

REPUBLIC OF KENYA

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

COURT NAME: MOMBASA ELRC

CASE NUMBER: ELRCA/E089/2025

EVANS MOTAI ONDIEKI VS ESTEEL CONSTRUCTION LTD

JUDGMENT

BACKGROUND.

1. Alleging that at all material times, he was an employee of the Respondent as a General Worker, whose employment was terminated unfairly, the Appellant sued the Respondent seeking declaratory and compensatory reliefs, Mombasa Chief Magistrates' Court, Employment and Labour Relations Cause No. E082 OF 2024.
2. Upon being served with summons to enter an appearance, the Respondent defaulted in entering an appearance and or filing a Memorandum of Response to the Claim. The matter consequently proceeded for formal proof.
3. After hearing the Appellant on his case, the learned trial Magistrate, E.M. Mwamuye, dismissed the Appellant's claim with no orders as to costs. The Appellant's appeal herein challenges the whole of the judgment.
The Appellant's case before the trial Court
4. It was the Appellant's case that he was first employed by the Respondent as a General Worker in January 2019. He worked continuously for the Respondent in the role until 25th January, 2024, when his employment was terminated at the Respondent's initiative.
5. He contended that on 25th January, 2024, he was summoned by the Respondent's Foreman, Mr. Richard, who informed him that the Managing Director, Mr Ramesh, had directed that he should not report to work any further, as his services were no longer required.
6. The Appellant further contended that, in the circumstances, he was summarily dismissed, without being given a reason for the dismissal, and without being accorded a hearing. The termination was in breach of the stipulations of sections 41, 43, and 44 of the Employment Act, 2007.
7. His monthly salary was KShs. 16,240. He worked from Monday to Sunday, from 4 pm to 8:00 am, without compensation for the overtime.
8. He asserted that in the circumstances of the matter, he was entitled to;
 - a) 12 months' salary as compensation.....KShs. 194,880.00
 - b) Notice PayKShs. 16,240.00
 - c) Service pay [KShs.8,120 x6 years]KShs. 48,720,00
 - d) Annual leave for 6 years worked.....KShs. 97,440.00
 - e) Over time, for 3 years worked [KShs. 136 x 5hours per day x 1095 days], KShs. 744,600.

The Lower Court's Judgment

9. After considering the material placed before her, the learned trial Magistrate held that the Appellant was at all material times in the employment of the Respondent as a casual worker, and whose employment did not convert into term employment under section 37 of the Employment Act. As such, he was not entitled to those

statutory protections and rights that the Employment Act affords to other categories of employees. Consequently, she declined to grant him any of those reliefs he had sought.

The Appeal

10. Aggrieved by the decision of the lower Court, the Appellant challenges the same through the instant appeal, setting out the following grounds;

- a) THAT the Learned Magistrate erred in not awarding the Appellant the prayers sought in the Memorandum of Claim, despite the Appellant adducing sufficient evidence.
- b) THAT the Learned Magistrate erred in fact by failing to consider and to consider the evidence adduced on behalf of the Appellant.
- c) THAT the Learned Magistrate failed to appreciate the submissions of the Learned Counsel for the Appellant by finding Judgment in favour of the Respondent herein.
- d) THAT in all circumstances of the case, the findings of the Learned Magistrate are insupportable in law or on the basis of the evidence adduced.

Analysis and Determination

11. I have carefully considered the grounds put forth in the Memorandum of Appeal, the record, and the respective submissions by Counsel for the parties herein, and hold that the appeal herein revolves around two principal issues: whether the Appellant’s employment was unfairly terminated, and whether the Appellant was entitled to those reliefs he had sought or any of them.

12. This being a first appeal, it is this Court’s primary duty to re-evaluate the evidence on record in order to come to its own independent conclusion on the evidence and the law.

13. It is important to emphasize that the absence of an appearance and response filing by a Respondent, leading to the case advancing to formal proof, does not entitle the Claimant to automatic success. The Claimant must present sufficient evidence to satisfy the applicable legal standards. This requirement is especially crucial within the framework established by the

Employment Act, wherein both the employee and the employer are subject to specific legal burdens. See Section 47[5] of the Employment Act. The Appellant’s Counsel’s submissions, which seem to suggest an automatic success in situations where the employer defaulted in appearance, are thus not well-grounded.

14. To address the first issue appropriately, one needs to answer the sub-question, namely, whether the Appellant was an employee of the Respondent and, if so, in what role. The Appellant pleaded and stated in his witness statement that was adopted as his evidence in chief by the lower Court, that at all material times, he was an employee of the Respondent as a general worker.

15. Based on inferences, which I hold were erroneous, the Learned trial Magistrate concluded that the Appellant was, at all material times, in the service of the Respondent as a casual worker, whose employment was intermittent, not continuous. She drew the conclusion from what she perceived of the MPesa statements presented by the Appellant in evidence to demonstrate that he was an employee of the Appellant and that the Respondent paid his salary through the mode.

16. This Court notes that the M-Pesa statement reflects that the Appellant would be paid more than once a month, and that the payments were way less than the monthly salary of KShs. 16,240.00, pleaded. In my view, the fact that, due to a contractual arrangement or a reason known to the employer, the employee’s salary is paid in instalments, at various points of the month and not once at the end of the month or any date of the month, cannot be enough to aid a conclusion that the service of the employee was intermittent and casual in nature. In fact, a clear pattern emerges: the Appellant was paid in four monthly instalments.

17. I have carefully considered the relevant transactions on the statement that explicitly reference salary payment and note that in;

- a) March 2023, the Appellant was cumulatively paid... KShs. 20,006.00
- b) April 2023, he was paid a cumulative sum of KShs. 17, 188.00.
- c) May 2023.....KShs. 20,556.
- d) December 2023..... KShs. 30,051.

e) November 2023.....KShs. 16,929.

f) October 2023..... KShs. 20,780.

18. The foregoing is sufficient to conclude that the Learned Trial Magistrate erred in finding that the Appellant would earn less than the amount stated in his pleadings.
19. In the upshot, I reach the inevitable conclusion that the Learned Magistrate's finding that the Appellant was a casual worker was based on an erroneous premise. In this Court's view, the Appellant was a General Worker.
20. Section 47[5] of the Employment Act, 2007, establishes a reverse legal burden. The employee bears the initial burden to demonstrate that an unlawful termination or wrongful dismissal occurred. It is trite now that all that the employee needs to establish is a prima facie case that the termination or summary dismissal was without adherence to the dictates of procedural and substantive justification. It is only after discharging this burden that the evidential burden shifts to the Employer to justify the termination or dismissal.
21. Considering the Appellant's assertions in his pleadings and statement of response, regarding the lack of procedural fairness and substantive justification, in the process leading to his termination, and the decision to have his employment terminated, respectively, it is not difficult to conclude that the Appellant discharged his legal burden under the provision.
22. The Appellant's evidence that his employment was terminated at the initiative of the Respondent was not challenged.
23. Under Section 47[5] of the Employment Act, for any complaint of unfair termination or wrongful dismissal, the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.
24. The Court in the case of Pius Machafu Isindu v Lavington Security Guards Limited [2017]eKLR, stated; " There can be no doubt that the Act places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal, prove that the reasons are valid and fair, and prove that the grounds are justified. A mandatory and elaborate process under Section 41 requiring notification and hearing before determination. The Appellant [employee] in this case had the burden to prove not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon to prove the reason for termination, and where the employer fails to do so, the termination will be deemed to have been unfair."
25. The Respondent did not present any evidence before the trial Court to prove the reason for the termination. They did not present any evidence to enable them to discharge their legal burden under Section 43 of the Act [prove the reason for the termination], Section 45 [that the termination was on a valid and fair reason], and Section 41[that the termination was procedurally fair]. The termination by dint of the provisions of section 45 of the Act is hereby deemed unfair.
26. In conclusion, the Learned trial Magistrate erred in law and fact when she failed to hold that the termination of the Appellant's employment was at the initiative of the Respondent. Further, the same was unfair.
27. Having found as I have hereinabove, I now turn to consider whether the Appellant is entitled to the reliefs that he had sought before the lower court or any of them.
28. Section 49 [1][c] of the Employment Act bestows on the courts the authority to grant an employee who has successfully challenged his or her employer's decision to terminate his or her employment or summarily dismiss him or her from employment, a compensatory award. However, the exercise of the authority is discretionary. It depends on the circumstances of each case.
29. I have carefully considered the manner in which the termination of the Appellant's employment was done, without adherence to the principles of procedural and substantive fairness, the length of service of the Appellant, and the fact that he did not in any proven manner contribute to the termination, and conclude that he is entitled to the compensatory award, to the extent of seven months' gross salary, KShs. 112, 917.
30. Under Section 28 of the Employment Act, annual leave is a statutory right for an employee. The Employer bears a statutory obligation to facilitate the right. The Appellant contended that he did not at any point

proceed for leave. His evidence was not challenged by the Respondent. Consequently, I grant him KShs. 56,458.5 for earned but unutilized leave days.

31. This Court observes that, in most months, as evidenced by the M-Pesa statement, the Claimant received payments significantly exceeding the monthly salary he asserted to be earning. He has not provided any explanation for the excess amounts. In the absence of such an explanation, I am compelled to conclude that these amounts represent overtime payments. Consequently, I decline to make any award under this head.
32. The Appellant's employment was terminable under Section 35 of the Employment Act, by notice. Inarguably, the Appellant's employment was terminated without notice. He is entitled to notice pay, one month's salary in lieu of notice.
33. In the upshot, this appeal succeeds partially in the following terms;
 - I. The Learned trial Magistrate's finding that the Appellant was at all material times of the Respondent, but as a casual worker, is hereby set aside.
 - II. That it is hereby declared that at all material times, the Appellant was an employee of the Respondent as a General Worker.
 - III. A declaration that the Appellant's employment was terminated at the initiative of the Respondent, in a manner that was procedurally and substantively unfair.
 - IV. Compensation pursuant to the provisions of Section 49[1][c] of the Employment Act, seven months' gross salary, KShs. 112,917. V. Notice pay, KShs. 16,131.
 - VI. Compensation for leave days earned but unutilized, KShs. 56, 458.5 VII. Costs of the suit in the lower court.
 - VIII. Costs of this appeal shall be in his favour.
 - IX. Interest on the sums awarded above, from the date of the lower Court Judgment till full payment.
- X. The Respondent is to issue the Appellant with a certificate of service within 30 days of today.

Read Signed and Delivered this 23rd Day of April 2026.

OCHARO KEBIRA

JUDGE