

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

ELRC APPEAL NO. E223 OF 2024

SUHUPI PALACE HOTEL LIMITED .....APPELLANT

VERSUS

ABDALLA WEPO MAKOKHA.....RESPONDENT

*(Being an Appeal against the judgment in MCELRC 766 of 2019 delivered on  
30<sup>th</sup> May 2024 by Hon. Maureen Nabibya)*

**JUDGMENT**

**Background**

1. Contending that at all material times, he was an employee of the Appellant, whose employment the latter terminated unfairly, the Respondent sued the Appellant in the above-stated suit, claiming both declaratory and compensatory remedies against it.

2. The Appellant resisted the Respondent's claim through a Reply to Memorandum of Claim dated 16th September, 2019. It denied the Respondent's cause of action against it and entitlement to the reliefs he sought in his pleadings.
3. After hearing the parties on their respective cases, and considering their evidence and submissions, the learned trial Magistrate found for the Respondent. The Appellant challenges the entirety of her Judgment through the current appeal.
4. This Court directed that the appeal be canvassed by way of written submissions. The parties obliged. Their submissions are on record for the Court's consideration.

### **Respondent's case in the lower court**

5. It was the Respondent's case that he first came into the employment of the Appellant in August 2013 as a waiter, earning a monthly salary of KShs. 18,000, and served continuously until 29th October 2018, when his employment was terminated.

6. It was the Respondent's case that he worked every day, including public holidays, in breach of the provisions of the Employment Act, and that on 29th October 2018.
7. On 29th October 2018, he received an SMS from the manager instructing him not to report for work until further notice. He later reported as instructed but was told that his services were no longer needed and was paid only his salary for the month.
8. The Respondent contended that the termination was unfair, unlawful, and procedurally flawed for failing to comply with Sections 40, 41, 43, and 45 of the Employment Act, 2007, as well as Article 47(1) and Article 41 of the Constitution and ILO Convention 158 on termination of employment.
9. Further, he alleged non-payment of terminal and contractual benefits, including accrued leave, public holidays, weekly off days, unpaid salary, and compensation for unfair termination, totaling Kshs. 658,598.

## **The Appellant's case before the trial court**

10. The Appellant called one witness to testify on its behalf. The witness, the Managing Director, Siyad Isaak Hassan, stated that the Respondent was never employed by the Appellant as a waiter on a monthly salary, as she claimed. He was only engaged intermittently, when required. Whenever he was called upon to work, specific tasks were assigned to him, and he was paid immediately after completing each task.
11. The witness asserted that the Respondent was a part-time worker paid on a daily basis, and that their engagement was terminable at the close of any day without notice in accordance with Section 35(1)(a) of the Employment Act, 2007.
12. Furthermore, the Appellant denied that the Respondent was unfairly and without any justifiable cause dismissed. The Respondent was, therefore, not entitled to the terminal and contractual dues of Kshs. 658,598 as claimed.

13. The Appellant also alleged that the Respondent's exit followed instances of rudeness, disobedience, and refusal to follow instructions.

14. It accordingly denied the allegations in the statement of claim and maintained that it had not contravened any statutory or contractual obligations towards the Respondent.

### **Judgment of the Lower Court**

15. After considering the pleadings, evidence, and submissions, the trial court found that, though the Respondent had been engaged as a casual, he worked as such continuously for a long time, and his engagement converted to term employment by dint of the provisions of section 37 of the Employment Act.

16. The trial Court held that the Respondent's employment was terminated at the initiative of the Appellant unfairly, without adherence to procedural fairness, and valid and fair reasons.

17. Consequently, the trial Court awarded the Respondent:

- One month's salary in lieu of notice (Kshs. 18,000).
- Accrued leave limited to three years under section 90 of the Employment Act (computed using the Respondent's salary).
- Unpaid salary for five months amounting to Kshs. 90,000.
- Compensation for unfair termination equivalent to eight months' salary (Kshs. 144,000).

18. The court rejected claims for severance pay, public holidays, and time off due to insufficient proof or detail.

### **The Appeal**

19. Dissatisfied with the Judgment of the lower Court, the Appellant filed the instant appeal, setting forth the following grounds;

- 1) The Learned Magistrate gravely erred in law and fact in failing to take into consideration that the Respondent did not provide any contract or agreement of employment between himself and the Appellant that spelt out the terms and conditions of the alleged work.

There was no employment relationship between the Appellant and the Respondent herein.

- 2) The Learned Magistrate erred in law and fact in completely ignoring the fact that failing to plead and tender evidence as to the nature of the alleged employment disentitles the Respondent from sustaining his claim.
- 3) The Learned Magistrate erred in law and fact in failing to appreciate that the Respondent was a hired part-time, paid on a daily basis and whose hire contract was terminable by either party at the close of any day without notice according to Section 35 (1) (a) of the Employment Act,2007.
- 4) The Learned Magistrate erred in law and fact in failing to take into account that the Respondent in his pleadings alleges that he sued for daily work and thus confirming that there was no employment contract as contemplated in the Employment Act to give rise to unfair, unprocedural or unlawful dismissal.

- 5) The Learned Magistrate erred in law and fact when he ignored to take into consideration that the NSSF statement exhibited by the Respondent was incomplete, unsigned and unauthenticated. It is not admissible in evidence. Its author has not been called. More importantly, the Respondent is shown to have been employed on 12th January 2005, whereas in his pleadings, he claims to have been employed in August 2013.
- 6) The Learned Magistrate erred in law in holding that the Respondent worked for the Appellant for an aggregate of over three months in a year, thus converting to contract employment.
- 7) The Learned Magistrate gravely erred in law and fact in granting reliefs that were not mentioned in the Pleadings.
- 8) The Learned Magistrate erred in law and fact in failing to take into consideration that the Respondent did not call any collaborative evidence, for example, of another casual labourer or employee to support the allegation

of work he undertook for an aggregate of over three months in a year.

9) The Learned Magistrate erred in law and fact in failing to appreciate that there was no contract of employment between the Appellant and Respondent that entitles him to the reliefs sought in his pleadings.

10) The Learned Magistrate erred in law in holding that the Respondent was unfairly terminated, yet there was no contract of employment between the Appellant and the Respondent.

### **Appellant's skeleton submissions dated 3<sup>rd</sup> Oct, 2025**

20. The Appellant challenged the trial court's finding that an employment relationship existed, arguing that the Respondent failed to prove it as required under section 2 and Part III of the Employment Act, 2007.

21. It was submitted that the Appellant consistently denied employing the Respondent as a monthly waiter and instead maintained that he was engaged intermittently on a daily,

task-based basis, terminable at the end of each day, under section 35(1)(a) of the Act. Reliance was placed on **Charles Juma Oleng v M/S Auto Garage Ltd & Another [2014] KEELRC 1170 (KLR)** to emphasise the importance of written contracts in establishing employment relationships.

22. The Appellant contended that the Respondent's evidence, comprising mainly the Respondent's witness statements, documents, and oral testimony, failed to establish employment. It was further argued that documents such as the NSSF statement and job card were insufficient, unauthenticated, and inconsistent with the Respondent's pleadings, particularly regarding the alleged date of employment.

23. The Appellant further asserted that the absence of pay slips, payroll records, corroborating witnesses, or proof of monthly salary undermined the claim of employment. Authorities, including **Monica Kanini Mutua v Al-Arafat Shopping Centre & another [2018] eKLR**, **Shadrack Matolo v Kantaria Commercial Stores [2022] eKLR**, and **Janet**

**Kwamboka & Another v Flomana Best Solution Services Ltd [2017] eKLR**, were cited to support the principle that proof of employment is a preliminary requirement in unfair termination claims.

24. On the application of the Employment Act, the Appellant submitted that the trial magistrate misapplied sections 35, 45, 49, and 90 of the Act. It was argued that reliance on section 35(1)(b) and (c) to convert casual engagement into contractual employment was erroneous because of inconsistencies in the Respondent's evidence regarding the period of service.

25. The Appellant further contended that consideration of sections 45 and 49 on unfair termination was premature and legally untenable in the absence of proof of employment, and that section 90 was wrongly applied in calculating the awards.

26. Regarding termination, the Appellant maintained that there could be no unlawful or unfair termination without proof of a contract of service. It was argued that the Respondent's

engagement was intermittent and task-based, with a defined start and end, and therefore not subject to statutory termination protections.

27. On evidential burden, the Appellant submitted that the Respondent failed to discharge the burden of proof under section 107 of the Evidence Act. The Appellant argued that the Respondent's evidence was unsupported and insufficient to justify the awards granted, and that the trial magistrate erred in awarding notice pay, leave, unpaid salary, and compensation in the absence of proof of employment.

28. In conclusion, the Appellant urged the appellate court, as the first appellate court, to re-evaluate the evidence and find that the trial magistrate erred in awarding Kshs. 289,800 to the Respondent in the absence of a proven employment relationship. The Appellant therefore prayed that the appeal be allowed with costs and that the trial court judgment be set aside.

### **Respondent's Submissions.**

29. Regarding the existence of an employment relationship, the Respondent argued that the Appellant's own witness statement recognised that the Respondent worked for the Appellant, albeit intermittently and on a daily pay basis. It was contended that employment was therefore acknowledged, with the only issue being its nature and duration.
30. The Respondent contended that evidence such as the issuance of a job card, medical examination, and NSSF contributions conceded by DW1 to apply only to permanent employees, proved employment on a balance of probabilities. The absence of a written contract could not defeat the claim, since section 9 of the Employment Act imposes a duty on the employer to issue such a contract.
31. The Respondent further argued that the Respondent's continuous service for about five years converted any casual engagement into a term contract under section 37 of the Employment Act, relying on **Kenya Union of Sugar**

**Plantation and Allied Workers v West Kenya Sugar Company Limited [2020] eKLR.**

32. It was submitted that the Appellant's failure to produce employment records, payroll, or registers; documents required under sections 74 and 79 of the Act; justified a negative inference against it.
33. Regarding the applicable law, the Respondent argued that the trial magistrate correctly applied sections 35, 45, 49, and 90 of the Employment Act. Referencing *Walter Anuro vs Teachers Service Commission* [2013] eKLR, it was submitted that lawful termination requires both substantive justification and procedural fairness, which the Appellant failed to establish.
34. Regarding termination, the Respondent argued that dismissal through an SMS without notice, a show-cause letter, or a hearing violated statutory procedure and rendered the termination both substantively and procedurally unfair. It was further submitted that, under

section 43 of the Employment Act, the employer's failure to prove reasons for termination automatically renders termination unfair.

35. On evidential burden, the Respondent contended that the Appellant proved his case on a balance of probabilities, relying on **JRS Group Limited v Kennedy Odhiambo Adwak, Kisumu Civil Appeal No. 180 of 2010**. Further, the Appellant's evidence was inconsistent and unsupported, leaving the Appellant's evidence largely unrebutted.

36. In conclusion, the Respondent urged the appellate court to find the appeal unmeritorious, uphold the trial court's findings, and award costs to the Respondent in accordance with the principle that costs follow the event.

### **Analysis and Determination.**

37. I have carefully considered the grounds of appeal set out in the Memorandum of Appeal filed herein, the record, and submissions by the parties, and take the view that the instant appeal revolves around two issues: what was the form of the relationship between the Appellant and the

Respondent, and was the Respondent entitled to the reliefs granted by the trial Court.

38. It is not in contention that the parties herein had an engagement; however, what is in dispute is the nature and the length thereof.

39. This Court observes the Appellant's contention that the Respondent has not provided any evidence of a written agreement between the parties. It is imperative to acknowledge at this juncture that the law appreciates that an employment contract need not be documented in writing. The absence of a written agreement, in evidence by the employee, does not inherently render their claim invalid. The existence of an employer-employee relationship can be ascertained from alternative materials and circumstances, especially in cases where no written contract exists.

40. The Respondent presented a National Social Security Fund statement of account to demonstrate that he was at all material times an employee of the Appellant. The learned

trial Magistrate relied on the document to hold that the Respondent had continuously worked for the Appellant and that his employment had to be considered converted from casual to term employment by operation of law.

41. A careful review of the record shows that the document was submitted as evidence without any objection from the Appellant. The Appellant cannot now contest the authenticity or admissibility of the document.

42. In light of the fact that the Appellant admitted that there was some form of engagement between it and the Respondent, and the production and reliance of the statement of account and other documents in evidence by the Respondent in a bid to demonstrate that at all material times, he was an employee of the Appellant, I am not hesitant to conclude that the Respondent discharged his legal burden under Section 45 of the Employment Act. He demonstrated prima facie that he had been continuously employed by the Appellant.

43. The architecture of the above-stated provision is that the burden of proof is then shifted to the Appellant to disprove the Respondent's evidence regarding this issue. If it indeed did not consistently remit funds to the Respondent's account, or at all, it would have been easy for them to produce a register or payment record, thereby refuting the alleged payments and supporting their consistency.
44. I have carefully considered the consistency of the transactions on the statement of account mentioned hereinabove. It gives one a clear message: it was in respect of an employee who worked continuously for the remitter of the funds for a long period. In fact, for more than three years.
45. Based on the foregoing premises, I am not persuaded to interfere with the learned trial Magistrate's conclusion that the Respondent's engagement was converted into a term employment pursuant to Section 37 of the Employment Act, and that, as such, at all material times, he was an employee of the Appellant.

46. The Appellant challenged most of the reliefs awarded by the learned trial Magistrate on the narrow grounds that there was no employer-employee relationship between the Respondent and the Appellant that could entitle the former to the statutory rights and protections under the Employment Act. Having found this position to be not well-founded, I have no basis to disturb the award by the trial Magistrate, save for one relief as outlined below.
47. The Respondent sought, and the trial Magistrate awarded him five months' gross salary under the head "Salary for 5 months". I am of the view that this claim was simply thrown to the trial Court. There was no factual evidence whatsoever before the trial to support the claim for special damage. The trial court erred in awarding the relief.
48. In the upshot, the Appellant's appeal is limitedly successful. The award of five months' gross salary under the above-stated head is hereby set aside. Each party to bear its own costs.

**Read Signed and Delivered this 12<sup>th</sup> Day of March 2026.**

**OCHARO KEBIRA**

**JUDGE**

ORIGINAL