



**Kitui Flour Mills Limited v Mbai (Appeal E172 of 2024)
[2025] KEELRC 177 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 177 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E172 OF 2024
M MBARÚ, J
JANUARY 30, 2025**

BETWEEN

KITUI FLOUR MILLS LIMITED APPELLANT

AND

BERNARD ODHIAMBO MBAI RESPONDENT

*(Being appeal from the judgment of Hon. G. Sogomo [M. L. Nabibya]
delivered on 25 July 2024 in Mombasa CMELRC Cause No.E019 of 2023)*

JUDGMENT

1. The appeal arises from the judgment delivered on 25 July 2024 in Mombasa CMELRC E109 of 2023. The appellant is seeking that the judgment be varied and or set aside with costs.
2. The background of the appeal is a claim that the respondent filed before the trial court. His case was that he was employed by the appellant as a general labourer on 1 April 2017 at a daily wage of Ksh.635, which was later increased to Ksh.735 in May 2022. On 1 October 2022, the appellant altered the employment terms and required the respondent to sign a term contract. He claimed that there were no consultations before the alterations. The changes were meant to deny him his dues for years worked. His supervisor advised he would not be allowed at work without signing the term contract. The human resources gave the respondent an ultimatum to execute the term contract or be dismissed. The respondent was not allowed within the premises leading to unfair summary dismissal. He claimed that his terminal dues were not paid.
3. The claims were that the daily wage paid at Ksh.635 from May 2018 to April 2022 was below the minimum at Ksh.653.10 and hence claimed the following;
 - a. Wage arrears 18 November 2022 Ksh.735;
 - b. Wage arrears 19 November 2022 Ksh.735;



- c. Underpayments May 2018 to April 2022 Ksh.26,064;
 - d. Notice pay Ksh.20,050;
 - e. Leave pay from 2017 to 2022 Ksh.83,238.75;
 - f. Damages for unfair termination of employment Ksh.264,600;
 - g. Costs of the suit.
4. In response, the appellant admitted the respondent was employed as a casual. He was paid based on the daily rate as gazetted by the Minister per the Wage Orders. From 1 May 2018, the appellant paid a daily wage of Ksh.735 more than the prescribed rate of Ksh.731.50 per day. However, the respondent deserted work on 19 November 2022 after being paid his daily wage. His employment was intermittent and not continuous as alleged. Before 31 May 2017, the appellant had engaged the Ready Consultant providing it with labour requirements.
 5. The appellant also argued that it offered the respondents a fixed-term contract but he declined. He remained as a casual on a needs basis. The claims made are without basis and there was no summary dismissal as alleged. The respondent deserted his duties without notice.
 6. The trial court delivered judgment and held that there was an unfair termination of employment and made the following awards;
 - a. Underpayments Ksh.19,440;
 - b. Leave pay Ksh.15,435;
 - c. 12 months compensation Ksh.264,600;
 - d. Certificate of service.
 7. Aggrieved, the appellant filed the appeal on the basis that the learned magistrate erred in law and fact by finding that the employment converted to a regular term contract by dint of Section 37 of the *Employment Act* and that employment terminated unfairly. The trial court shifted the burden of proof contrary to Section 47(5) of the *Employment Act*. The awards of annual leave, underpayments, and maximum compensation were not justified. Notice pay should not have been awarded since the respondent was a casual employee and the award of wages for 18 and 19 November 2022 was in error as there was evidence of these payments.
 8. Both parties attended and agreed to address the appeal by way of written submissions.
 9. The appellant submitted that the conversion of employment to regular employment under Section 37 of the *Employment Act* was in error since the respondent was employed as a casual when employment was available. The employment was not continuous and payments were for days worked. The NSSF and NHIF records are not proof of continuous employment as held in *Asakbulu v West Kenya Sugar Company Limited ELRC Appeal No.1 of 2023*. Where an employee is engaged as a casual intermittently, section 37 of the *Employment Act* does not apply as held in *Rashid Mazuri Ramadhani & 10 others v Doshi & Company (Hardware) Limited & another [2018] eKLR*.
 10. There was no evidence of unfair termination of employment. The respondent did not discharge his burden under Section 47(5) of the *Employment Act* to warrant the appellant to justify or give reasons for the respondent's absconding duty. The appellant issued the respondent with a term contract which he declined to execute and opted to remain on casual terms as held in *Mugo v Mwietheri Savings & Credit Co-operative Ltd [2022] eKLR*.



11. The appellant submitted that the awards for annual leave from April 2017 to November 2022 were not justified and had no legal basis. Before 31 May 2017, the appellant did not engage casuals since they were all under a third party, Ready Consultancy. The claims going back to 2017 were time-barred as held in *Charles Muthusi Mutua v Kathi Kathoka Services Limited* [2022] eKLR. The court in the case of *Del Monte Kenya Limited v Kyengo* [2024] eKLR held that an employee cannot accumulate annual leave for over 10 years. Such is limited under Section 90 of the *Employment Act*.
12. The awards for notice, pay for 18 and 19 November 2022, underpayment, and compensation at 12 months were without legal basis since there was no proof of unfair termination of employment. The maximum award of 12 months was not given any reasonable basis and the judgment of the trial court should be varied or set aside and dismissed with costs.
13. The respondent submitted that the ground that the trial court erred in finding that the respondent was a causal employee converted under Section 37 of the *Employment Act* was lawful. Under Section 10(7) of the *Employment Act*, the employer must file work records. Section 37 of the Act, where the employee is retained beyond 24 hours, employment is converted to term employment as held in *Chemelil Sugar Company v Ebrahim Ochieng Otuon & 2 others* [2015] eKLR and *Empire Feeds Ltd v King'ou Appeal 6 of 2020*.
14. In this case, the respondent was employed as a general loader from 1 April 2017 to 21 November 2021. There are NSSF and NHIF records to prove such employment. The records filed show the respondent was working during the night shift for Factory Guards and working for the appellant during the day as a loader. Without the appellant producing work records under Section 74 of the *Employment Act*, the case before the trial court was not challenged. In *Kenyatta University v Maina Civil Appeal 261 of 2020*, the court held that the effect of Section 37 of the *Employment Act* is to give the employee protection. The signing of 3 months contract which was renewed upon expiry was proof that there was continuous employment.
15. The respondent submitted that it was alleged that he deserted duty on 19 November 2022. Desertion of duty inferred there was continuous employment. In the case of *Joash Nyongesa Makokha v Amboseli Court Limited* [2021] eKLR the court held that where the employer fails to demonstrate the efforts taken to trace an alleged deserting employee, the assumption is that there was an unfair termination of employment.
16. In this case, the appellant failed to adhere to the mandatory provisions of Sections 41, 43 and 45 of the *Employment Act* leading to unfair termination of employment. The claims made should be confirmed with costs. Maximum compensation was justified due to the nature of the violations. Costs are justified for the trial court and the appeal.

Determination

This is a first appeal.

17. As this is a first appeal, the court must analyze and re-assess the evidence on record and reach conclusions. However, take into account that the trial court had the opportunity to hear witnesses testify.
18. As outlined above, the respondent claimed that he was employed as a general labourer by the appellant but was required to execute a term contract and when he declined, his employment was terminated without payment of his terminal dues. He admitted that he was on a daily wage.



19. The appellant on their part asserted that there was no continuous employment and the respondent was on a daily wage. He was issued with a term contract but declined to execute it and opted to remain as a casual employee.
20. Whereas an employee who works continuously and for work that is not likely to end each day is protected under the provisions of Section 37 of the *Employment Act*, an employer has the legal duty to issue an employee with a written contract under the provisions of Section 10(1) and (3) of the *Employment Act*;
 - (1) A written contract of service specified in section 9 shall state the particulars of Employment which may, subject to subsection (3), be given in instalments and shall be given not later than two months after the beginning of the employment.
21. The issuance of a written term contract by the appellant to the respondent was lawful and a statutory requirement. His refusal to execute the same though his right, the appellant should have issued notice to terminate the continuous engagement of the respondent.
22. Part of the records filed by the appellant to support its case before the trial court was the casual payment records. The evidence of the parties also confirms the respondent was engaged continuously and though paid a daily wage, the nature of work done was not ending each day. His services were required daily by the appellant.
23. The import of Section 37 of the *Employment Act* should be read in full. Taking parts thereof would not give a proper meaning and understanding of the section. In this regard, Section 37(1) (b) of the Act protects a casual employee in this manner;
 - (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,
24. In this case, the respondent was at the disposal of the appellant and indeed, the response is that he refused to execute the term contract and opted to remain on casual terms. The respondent was protected under the law and was entitled to rights and benefits under the Act at the end of his employment. Where he refused to comply with proper and lawful directions and instructions of the employer to execute a written contract with defined terms and conditions of employment, the duty was on the employer and appellant herein to issue him with notice to address such lapse.
25. To allow the respondent to continue serving on casual terms exposed the appellant to a claim such as herein.
26. Allowing the respondent to abandon work or fail to execute a written contract resulted in unfair termination of employment.
27. The award of notice paid by the trial court cannot be faulted. This is justified.
28. On the award of 12 months compensation, under Section 45(5) (2) of the *Employment Act*, the court in assessing the compensation to be awarded is required to look at the conduct of the parties. The appellant made a great effort to have the respondent under a written term contract. This is a legal requirement. The respondent declined. This conduct put into account, to award compensation at the maximum of 12 months is without a reasonable basis. An award of one (1) month for the legal lapse on the part of the appellant and the conduct of the respondent is sufficient.



29. The records demonstrate that the last wage paid to the respondent was Ksh.735 on 19 November 2022. This was over and above the legal minimum which at the time was Ksh.731.50 and on this rate, a notice pay award of Ksh.22, 050 is appropriate.

Compensation is awarded at ksh.22, 050.

30. On the claims for wage arrears on 18 and 19 November 2022, the appellant filed evidence of payment on pages 084 and 085 of the Record of Appeal. These payments were for Ksh.735 each day which is a rate over and above the legal minimum.
31. Taking annual leave for a protected employee is lawful. Under Section 28 of the *Employment Act*, an employee protected under Section 37 of the Act has the right to 21 leave days each year. However, such annual leave cannot accumulate for more than 18 months under the provisions of Section 28(4) of the Act. The appellant did not allocate annual leave on the mistaken belief that the respondent was on casual employment. In this regard, the respondent is only entitled to 33 leave days. On the last wage of Ksh.735, the due leave pay is ksh.24, 255.
32. On the alleged underpayments of wages, the respondent's case was that from May 2018 to April 2022 he was paid a wage of Ksh.635 instead of Ksh.653.10 under the Wage Orders.
33. Underpayment of wages is a continuing injury. It occurs daily for a casual employee or monthly for a protected employee. Under the provisions of Section 89 of the *Employment Act* (previously Section 90), a continuing injury that occurs daily or monthly should be addressed within 12 months from the date of cessation as held in *Oi Pejeta Ranching Limited v David Wanjau Muhoro* [2017] KECA 329 (KLR); *G4S Security Services (K) Limited v Joseph Kamau & 468 others* [2018] KECA 827 (KLR); and *The German School Society & another v Ohany & another* [2023] KECA 894 (KLR).
34. In this case, the claims for underpayments relate to the period of April 2022 going back to May 2018. The Memorandum of Claim before the trial court was filed on 27 January 2023.
35. Under the mandatory provisions of Section 89 of the *Employment Act*, claims for alleged underpayments can only go back to January 2022. The records in this regard demonstrate the appellant paid the respondent a daily wage of Ksh.655 on 12 January 2022. The legal minimum was Ksh.653.10 per day.
- There is no underpayment.
36. Regarding costs, the claims made by the respondent are partially successful. He was entitled to his costs.
37. For the appeal, of the analysis above, each party should pay its costs.
38. Accordingly, the judgment in Mombasa CMLECR E019 of 2023 is hereby varied in the following terms;
- a. Compensation Ksh.22,050;
 - b. Notice pay Ksh.22,050;
 - c. Annual leave Ksh.24,255;
 - d. Certificate of service;
 - e. Costs of proceedings before the trial court as awarded and each party bears its costs for the appeal.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 30 DAY OF JANUARY 2025.



M. MBARŪ
JUDGE

