

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

(Before Hon. Lady Justice Monica Mbarũ)

APPEAL NO. E148 OF 2025

DAVID NYAUNDO OKONG'O.....APPELLANT

VERSUS

NEWTIMES INTERNATIONAL LIMITED T/A

NEWTIMES HOTEL..... RESPONDENT

[Being an appeal from the judgment of Hon. L.K. Sindani delivered on 30th June 2025 in Mombasa MCERLC No. E059 of 2023]

JUDGMENT

The appeal arises from the judgment delivered on 30th June 2025 in Mombasa CMERLC No. E059 of 2023. The appeal is that the learned trial magistrate erred in law and fact in failing to consider the evidence before it. The finding that there was no employment relationship was despite the fact of the Respondent admitting that he rendered services to them as a casual laborer and hence there were binding statutory provisions and judicial precedent that protect casual workers. The trial court failed to apply section 10(7) of the Employment Act (the Act) in calling for work records and thus shifted the burden of proof to the Appellant instead of the Respondent, the employer.

Other grounds of appeal are that the trial court erred in failing to assess the claims based on the evidence before it. The claimants for notice pay, compensation, public holidays, and house allowance should have been accordingly assessed. The appeal should be allowed with an assessment of the claim.

The background to the appeal is a claim filed by the Appellant on the basis that he was employed by the Respondent on 29th August 2015 as a cleaner at the hotel trading as Newtimes Hotel. On 12th February 2020, his employment was terminated without the due process. He was not issued with reasons, notice or paid any terminal dues. At the time, he was earning Ksh. 9,000 per month instead of Ksh. 13,572.90 as prescribed under the wage Orders hence there was underpayment of wages. He claimed the following:

- a) Notice pay Ksh. 13,572.90.
- b) Accrued leave days from 2015 to 2019 Ksh.62,851.31
- c) Public holidays worked from 2014 to 2020 Ksh. 63,626.69
- d) House allowance from 2014 to 2020 Ksh. 118,010.23
- e) Underpayments from 2014 to 2020 ksh. 200,866.80
- f) Gratuity for 5 years for non-payment of statutory dues to NSSF Ksh. 33,932.25
- g) 12 months compensation.
- h) Costs of the suit.

In response, the Respondent denied the claims and that on 29th August 2015, it employed him as a cleaner as alleged. There was no employer/employee relationship between the parties. The Appellant was employed as a security guard by one of the security companies contracted to offer services to the Respondent hotel. The terms of engagement were between the security company and the Appellant and not between the Appellant and the Respondent as alleged. The claims made should be dismissed with costs.

The Respondent supported its case and filed the witness statement of Benjamin Gitonga Mutugi a director of the company. His case was that the hotel would engage casual laborers from time to time. The Appellant was among the casual workers engaged vocationally during seasons when there were many guests at the hotel. He would be paid each day for work done. Since he was employed on casual terms, there was no termination of employment as alleged.

The Respondent also filed the witness statement of George Kimathi Ndatho the manager. His case was that he would engage the Appellant as a casual worker for periods of a day to 3 weeks at most. During COVID pandemic 2020 and hotel business was closed following government directives and it took long to reopen operations hence no need for the Appellant services.

The Appellant did not file any response to the Respondent's responses.

The learned magistrate heard the parties and held that there was no proof of the employment relationship. Without such a relationship, the claims were meritless and were thus dismissed.

On the appeal, the Appellant reiterated that the failure of the trial court to recognize the employment relationship between the parties was in error. This was despite the Respondent's admission of the employment relationship, as held in **Tabitha Mumbua Kimongo v Shrink Pack Limited**.

Under section 10(7) of the Act, the employer who pleads to the employment relationship has the duty to produce work records. The Respondent failed to address these statutory obligations. In **Patrick Shikuvale Bunoywa v Nobken General Supplies [2013] eKLR**, the court held that the employer's failure to produce work records places the employer at a disadvantage.

In this case, the trial court should have assessed the claims on merit and made the awards. The appeal should be allowed, with the claim reassessed and costs.

The respondent submitted that the trial court well established that there was no employment relationship between the parties. There were no work records since in the first place, without the employment being proved, such records would not be kept for the Appellant. The Appellant admitted knowledge of a similar case, **Austin Nyeta Ndaa v Newtimes International Limited [2023] eKLR**, in which a similar claim failed.

The Respondent submitted that, in evidence, it called Benjamin Gitonga Mutungi, a director, who admitted that the Appellant was a casual laborer, was paid only when work was available, and that it had no obligation to pay terminal dues as claimed.

The Respondent also called George Kimathi Ndatho, the manager, testified that the Appellant would be employed once in a while and not beyond three (3) weeks at a time. Without an employment relationship, the judgment of the trial court should be affirmed and the appeal dismissed with costs.

Determination

This initiated a first appeal; the court has the duty to reassess the record, review the finding, and reach a conclusion. However, consider that the trial court had the opportunity to see and hear the witnesses testify.

The main challenge in the appeal is the finding that there was no employment relationship between the parties; hence, the Appellant's claim was dismissed.

However, a review of the record in its entirety is the evidence by the Respondent in response. The case was that the Appellant was employed as a security guard by a third party. The necessary evidence to support such a claim is not submitted. Further, two crucial witnesses were called by the Respondent: Benjamin Gitonga Mutungi, a director, and George Kimathi Ndatho, a manager.

Both admitted in their statement and in evidence that the Appellant was employed as a casual worker from time to time; indeed, the manager, Mr Ndathi, emphasized that the Appellant would be employed for up to 3 weeks.

In employment claims, unlike any other commercial dispute, the employer must produce work records pursuant to section 10(6) and (70 and 74 of the Act. Upon a claim such as the one made by the Appellant, the duty to produce rests upon the employer as held in **Cyka Manpower Services Limited v Mlewa [2026] KEELRC 700 (KLR)** and **Unga Company Limited & another v Isabwa [2026] KEELRC 391 (KLR)**.

On the response that the Appellant would offer his services for up to 3 weeks at a time, the Respondent should have filed the casual workers' records to assist the trial court in analyzing them and assessing the claims. The rationale is that a casual employee is one employed for a day and the work ends each day as held in **Newtimes International Limited t/a Newtimes Hotel v Charo [2026] KEELRC 709 (KLR)**.

The evidence and admissions by the witnesses called by the Respondent thus confirmed that employment of the Appellant went beyond a day. He then became protected under section 37 of the Act. He acquired rights and benefits under the Act.

The claim made should have been analysed on the merits.

Notice pay is due to the employee whose employment is terminated without due process under the mistaken belief that he is a casual laborer, even though the work undertaken, in its nature, did not end with each day. The Appellant would be employed for up to 3 weeks at a time. Under sections 2 and 37 of the Act, he ceased being a casual employee.

The wage due to a general worker in Mombasa in 2020 is Ksh. 13,572.90 as the basic wage. There is a due house allowance of 15% thereof, amounting to KSh. 2,035.95 and gross wage Ksh. 15,608.85.

On the claim for underpayment, the Appellant was paid Ksh. 9,000 per month. On the due wage of Ksh. 15,608.85 per month, there was an underpayment of ksh. 6,608.85.

Underpayments being a continuous injury under section 89 of the Act, he can only claim for 12 months at KSh. 79,306.20.

This assessment of underpayment accounts for the due house allowance.

Termination of employment without due process is unlawful and unfair. The court finds an award of one month's compensation appropriate at Ksh. 15,608.85.

On the claim for public holidays, these were particularised in the Memorandum of Claim. Each day is published by the Minister as a special day. When the

employee is at work, he earns for it. However, the Appellant claimed that he had been employed since 29th August 2015. However, he seeks payment for public holidays from 2014. These claims are exaggerated, and, to balance the scales of justice, the court awards him compensation for public holidays not taken in the last 12 months of his employment, amounting to Ksh. 13,572.13.

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.

On the claim for gratuity for non-payment of NSSF dues, whereas gratuity is due under a written contract of collective agreement, the technical application of such term is understood to apply where statutory dues were not remitted. This is confirmed by the Respondent, who took the Appellant to be a casual labourer, and hence did not accord him the rights under the Act. Where statutory dues are not remitted by the employer under section 35(5) of the Act, the employee is entitled to claim service pay. In this case, the claim for Ksh. 33,932.25 for non-remittance of statutory dues to NSSF is reasonable and justified.

On costs, the Appellant's claims had a good foundation. Costs should have been awarded by the trial court. This appeal has been found with merit, and it is allowed with costs.

Accordingly, judgment in Mombasa CMELRC No. E059 of 2023 is set aside, and the following orders are issued:

- a) Employment of the Appellant by the respondent terminated unlawfully and unfairly.
- b) Compensation Ksh. 15,608.85.
- c) Notice pay Ksh. 15,608.85.
- d) Underpayments and house allowance Ksh. 79,306.20.
- e) Public holidays 79,306.20.
- f) Leave pay Ksh. 17,169.79
- g) Service pay 33,932.25
- h) Costs for the appeal and trial court.

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

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Catherine and Omar

..... and

.....