

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT MACHAKOS

APPEAL NUMBER E005 OF 2025

CONSOLIDATED WITH APPEAL NUMBER E169 OF 2022

WALKER INDUSTRIES KENYA LIMITED.....APPELLANT

-VERSUS-

KYULE FRANCIS MATHINA.....RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Hon. A. Nanzushi (SPM)  
delivered on 28<sup>th</sup> January 2025 in Mavoko MCELRC No. E081 of 2024)*

CORAM

*Before Lady Justice J. W. Keli*

*C/A Otieno*

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. A. Nanzushi (SPM) delivered on 28th January 2025 in Mavoko MCELRC No. E081 of 2024 filed a Memorandum of Appeal dated the 25<sup>th</sup> of February 2025 seeking the following orders:

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a) The Appeal herein be allowed.

## GROUND OF THE APPEAL

2. The Appellant above-named not being satisfied by the judgment of the Honourable Martha A. Nanzushi (SPM) in the above suit dated the 28th January 2025, appeal to this court, and set forth the following grounds of objection to the judgment appealed from namely: -

- (1) THAT the learned magistrate erred in law and in fact in holding that the Appellant did not follow due procedure as per the Employment Act 2007 in terminating the employment of the Respondent herein.
- (2) THAT the learned magistrate erred in law and in fact in not appreciating the fact that the Respondent was and had always been engaged on a fixed term contract basis.
- (3) THAT the learned magistrate erred in law and in fact in holding that the Respondent's employment was unfairly, wrongfully and illegally terminated.
- (4) THAT the learned magistrate erred in law and in fact in awarding the Respondent compensation for unfair termination when the Respondent was employed for a fixed term only and whose term expired via effluxion of time.
- (5) THAT the learned magistrate erred in law and in fact in awarding the Respondent leave pay despite there being clear evidence that he had already been paid in lieu.
- (6) THAT the learned magistrate erred in law and in fact in awarding the Respondent service pay yet he was a member of NSSF which was duly remitted by the Appellant.
- (7) THAT the learned magistrate erred in law and in fact in awarding the Respondent costs of the suit.

3. The Honourable Magistrate erred in law and in fact in holding that the Appellant did not follow due procedure as per the Employment Act 2007 in terminating the employment of the Respondent herein.
4. The Honourable Magistrate erred in law and in fact in not appreciating the fact that the Respondent was and had always been engaged on a fixed term contract basis.
5. The Honourable Magistrate erred in law and in fact in holding that the Respondent's employment was unfairly, wrongfully and illegally terminated.
6. The Honourable Magistrate erred in law and in fact in awarding the Respondent compensation for unfair termination when the Respondent was employed for a fixed term only and whose term expired via effluxion of time.
7. The Honourable Magistrate erred in law and in fact in awarding the Respondent leave pay despite there being clear evidence that he had already been paid in lieu.
8. The Honourable Magistrate erred in law and in fact in awarding the Respondent service pay yet he was a member of NSSF which was duly remitted by the Appellant.
9. The Honourable Magistrate erred in law and in fact in awarding the Respondent costs of the suit.

## BACKGROUND TO THE APPEAL

10. The Respondent filed a suit against the Appellant vide a memorandum of claim dated 26<sup>th</sup> January 2024 seeking the following orders: -

- a) A declaration that the Claimant's termination/ dismissal was illegal, unlawful and/or unfair and the Claimant to be paid his terminal dues and damages.
- b) An order for the Respondent to pay the Claimant Kshs. 422,004/=
- c) Certificate of Service.
- d) Interest on (b) above at court rates.
- e) Costs of this claim.

(pages 9-10 of Appellant's ROA dated 24<sup>th</sup> June 2025).

1. The Respondent filed his witness statement dated 26<sup>th</sup> January 2024; list of witnesses of even date; and list of documents of even date with the bundle of documents attached (pages 12-21 of ROA).

2. The claim was opposed by the Appellant who entered appearance and filed a statement of response dated 8<sup>th</sup> July 2024 (pages 26-28 of ROA). In support of their response, the Appellant filed a witness statement of BONFACE DOLA dated 8<sup>th</sup> July 2024; and a list of documents of even date with the bundle of documents attached (pages 29-130 of ROA).

3. The Claimants/Respondent's case was heard on the 14<sup>th</sup> of November 2024 with the Claimant/Respondent testifying. He relied on his filed witness statement as his evidence in

chief and produced the documents attached to his list of documents as exhibits. He was cross-examined by counsel for the Appellant, Mr. Ondwego (pages 143-144 of ROA).

4. The Appellant's case was heard on the same day with the Appellant calling one witness: BONFACE DOLA as DW1, to testify on their behalf. 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 Claimant/Respondent Mr. Mburia (pages 144-145 of ROA).
5. The parties took directions on the filing of written submissions after the hearing, and complied.
6. The Trial Magistrate Court issued its judgment on January 28, 2025, awarding the Claimant/Respondent a total of Kshs. 319,045.15. This amount includes one month's pay in lieu of notice, nine months' wages as compensation for unfair termination, leave days, and service pay. The Claimant was also granted costs of the suit (Judgment at pages 147-150 of ROA).

#### DETERMINATION

7. The appeal was canvassed by way of written submissions. Both parties complied. The court on perusal of grounds of appeal discerned the issues for determination in the appeal to be:

- a) Whether there was unfair termination of employment or the contract ended by effluxion of time.
- b) Whether the trial court erred in relief granted.

Issue (a)Whether there was unfair termination of employment or the contract ended by effluxion of time.

8. The prove of employment claims is as per section 44(5) of the Employment Act to wit:-The prove of the termination is germane that there was no unfair termination as contract expired. The Respondent/Claimant pleaded that he was employed on 2<sup>nd</sup> June 2017 and on 28<sup>th</sup> June 2023 wrongfully dismissed without justifiable cause (page 9 of ROA- was the claim).

9. In a witness statement, the Respondent/Claimant stated that the termination was on 28<sup>th</sup> June 2022 while he was working at 12.45 p.m. The Respondent issued a demand later to the Appellant vide his advocates, Samuel, Mburia & Company Advocates, dated 22<sup>nd</sup> January 2024, where it was stated in part – “On 22<sup>nd</sup> June 2022, you illegally, unlawfully and unfairly terminated our client’s employment.” The demand letter is a precursor to the filing of suit. It gives an opportunity to the Respondent to settle the dispute before litigation. whereas the court rules do not require the demand letter to accompany the filing of the suit, this is an obligation under Order 3 Rule 2 of the Civil Procedure Rules, to wit - All suits filed under rule 1(1) including suits against the government, except small claims, shall be accompanied by-“(d)copies of documents to be relied on at the trial including a demand letter before action” . I believe issuance of a demand letter is a good practice and urge the

Employment and Labour Relations Court Rules Committee to consider revising Rule 7(3) of the Court Rules to include a demand letter. In the instant case, consistent with the good practice, the appellant issued a demand letter as stated above.

10. The Appellant, in response, filed a statement of response and stated that the Respondent had a fixed-term contract of 6 months from 23<sup>rd</sup> February 2022, which terminated on 22<sup>nd</sup> August 2022. The contract was produced and at Clause 3 it was stated to be a contract of 6 months. The commencement date was 23<sup>rd</sup> February 2022 and the expiry date was 22<sup>nd</sup> August 2022.
11. During the hearing before the trial court, the Respondent/Claimant told the court his services were terminated on 29<sup>th</sup> August 2022 and that the date of 23<sup>rd</sup> June 2023 (pleaded in claim) was in error. At cross-examination, the Respondent told the trial court that the job he was doing was to expire on 22<sup>nd</sup> August 2022.
12. The witness for the Appellant told the trial court that the Respondent held a contract of 6 months. (Pages 143 – 145 of ROA were the proceedings).
13. In judgment, the Learned Trial Magistrate Hon. Nanzushi (SPM) held the Respondent's services were terminated on 14<sup>th</sup> October 2023. The court found the said date was not consistent with the pleadings and evidence before the court as analyzed above.
14. The fact of termination, as indicated earlier, is germane to the claim of unfair termination. The trial court relied on the date of 14<sup>th</sup> October 2023. That date just dropped from nowhere. Even the Respondent pleaded 23<sup>rd</sup> June 2023 in the claim and 29<sup>th</sup> August 2022 in the witness statement respectively, the later being the date he adopted at examination in chief. The court holds that the trial court's termination date was in error.

15. The Respondent admitted his contract was to expire on 22<sup>nd</sup> June 2023. There was evidence of continuous renewal of contracts for specific timelines. The demand letter, which the court held was the precursor to the suit, stated the termination was on 22<sup>nd</sup> June 2022, which was the date of expiry of the contract.
16. The Court found evidence of the Respondent's attempt to shift gears on the termination date to justify the claim of different termination dates in the statement of claim and witness statement.
17. The Claimant indicated June 22, 2022, as the termination date in the demand letter, consistent with the contract. The court finds that it was more likely than not that the employment contract ended by expiration of the term on August 22, 2022.
18. The Court of Appeal held the employer has no obligation to the employee beyond contract date  
  
in *Transparency International - Kenya v Omondi* [2023] KECA 174 (KLR) .
19. In the upshot, I hold the trial court erred in imposing a termination date not pleaded by either party, thus leading to the erroneous conclusion that the contract was wrongly terminated. The evidence before the court, supported by the demand letter and contract of employment, was to the effect that the contract expired by effluxion of time on 22<sup>nd</sup> June 2022. The claim for unfair termination could not arise. The holding of unfair termination is set aside.

Whether the trial court erred in granting relief.

20. The relevant grounds of appeal were-

- A. THAT the learned magistrate erred in law and in fact in holding that the Appellant did not follow due procedure as per the Employment Act 2007 in terminating the employment of the Respondent herein.
  
- B. THAT the learned magistrate erred in law and in fact in not appreciating the fact that the Respondent was and had always been engaged on a fixed term contract basis.
  
- C. THAT the learned magistrate erred in law and in fact in holding that the Respondent's employment was unfairly, wrongfully and illegally terminated.
  
- D. THAT the learned magistrate erred in law and in fact in awarding the Respondent compensation for unfair termination when the Respondent was employed for a fixed term only and whose term expired via effluxion of time.
  
- E. THAT the learned magistrate erred in law and in fact in awarding the Respondent leave pay despite there being clear evidence that he had already been paid in lieu.

F. THAT the learned magistrate erred in law and in fact in awarding the Respondent service pay, yet he was a member of NSSF, which was duly remitted by the Appellant.

G. THAT the learned magistrate erred in law and in fact in awarding the Respondent costs of the suit.

21. The Court from the outset holds that the award of notice pay and compensation cannot stand if the court has set aside the finding of unfair termination.

22. The Respondent was granted leave for 6 years, equivalent to 6 months. The appeal's ground was that the leave award was incorrect because the Claimant had been paid in lieu. The court, after reviewing the payslips submitted to the trial court, found that an item called leave pay was issued. For instance, the Respondent received leave pay of Kshs. 4,552.49 in July 2022, and Kshs. 4,275.84 in January 2022. The Claimant had a 6-month contract from February 22, 2022, to January 22, 2022.

23. Since the Respondent received leave pay during the period, I find no basis for an award of full leave by the trial court, and this decision is hereby set aside. The Respondent argued that leave pay covered the entire duration of employment. There was evidence of leave pay, so the claim was unfounded, and the award is considered a factual error. (Mbogo vs. Shah)

24. Service pay - The Claimant was awarded service pay for the 6 years worked. The Appellant contends that the award was erroneous because the Respondent/Claimant was under NSSF. A review of the payslips before the trial court showed that the Respondent was registered under NSSF No. 272 26 2919, with Kshs. 200 deducted monthly. Section 35(5) provides for the payment of service pay for each complete year. However, under section 35(6), provides that employees under NSSF are not entitled to service pay. Therefore, the award of service pay to the Respondent, who was under NSSF, was in error and is hereby set aside.
25. In the upshot, the appeal is allowed. The entire judgment and decree of Hon. Martha A. Nanzushi (SPM ) delivered on the 28<sup>th</sup> January 2025 is set aside and substituted with a judgment, and the claim is dismissed with costs to the Respondent.
26. The Appellant is awarded costs in the appeal.
27. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 13<sup>TH</sup>  
DAY OF MARCH, 2026.

J. W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – Ondego

Respondent – absent