

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
ELRC APPEAL NO. E045 OF 2024

BETWEEN

DANIEL EROGO
EKENO.....APPELLANT

AND

DEDAN KIMATHI UNIVERSITY OF
TECHNOLOGY.....RESPONDENT

(Being an Appeal from the Judgment and decree of Hon. Anastacia Ndungu in Nyeri CMELRC No. E016 of 2022 delivered on 25th November 2024)

JUDGMENT

1. The Respondent instituted proceedings before the Chief Magistrate’s Court at Nyeri in CMELRC Cause No. E016 of 2022, asserting that he was engaged by the Appellant on 6th August 2009 as a day and night watchman on a casual basis. He averred that he worked continuously in the same capacity until 31st July 2017, when his employment was verbally terminated by the Appellant. He further contended that the nature of his duties was such that they could not be completed within a period of three months.

2. The Respondent's position before the trial Court was that, pursuant to **Section 37 of the Employment Act**, his engagement as a casual employee converted into a contract where wages were payable monthly, thereby bringing his employment within the ambit of **Sections 35(1)(c) and 45 of the Act**.
3. The Respondent averred that his termination was unfair, unlawful, unconstitutional, and procedurally flawed. Consequently, he sought declaratory reliefs against the Appellant, together with claims for overtime, unpaid public holiday dues, house allowance, accrued leave, and compensation for unfair termination and unfair labour practices, in addition to costs and interest.
4. In response to the Claim, the Appellant asserted that the Respondent was engaged as a security guard on a casual basis for discontinuous periods not exceeding one (1) month at any given time, and that such engagement never crystallized into term employment. The Appellant maintained that the employment relationship terminated at the end of each day's work, and that the Respondent never worked for more than 24 hours at any one time.
5. The Appellant further denied violating the Respondent's right to fair labour practices and contended that the Respondent was not entitled to the reliefs sought, on the basis that his employment was never converted from casual to

term employment, that he was duly paid all sums owing, and that his disengagement was fair and lawful. To this end, the Appellant urged the Court to dismiss the suit with costs.

6. The matter proceeded before the trial Court by way of oral evidence and documentary exhibits, followed by written submissions. The Respondent testified in support of his case, while the Appellant called one witness, **Peter Wandurua Kariuki**, its Head of Human Resources.
7. Upon considering the evidence and submissions by both parties, the learned Magistrate rendered judgment in favour of the Respondent. In her determination, the learned Magistrate held that the Respondent's engagement had transformed into regular employment, thereby entitling him to statutory safeguards, including protection against unfair termination and benefits such as leave and overtime.
8. The Court further found that the termination of the Respondent's employment was unfair. Accordingly, the Court granted the Respondent declaratory reliefs and awarded him **Kshs 274,804/=** comprising notice pay, compensation for unfair termination, and accrued leave. The Court further awarded the

Respondent costs and interest, and directed the Appellant to issue him with a certificate of service.

The Appeal

9. Aggrieved by the aforesaid determination, the Appellant lodged the present Appeal, advancing the following eight grounds in support thereof;

- 1) THAT the learned trial Magistrate erred in law and in fact in holding that Respondent's casual employment had converted to a contract of service, a finding which was not supported by evidence, law or legal principles in the cited authorities.**
- 2) THAT the learned trial Magistrate erred in law and in fact in holding that the Respondent's employment was unfairly and unlawfully terminated, when the Appellant had already proved the reasons for termination.**
- 3) THAT the learned trial Magistrate erred in law and in fact in making an award of claim for annual leave, a finding which was not supported by evidence, law or legal principles in the cited authorities.**
- 4) THAT the learned trial Magistrate erred in law and in fact and wholly misapprehended the legal principles governing the assessment of damages for unfair termination of employment and fair termination of**

employment and section 49 of the Employment Act, of the Employment Act thereby making an award which was manifestly excessive.

5) THAT the learned trial Magistrate exercised her discretion wrongly in the assessment of the damages for unfair termination of employment, thus arriving at an excessive award.

6) THAT the learned trial Magistrate erred in law in grossly misdirecting herself on the principles of law enunciated in the authorities, thereby arriving at an erroneous decision of awarding costs to the Respondent.

7) THAT the learned trial Magistrate erred in law in failing to properly analyze all evidence on record and hence arriving at a wrong conclusion.

8) THAT the learned trial Magistrate erred in law in failing to consider the Appellant's submissions before delivering the judgment.

10. Consequently, the Appellant seeks the following orders from this Court:

a) THAT this Appeal against the judgment delivered by the trial Magistrate on 25th November 2024 be allowed in its entirety.

b) THAT the said judgment and decree of the learned trial Magistrate be varied and/or set aside.

c) THAT the Appellant be awarded costs of this Appeal.

d) THAT this honorable Court grants any other or further relief it deems fit or just.

The Submissions

11. The Appeal was canvassed by way of written submissions. Both parties filed their respective submissions, which the Court has duly considered.
12. On his part, the Appellant submitted that the Respondent's engagement as a day or night watchman remained purely casual and never crystallized into a contract of service.
13. The Appellant further contended that the Respondent, together with other claimants in similar suits, worked intermittently for discontinuous periods, each lasting less than one month at any given time.
14. It was the Appellant's position that the Respondent's evidence did not meet the statutory threshold for conversion of casual employment into a term contract under section 37 of the Employment Act.
15. Additionally, the Appellant argued that the trial court failed to appreciate the Respondent's own admission that he was a casual employee, and that some of

his colleagues had successfully applied for and secured employment on contractual or permanent terms. The Appellant faulted the Respondent for failing to explain why he did not pursue similar opportunities, contending that his claim was an afterthought following the lawful termination of his casual engagement.

16. The Appellant further maintained that the termination of the Respondent's engagement was fair and lawful, and that the Respondent neither disclosed nor proved the circumstances surrounding the termination.

17. It was the Appellant's submissions that the Respondent failed to discharge the evidentiary burden imposed under the Employment Act. In support of this position, reliance was placed on the case of *Nicholas Ngula Mwaniki v R.K. Sanghani Limited [2021] KEELRC 993 (KLR)*.

18. On the other hand, the Respondent submitted that he adduced evidence demonstrating that he was remunerated on a monthly basis. In the same breath, he contended that the Appellant failed to produce a written contract or the statutory particulars required under Sections 10(1) and 74 of the Employment Act.

19. The Respondent further argued that any intermittent breaks in service did not affect the aggregation of his employment, given the consistent pattern of engagement on a day-to-day, week-to-week, month-to-month, and year-to-year basis.

20. The Respondent urged the Court to find that he had established, on a balance of probabilities, that he worked for a continuous period exceeding one month in aggregate, and that he had demonstrated conversion of his casual employment into term employment under Section 37(1)(a) of the Employment Act. In support of this argument, the Respondent placed reliance on the decisions in ***Rashid Odhiambo Allogoh & 245 others v Haco Industries Limited [2015] eKLR***, ***Silas Mutwiri v Haggai Multi-Cargo Handling Services Limited [2013] eKLR***, and ***Chemilil Sugar Company v Ebrahim Ochieng Otuon & 2 others [2015] eKLR***.

21. The Respondent urged the Court to find that he had satisfied the requirements of Section 37(3) of the Employment Act and was therefore entitled to the full protection afforded to permanent employees under the Act.

22.The Respondent further submitted that no valid reason was provided for his dismissal and that the termination process was procedurally flawed, as he was neither accorded due process nor issued with notice or payment in lieu thereof.

Analysis and Determination

23.As a first appellate Court, this Court is obligated to re-examine and re-evaluate the evidence on record, together with the Judgment, and to arrive at its own independent conclusion. In this regard, the Court ought to be cognizant that it did not have the advantage of observing and hearing the witnesses testify firsthand. This duty was reaffirmed in *Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR*, as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

24. Being mindful of the Court's role at this stage, and upon consideration of the Memorandum of Appeal, the entire record, and the parties' respective submissions, the Court distills the following issues for determination:

- a) Whether the trial Court erred in holding that, by operation of law, the Respondent's engagement was converted from casual employment to a term contract;**
- b) Depending on the finding in (a), whether the trial Court erred in concluding that the Respondent's termination from employment was unfair;**
- c) Depending on the finding in (b) whether the reliefs awarded to the Respondent by the trial Court are sustainable in law.**

Conversion of the Respondent's employment to a term contract

25. It is not in dispute that the Respondent was initially engaged on a casual basis. The issue in contention is whether the said engagement converted into a term contract.

26. At the trial Court, the Respondent asserted that he served the Appellant continuously from 6th August 2009 until 31st July 2021, when his employment was terminated. The Appellant disputed this position, asserting that the

Respondent was engaged on a casual basis for intermittent periods of less than one (1) month at any given time, and that such engagement never crystallized into a term contract.

27. In view of this divergence in positions between the parties, the central issue for consideration at the outset is: who qualifies as a casual employee? The answer is found in Section 2 of the Employment Act, which defines a casual employee as follows:

“A person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.”

28. In essence, a casual employee is one engaged on a day-to-day basis, with each engagement not exceeding 24 hours. Pursuant to Section 35(1)(a) of the Employment Act, such an engagement is terminable by either party at the close of the day without the requirement of notice.

29. Before the trial Court, the Respondent produced weekly duty rosters covering the periods 6th November 2020 to 14th November 2020, 23rd April 2021 to 1st

May 2021, 9th May 2021 to 15th May 2021, 16th May 2021 to 22nd May 2021, 2nd July 2021 to 4th July 2021, and 9th July 2021 to 11th July 2021.

30. The Respondent further exhibited his National Social Security Fund (NSSF) provisional member statement, which identified the Appellant as his employer and reflected consistent monthly contributions made on his behalf from 2012 through to 2020.

31. In addition to the foregoing, the Respondent produced copies of his tax Deduction Cards for the years 2018, 2019, and 2020. It is noteworthy that, save for May 2019, the Appellant remitted the Respondent's income tax for the entirety of 2018 and 2019. With respect to 2020, remittances were made except for the months of April, May, June, July, August, September, and December.

32. The Respondent further exhibited a letter of recommendation dated 31st August 2017 authored by **Dr. Lilian Mwenda**, the Appellant's Senior Lecturer and Deputy Director, in which she confirmed that the Respondent was known to her as a member of the Appellant's security team, having served in that capacity since 15th March 2015.

33. Having asserted that the Respondent's engagement was purely casual in nature, the Appellant bore the burden, under **Section 10(7) of the Employment Act**, of proving that assertion. The said statutory provision stipulates as follows:

(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

34. Notwithstanding the statutory obligation imposed upon the Appellant, it failed to tender any evidence before the trial Court to demonstrate that the Respondent's engagement was indeed intermittent and casual in nature. This was despite its statutory role as the custodian of employment records.

35. Indeed, rather than adducing evidence to substantiate its position, the Appellant merely sought to discredit the evidence tendered by the Respondent.

36. Upon a re-evaluation of the evidence on record, including the weekly duty rosters, the Respondent's NSSF provisional member statement, the Tax Deduction Cards, and the letter of recommendation dated 31st August 2017 authored by **Dr. Lilian Mwenda**, this Court is persuaded that the Respondent

worked for periods exceeding 24 hours and was remunerated on a monthly basis, thus surpassing the threshold contemplated for casual employment under **Section 2 of the Employment Act.**

37. The Appellant's contention that the sampled weekly duty rosters demonstrate that the Respondent had at least one (1) day off per week is unpersuasive, particularly in light of **Section 27(2) of the Employment Act**, which entitles an employee to a minimum of one (1) rest day in every seven (7) days.

38. Further to this, the variability in the Respondent's salary does not, of itself, establish that his engagement was casual in nature, as such fluctuations may reasonably be attributed to overpayments or deductions in certain months.

39. In any event, the burden of proving the nature of the Respondent's employment lay squarely with the Appellant. It is therefore unclear why it failed to produce comprehensive duty rosters to substantiate its assertion that the Respondent's engagement was intermittent and purely casual.

40. This Court agrees with, and is bound by, the holding of the Court of Appeal in ***Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune [2021] eKLR***, wherein it was stated that: -

“[15]. In any event, as per the respondent, the burden lay with the appellant by virtue of Section 10(7) of the Employment Act to establish the terms of her employment. His failure to render any employment record meant that the appellant had not established his allegations that she was a casual employee. Besides, the respondent submitted that having worked for the appellant from August, 2010 until November, 2013, the appellant was estopped by Section 37 of the Employment Act from claiming that she was a casual employee.”

41. In light of the Appellant’s failure to discharge its evidential burden, this Court concludes that the engagement between the Appellant and the Respondent assumed permanency with wages payable on a monthly basis.

42. Consequently, **Section 35(1)(c) of the Employment Act** applied to the Respondent’s contract of service by virtue of **Section 37**, which is couched as follows:

(1) Notwithstanding any provisions of this Act, where a casual employee

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

(b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more,

the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.

(2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.

(3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have

been entitled to under this Act had he not initially been employed as a casual employee.

(4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.

(5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of this Act shall apply.

43. This position was affirmed by the Court of Appeal in *Nanyuki Water & Sewage Company Limited vs Benson Mwiti Ntiritu & 4 others [2018] eKLR*, where it was held that: -

“Section 37 of the Employment Act, 2007 applies to the employment of the respondents to the effect that their casual employment was converted into a contract of service where wages are paid monthly and to which section 35 (1) (c) of the Act applies. The respondents were entitled to such terms and conditions of service as they would have been entitled to under this Act had they not initially been employed as casual employees.”

44. I am in full agreement with the Court of Appeal's determination and find it applicable to the present case. I further note that the Appellant's contention in its submissions that the Respondent did not apply for conversion is without merit, as the conversion occurred automatically by operation of law. The Respondent did not need to apply for conversion.

45. In sum, there is no error in the trial Magistrate's finding that the Respondent's employment was converted into a term contract by operation of law.

Unfair termination of employment

46. At the trial Court, the Appellant's defence on this issue was that no notice or reasons for termination were required, as the engagement involved daily wage payments in accordance with **Section 35(1)(a) of the Employment Act**.

47. Having established that the trial Magistrate correctly found that the Respondent's employment was converted by operation of law into a term contract, it follows that the Respondent was entitled to protection against unfair termination. Accordingly, the Appellant was required under **Sections 43 and**

45(2)(a) and (b) of the Employment Act to demonstrate the reasons for the Respondent's termination from employment and further, that the said reasons were valid, fair, and based on his conduct, capacity, compatibility, or its operational requirements.

48. The Appellant was further required to establish that the Respondent was afforded a fair hearing, as envisaged under Section 41 of the Employment Act.

49. It is noteworthy that in its judgment, the learned trial Magistrate observed that the Respondent's termination arose from a lack of government funding occasioned by the COVID-19 pandemic, and on that basis concluded that the reason for termination was valid and fair.

50. Notwithstanding that finding, the record reflects that the Appellant had pleaded before the trial Court that the Respondent's termination was not grounded on misconduct, poor performance, or physical incapacity, circumstances which would otherwise necessitate providing reasons for termination.

51. Accordingly, based on the Appellant's pleadings, no reasons were furnished for the termination of the Respondent's employment. This being the case, there are no reasons presented upon which the Court can assess their validity and fairness under the criteria set out in **Sections 45(2)(a) and (b) of the Employment Act**.

52.It therefore goes without saying that the Respondent was terminated without cause, in contravention of **Sections 43 and 45(2)(a) and (b) of the Employment Act.**

53.What's more, the Respondent was not notified prior to his termination that the Appellant was considering ending his employment for any reason. This further demonstrates a breach of the requirements for a fair hearing under **Section 41 of the Employment Act.**

54.In light of the foregoing, this Court concurs with the trial Magistrate's finding that the Respondent's termination from employment was unfair.

Remedies?

55.The trial Court, having found that the Respondent's termination was unfair, awarded him compensation equivalent to twelve (12) months' salary, in addition to one (1) month's salary in lieu of notice. In granting the maximum compensation under Section 49 of the Employment Act, the trial Court observed that the award was discretionary and was influenced by the length of the employment relationship.

56.As held by the Court of Appeal in *Kenya Revenue Authority v Mwangela* [2025] KECA 262 (KLR), the Court’s discretion under Section 49(1) of the Employment Act must be exercised judicially, taking into account all relevant factors and ensuring fairness to all parties.

57.Indeed, **Section 49(4) of the Employment Act** specifically enumerates 13 factors to guide the Court in determining the quantum of compensation for wrongful dismissal or unfair termination.

58.In the present case, the trial Court did not indicate any factor considered in awarding the maximum compensation other than the length of the employment relationship.

59.Given that 12 months’ salary represents the maximum compensation under **Section 49(1)(c) of the Employment Act**, it was reasonably expected that the trial Court would identify special circumstances justifying the award of the full statutory limit.

60.The record indicates that the present matter was one of a series of 23 related cases, being tried as a test suit. It thus follows that the award of maximum compensation could have a cascading effect on the other matters.

61. Further to the foregoing, the trial Court found that the reason for the Respondent's termination was valid and fair, attributing it to the COVID-19 pandemic. It is therefore contradictory that, having so found, the trial Court nonetheless proceeded to award the Respondent maximum compensation under Section 49(1) (c) of the Employment Act.

62. In view of the foregoing, and guided by the principle of "*a fair go all round*," the Court finds that an award of 12 months' salary in the circumstances of this case is excessively high. Accordingly, the Court considers compensation equivalent to six months' salary to be a fair and reasonable remedy for the unfair termination.

63. The trial Court further awarded the Respondent accrued annual leave for six years, from June 2015 to 31st July 2021.

64. **Section 28(4) of the Employment Act** prescribes the timeframe within which an employee must take statutory annual leave, preventing indefinite accumulation and potential forfeiture. Under this provision, an employee is required to take leave within the initial 12 consecutive months in which it is earned, with any remaining leave to be taken no later than 18 months after the end of the leave-earning period.

65. Applying Section 28(4) to the present case, it is clear that the Respondent is entitled to recover accrued leave only up to a maximum of 18 months, rather than the six years claimed and awarded by the trial Court.

Orders

66. In the final analysis, the Court partly allows the Appeal and makes the following orders: -

- a) The declaratory orders awarded by the trial Court are hereby sustained.**
- b) The award of one (1) month's salary in lieu of notice, amounting to Kshs 16,144.00, is upheld.**
- c) The award for compensation is upheld, but the quantum is revised from twelve (12) months' salary to six (6) months' salary, resulting in an adjusted sum of Kshs 96,864.00.**
- d) The award for unpaid annual leave is sustained but reduced to Kshs 16,951.20, reflecting a maximum of eighteen (18) months' leave.**
- e) The total decretal sum of Kshs 274,804.00 is set aside, and the final award is determined at Kshs 129,959.20.**

f) Interest on the amount in (e) shall accrue at court rates from the date of this Judgment until full payment is made.

67. The costs in this Court and at the trial Court shall be borne by the Appellant and shall be calculated based on the final award.

DATED, SIGNED and DELIVERED at NYERI this 17th day of April 2026.

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STELLA RUTTO

JUDGE

In the presence of:

For the Appellant

Mr. Gitibi

For the Respondent

Mr. Waweru

Court Assistant

Ndati

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent direction of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court.

In permitting this course, this Court had been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE