

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

(Before Hon. Lady Justice Monica Mbarũ)

APPEAL NO. E183 OF 2025

HYDERY (P) LIMITED..... APPELLANT

VERSUS

SETH MIRUKA.....RESPONDENT

**Being an appeal from the judgment of Hon. Lucy Sindani delivered on 21st
August 2025 in Mombasa CMELRC No. E278 of 2023]**

JUDGMENT

The appeal arises from the judgment delivered on 21st August 2025 in Mombasa CMELRC No. E278 of 2023.

The background of the appeal is a claim filed by the Respondent before the trial court.

The claim was that the Respondent was employed by the Appellant and engaged as a loader on 10 January 2016, earning daily wages of Ksh. 1,000, amounting to Kshs 30,000 per month. The said wages were paid in cash at the end of the day, and upon receiving them, the Respondent would sign a voucher acknowledging receipt and return it to the Appellant. There was no contract

issued. The Respondent worked until 6th January 2023, when the Appellant terminated his services without a valid reason and without following due process. It was the company policy that all employees undergo medical examination every six months and obtain a Certificate to that effect. The Company Supervisor advised all employees, including the Respondent, to obtain their medical Certificates on time to avoid being locked out of the company premises. Due to financial constraints, the Respondent was unable to obtain his certificate on time. On 6 January 2023, he approached the Supervisor, Mr Harris, explained his predicament, and requested permission to access the premises to sort out his financial issues and obtain a Certificate. The supervisor, however, refused and ordered him to leave the premises and not to return. He claimed there was unfair termination of employment and claimed the following dues:

- a) Notice pay Ksh. 30,000.
- b) Leave pay Ksh. 147,000.
- c) House allowance Ksh. 378,000.
- d) Service pay Ksh. 105,000.
- e) 12 months' compensation Ksh. 360,000.
- f) Certificate of service.
- g) Costs of the suit.

In response, the Appellant's case was that there was no employment as a loader on 10th January 2016, nor did the Appellant earn a wage of Ksh. 1,000 per day as alleged. The wages earned when work was allocated would be paid in cash, and the Respondent would sign a voucher. There was no employment relationship because the Appellant engaged a supervisor as an independent contractor to provide labour services, and the contractor would, in turn, engage the Respondent to provide labour. The Appellant was a stranger to the terms of engagement between the superior and the Respondent. The independent contractor kept a work register for its employees, which was placed with the Appellant. The Respondent would sign the register every time he accesses the premises. Work was only allocated when available and not for more than 3 months. The gang leader would be paid in return and pay the Respondent; hence, the claims made should be dismissed with costs.

The Learned Magistrate heard the parties and held that there was unfair termination of employment and awarded the following:

- a) 5 months' compensation Ksh. 280,000.
- b) Leave pay Ksh. 33,000.
- c) Notice pay Ksh. 26,000.
- d) Service pay for 7 years Ksh. 91,000.
- e) Costs of the suit.

Aggrieved, the Appellant raised 7 grounds of appeal that the Learned Magistrate erred in law and fact in finding that the Respondent was a casual employee who converted to permanent employment without proof or evidence of such matter. The court failed to appreciate that the Appellant occasionally employed the Respondent, through an external supervisor, when work was available. Thus, the finding of unfair termination of employment was an error, as there was no employment relationship. The award of notice pay at Ksh. 26,000 was not justified since there was no contract of service. The award of 5 months' compensation at Ksh. 130,000 for alleged unfair termination was without merit. Without proof of employment, leave pay is at Ksh. 33,000 was not warranted. Tabulation of service pay for 7 years without proof of employment had no legal basis.

The Appellant thus seeks that the judgment be set aside with costs.

The Appellant submitted that there was no proof of employment to support the trial court's findings. There was casual employment, with the Respondent being sourced from time to time when work was available. This is allowed under section 2 of the Employment Act (the Act), which defines a casual employee; hence, the same could not be converted to permanent employment under section 37 of the Act. In **Rapid Kate Services Limited v John Mutisya & 2 others [2018] KECA**, the court held that casual employment only converts to permanent employment when the statutory conditions of section 37 of the Act

are met. The mere intermittent engagement does not amount to continuous service sufficient for conversion.

The basis for assessing the claims was that there was permanent employment, which

was the case. Thus, the finding that there was an unfair termination of employment was incorrect, and it did not justify the award of 5 months' compensation, notice pay, leave pay, and service pay for 7 years, given that employment was not continuous. The Appellant relied on the case of **Everret Aviation Limited v Kenya Revenue Authority [2013] eKLR**, **Kenya Power & Lighting Co. Ltd v Nathan Karanja Gachoka & another [2015] eKLR**, and **Thome v Katuma & another [2024] eKLR**.

The Appellant submitted that the judgment of the trial court should be set aside.

The Respondent submitted that he was employed by the Respondent in January, 2016. The Appellant, however, failed to issue the Respondent a letter of appointment or a contract of service as required under the law. The documents on record, however, support the assertions that he was employed by the Respondent, as evidenced by the work attendance sheets and medical certificates.

The Appellant called witnesses to support the response that labour was outsourced. However, there was no evidence or proof of such outsourcing. The

Appellant's evidence is inconsistent, unsupported by documentary proof, and falls short of displacing the Respondent's case. In **Vincent Owino Oduor v Mitchel Cotts Freights [K] Limited [2020] eKLR**, the court faced a similar situation when the Respondent denied the existence of an employer-employee relationship with the claimant, stating that it outsourced its employees to a third party. The court held there was no outsourcing agreement between the Respondent and the alleged outsourcing agent, and that the said outsourcing agent had failed to prove that he was a legitimate outsourcing agent.

The fact of wages being paid by the supervisor is not in itself sufficient proof of outsourcing. The alleged third party had no records of employment for the Respondent. The trial court assessed the facts and made correct findings.

Determination

This being a first appeal, the court may review the record, reassess the findings, and render its conclusions. However, take into account that the trial court had the chance to take evidence and thus see and hear the witnesses give evidence.

The Appellant has challenged the fact that there was no employment relationship between the parties. It asserts that the Respondent was taken by a supervisor, an outsourced gang leader who would pay his wages.

The Respondent asserts that he was employed from 2016 and would obtain medical certificates to gain access to the Appellant's premises. He would be paid a daily wage of Ksh. 1,000 all at Ksh. 30,000 per month.

Outsourcing of labour is a concept now accepted in our labour practices. In **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR**, the court appreciated that:

... [the employer is] within its rights to declare redundancies. ... [what the court is] to consider was that in this age of heightened technology, increased mechanization, and an increasingly skilled workforce, there are diverse business concepts which when effected, can cost effectively facilitate expansion and growth of a business, while reducing workforce requirements. Outsourced services is one such widely accepted business concept, which enables a company to focus on core business, reduce overheads, increase cost and efficiency savings, and manage cyclical resource demands. It is not designed to deprive Kenyans of their jobs.

However, with outsourcing, the employer should not assign the entity's core duties. See **Wrigley Company (East Africa) Limited v Attorney General & 2 others & another [2013] eKLR**.

The principal cannot outsource its core mandate. Such must be undertaken by the primary employees.

The Appellant asserts that it outsourced labour to the supervisor. There is no evidence of the Respondent outsourcing crucial duties from 2016 to 2023. Where a gang leader was deemed necessary to the business, recourse should have been to a formal agreement under which the Appellant would have been protected.

Without any evidence of outsourced labour, the alleged supervisor to the Respondent maintained work records for and on behalf of the Appellant. For work done that was too likely to end each day despite payment of a daily wage, the Respondent became protected under section 37 of the Act.

Section 37(1) (b) requires that:

(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 work records submitted by the Appellant are in the nature that the Respondent was at work:

In July to August 2022;

In September 2022;

In October and November 2022.

The work allocated to the loader was not, by its nature, likely or reasonably expected to be completed in a day. Thus, under section 37 of the Act, the Respondent became protected with rights and benefits under the Act.

The Appellant then proceeded under the mistaken belief that there was outsourced labour and thus proceeded to terminate employment without due process. Without proof of the outsourcing of labour, the Appellant should have adhered to the mandatory provisions of sections 35, 41 and 43 of the Act, as held in **In Esther Njeri Maina v Kenyatta University [2020] eKLR**, that retaining an employee as a casual for over three months while performing continuous duties is unlawful and entitles the employee to statutory protections.

In **Humphrey Nyaga Thomas & 25 others v Kenyatta University [2021] KEELRC 18 (KLR)**, the court emphasised 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.

On the evidence before the court, the Appellant was a protected employee under section 37 of the Act. Without being accorded a hearing before termination of employment, the Respondent was in breach of sections 35, 41 and 43 of the Act

as held in **Josephine M. Ndungu & others v Plan International Inc. [2019] eKLR.**

The provisos of section 41 of the Act are mandatory. Before termination of employment, the employer should issue notice and allow the employee to make his representations. Even in a case of gross misconduct or the alleged theft by the Appellant, the due process of sections 44 and 41(2) is mandatory as held in **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR** and **Isindu v Lavington Security Guards Ltd [2017] KECA 225 (KLR):**

Section 41 of the Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative.

The award of notice pay and compensation is justified.

On the claims made, taking annual leave is a right under section 28 of the Act. Pursuant to the rights due to an employee protected under section 37 of the Act, the Respondent was entitled to his annual leave. However, such is not allowed to accumulate over the years and only accrues for 18 months pursuant to section 28(4) of the Act, all at 33 days. For the wage of Ksh. 1,000 the assessment by the trial court at Ksh. 33,000 is justified.

On the claim for house allowance, a casual employee earning Ksh. 1,000 per day is over and above the minimum wage due to Ksh. 731.50, which is inclusive of house allowance. The paid wage per day was generous, and a claim for house allowance is not justified.

On the claim for service pay, the Respondent testified that for the time served under the Appellant, he was required to obtain a medical certificate. He did not state who paid for it. Under section 35(5) and (6) of the Act, where the employer secures the employee under a medical cover or such other social policy, service pay is not due.

On costs, the appeal was partially successful; each party should meet its costs.

Accordingly, the judgment in Mombasa CMELRC No. E278 of 2023 is hereby reviewed in the following terms:

- a) Employment terminated unfairly.**
- b) 5 months Compensation awarded at Ksh. 280,000.**
- c) Leave pay Ksh. 33,000.**
- d) Notice pay Ksh. 26,000.**
- e) Each party to bear its costs for the trial court and the appeal.**

Delivered in open court at Nairobi, this 23rd day of April 2026

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Catherine and Omar

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and

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