Sogomo delivered on 18 July 2025 in Mombasa CMELRC No. E060 of 2023]

**JUDGMENT**

The appeal arises from the judgment delivered on 18 July 2025 in Mombasa CMELRC No. E060 of 2023. The appeal is that the learned magistrate erred in law and fact in finding that there was unfair and unlawful termination of employment and that the claims made had been proved. The award of alleged underpayments, house allowance, severance pay, notice pay, and 3 months' compensation was without proof or justification and remains unsupported. The judgment should be set aside and the appeal allowed with costs.

The respondent filed his claim before the trial court on the basis that he was employed by the appellant as a chef at the hotel from 1 June 2016 and worked until 9 March 2020, when his contract was terminated. His claim was that he was declared redundant without the due process of section 40 of the Employment Act or articles 41 and 47 of the Constitution. His claim was that during employment, he was underpaid at a wage of Ksh. Ksh. 10,000 per month instead of Ksh. 14,658.85 per month, and without the house allowance. He thus claimed the following terminal dues:

- a) Notice pay Ksh. 14,658.85
- b) 12 months' compensation Ksh. 175,906.20
- c) Accrued leave days for up to June 2019 Ksh. 23,116.14
- d) Public holidays
- e) Underpayments from June 2016 to 2020 ksh. 126,462.23
- f) Overtime work from 2016 to 2020 Ksh. 287,640.50
- g) Severance pay for 3 years ksh. 21,986.27
- h) Costs of the suit.

In reply, the appellant's case was that the respondent was a casual employee engaged intermittently to clean the hotel and serve customers, depending on the seasonal availability of work, and hence his employment was on a daily basis. There was no contractual obligation to make the alleged payments, and hence, the claim should be dismissed.

The learned magistrate heard the parties and held that there was an employment relationship that was unfairly and unlawfully terminated. He made the following awards:

- a) Notice pay Ksh. 13,572.90
- b) 3 months' compensation Ksh. 40,718.70
- c) Unpaid leave Ksh. 23,116.14
- d) House allowance Ksh. 89,581.14
- e) Underpayments Ksh. 126,462.23
- f) Severance pay Ksh. 21,988.28 costs and interests.

On the appeal, the appellant submitted that the employer-employee relationship was not proved. The respondent alleged that he was employed as a chef without proof. He was taken in as a casual on a seasonal basis and paid each day, and thus not protected under section 37 of the Act.

There was no proof of unfair termination of employment as required under section 47(5) of the Act, and in **Omar Ndaro Zuma v Modern Coast Express [2019] eKLR**, the court held that the employee has the burden of proof in a claim of alleged unfair termination of employment. Without discharging such burden, the employer has no burden to discharge.

The assessment of the due wages at Ksh. The trial court's award of 13,572.90 was arbitrary, since the respondent admitted he was paid. 10,000. He was not entitled to house allowances, which were included in the wages paid. Severance pay is not due because this was not a redundancy.

There are no written submissions by the respondent

### **Determination**

The respondent testified that he was employed by the appellant as a casual employee. This is admitted by the appellant in reply that employment was on a casual basis for seasonal work, and payments were made daily whenever there was work. However, there are no records filed to confirm such facts as addressed by the appellant. The casual wages, the casual records or the employees on the shop floor with the respondent. None are filed as required under section 10(6) and (7) and 74 of the Act.

Where, indeed, the respondent was employed on a casual basis, without any written records, his work being cleaning and serving customers, such work was continuous and/or not likely to end in a single day. He became protected under section 37 of the Act. Such an employee accrues benefits and rights under the Act as held in **Kenyatta University v Maina [2022] KECA 1201 (KLR)** and **Kenyatta University v Thomas & 25 others [2025] KECA 1014 (KLR)**. The employer is not allowed to treat the employee as a casual when there is work and then abandon him when work is low. Such an employee is protected under section 37 of the Act.

The learned magistrate's findings that the employment was terminated unlawfully and unfairly are correct. There was no due process, nor any effort to justify it.

Notice pay and compensation were well assessed for a general labourer.

On the terminal dues claimed, underpayment of wages below the minimum wage is not permissible. The employee cannot lawfully agree to an underpayment below the minimum wage published by the Minister.

A general labourer in 2020 was earning Ksh. 13,572.90 as the basic wage. There is a due house allowance of 15% thereof at KSh. 2,035.95 and gross wage Ksh. 15,608.85

This is the due wage in assessing the notice pay and compensation, Ksh. 15,608.85.

The respondent was paid Ksh. 10,000 per month.

There was an underpayment of Ksh. 5,608.85 each month.

Underpayment of wages is a continuing injury under section 89 of the Act. This should be claimed within 12 months.

In this case, the underpayments, including house allowance, are only due going back to 12 months.  $\text{Ksh. } 5,608.85 \times 12 = \text{Ksh. } 67,306.02$ .

On the award of notice pay, the due amount under section 49(2) of the Act is the gross wage of Ksh. 15,608.85

The award of compensation at 3 months is due at Ksh. 46,826.55.

On the claim for public health, these were particularised in the Memorandum of Claim. There's no record to negate the same. These are due in 12 days = Ksh. 6,243.20.

Over time, work was not proven.

On the claim for leave pay, an employee protected under section 37 of the Act is entitled to 21 leave days each year. However, under section 28(4) of the Act, such annual leave should not accumulate beyond 18 months. In this case, the respondent is entitled to 33 days at Ksh. 17,169.79.

The claim for severance pay is not proved. No notice was issued declaring a redundancy. The aspect of unfair termination of employment is addressed above.

On costs in employment claims, such must be justified and reasons given.

**Accordingly, judgment in Mombasa CMELRC No. E060 of 2023 is hereby reviewed in the following terms:**

- a) Employment terminated unfairly and unlawfully.**
- b) Notice pay Ksh. 15,608.85**
- c) Compensation Ksh. 46,826.55**
- d) 12 public holidays Ksh. 6,243.20**
- e) Undepayments, including house allowances, Ksh. 67,306.02.**
- f) Leave pay Ksh. 17,169.79.**
- g) Each party to bear its costs for the appeal and trial court.**

Delivered in open court at Mombasa, this 12<sup>th</sup> day of March 2026.

M. MBARŪ  
JUDGE

In the presence of:

Court Assistant: Omar

..... and .....