

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

(Before Hon. Lady Justice Monica Mbarũ)

APPEAL NO. E225 OF 2025

RICHARD NYANGERI OMWRO..... APPELLANT

VERSUS

KENY TANZ TRADING LIMITED.....RESPONDENT

**[Being an appeal from the judgment of Hon. L. K. Sindani delivered on 13th
November 2025 in Mombasa CMELRC No. E325 of 2024]**

JUDGMENT

The appeal arises from the judgment delivered on 13th November 2024 in Mombasa CMELRC No. E325 of 2025.

The Appellant, aggrieved by the judgment, has raised 5 grounds of appeal that the Learned Trial Magistrate erred in law and fact in finding that the Appellant failed to establish an employment relationship with the Respondent despite tendering evidence in terms of the NSSF statement and the letter of termination of employment by summary dismissal dated 7th May 2024. The appeal is also that there was an error in the judgment, in that the trial court failed to find that there was no fair hearing before summary dismissal, after the Appellant had

worked as a casual employee, and hence the claims made should have been analysed on the merits.

The Appellant seeks that the trial court's judgment be set aside and the claims assessed on the merits.

The Appellant filed a claim before the trial court, asserting that he was employed as a machine operator on 2nd February 2021, earning a basic wage of Ksh. 18,200. He worked for the Respondent until 7th May 2024, when his employment was terminated without proper procedure and without justification. On 27th April 2024, while at work, the director came to the factory and found some rejected candles lying beneath a faulty machine. The Appellant was working near the machine and informed the director that he was not the one who had left the candles. There were five other 5 machine operators present, but the director summoned him to the office and asked him to leave the premises. On 28th April 2024, the Appellant was called by the supervisor Kazungu, who directed him to report to work the following day. The Appellant worked until 7th May 2024, when he was served with notice terminating his employment without being accorded a hearing. He was not paid for the days worked, Ksh. 8,455. He had not taken annual leave, was not paid a house allowance or terminal dues and thus claimed the following:

- a) Notice pay Ksh. 18,200.
- b) Unpaid salary arrears Ksh. 8,455.

- c) Hose allowance for 36 months Ksh. 98,280.
- d) Unpaid leave for 3 years Ksh. 38,241.
- e) 12 months' compensation Ksh. 218,000.
- f) Unpaid NHIF for 3 years, Ksh 18,000.
- g) Service pay for 3 years Ksh. 27,300
- h) Certificate of service.

In reply, the Respondent denied the claims, stating that there was no employment contract or relationship between the parties. The Appellant was engaged only on a needs basis, not permanently. He was paid for the days worked as agreed upon in the job description. The alleged events occurring on 27th April 2024 were denied, and the Respondent has standard operating procedures. Internal investigations were conducted, and the Appellant was found to have stolen the Respondent's items. There was no formal employment as alleged; hence, there was no case of contract termination, and wages were paid only for the allocated work. The claims had no merit.

The Respondent filed various work records regarding the Appellant, including a suspension notice dated 27th April 2024, weekly operators' payments, and NSSF and NHIF payments.

The Learned Magistrate heard the parties and held that the Appellant failed to prove that he was in the continuous employment of the Respondent. The

Respondent had demonstrated that he worked only 3 days a week, and in some weeks, only 1 day, hence intermittent employment. This could not be converted to protected employment under section 37 of the Employment Act (the Act), hence the claims made had no merit and were dismissed.

On the appeal, the Appellant submitted that under section 47(5) of the Act, upon an employee discharging the burden of proof that there was unfair termination of employment, the employer is then required to justify the reason leading to termination of employment, as held in **Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] eKLR; Muthaiga County Club v KUDHEIHA Workers [2017] eKLR**. In this case, the Appellant discharged his burden by testifying that his employment was terminated unlawfully without due process. The finding that there was no employment relationship was in error, as records confirmed otherwise. The notice of termination of employment was proof of the employment relationship. The trial court should have analysed the claims on this basis.

The Respondent did not attend or file written submissions.

Determination

As this is a first appeal, the court may review the record, reassess the findings, and render its conclusions. However, consider that the Learned Magistrate had the chance to see and hear the witnesses give evidence in court.

In the employment relationship, part of the records filed by the Respondent were the weekly operators' payments. This allocates work for the Appellant for 3 days a week. The last record of employment was on 28th April 2024. The Appellant was called by the supervisor, Kazungu, who directed him to report to work the following day. Thus, from 29th April 2024 until 7th May 2024, the Appellant was at work when he was served with notice terminating his employment.

There is a notice terminating employment. No disciplinary hearing was conducted for the alleged theft of the Respondent's property.

Under section 37 of the Act, an employee who works continuously and the employment is not terminated at the end of each day is protected. Further, an employee who undertakes duties that are unlikely to be completed within a day is protected under section 37 of the Act. The employee acquired benefits and rights under the Act.

In **Esther Njeri Maina v Kenyatta University [2020] eKLR**, the court held 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.**

Under the mistaken belief that there was no formal contract of employment and thus the Respondent could terminate employment at will, due process was not addressed. The provisions 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.”

In this case, notice pay and compensation are due to the Appellant for non-adherence to the mandatory provisions of section 41 of the Act.

Notice pay is due at Ksh. 18,200.

The Appellant had worked for over 3 years from 7 February 2021 to 7 May 2024. A compensation of 3 months is hereby found appropriate at Ksh. 54,600.

On the claim for house allowance, the Appellant was not on contract. The protection under section 37 of the Act allowed him basic terms and benefits. The wage is paid in Ksh. 18,200 is above the minimum, inclusive of house allowance.

Under section 28 of the Act, the claim for 3 years of untaken leave days is a right. However, leave days arrears can only go back to 18 months pursuant to section 28(4) of the Act. This amounts to 33 days at Ksh. 20,020.

Regarding the claim for NSSF unremitted dues, these accrue to the statutory body, not to the employee.

In the claim for service pay, the main evidence of employment was the NSSF remittances. The Respondent also filed records for NHIF and NSSF. Service pay is not due.

On the claim for a Certificate of Service, this is due at the end of employment in terms of section 51 of the Act. It should issue unconditionally upon clearance.

On costs, the claim was successful; the costs are due to the trial court and the appeal.

Accordingly, judgment in Mombasa CMELRC No. E325 of 2024 is set aside and judgment entered for the Appellant against the Respondent in the following terms:

- a) A declaration that there was employment between the parties protected under section 37 of the Act and was terminated unlawfully and unfairly.**
- b) Compensation Ksh. 54,600.**
- c) Notice pay Ksh. 18,200.**
- d) Leave pay Ksh. 20,020.**
- e) Certificate of service.**
- f) 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

.....

and

.....