



**Kitui Flour Mills Limited v Mitambo & another (Appeal E188 & E187 of 2024  
(Consolidated)) [2025] KEELRC 201 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 201 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E188 & E187 OF 2024 (CONSOLIDATED)**

**M MBARŪ, J  
JANUARY 30, 2025**

**BETWEEN**

**KITUI FLOUR MILLS LIMITED ..... APPELLANT**

**AND**

**JOSEPHAT KWEYU MITAMBO ..... 1<sup>ST</sup> RESPONDENT**

**VINCENT TAABU OBWONG ..... 2<sup>ND</sup> RESPONDENT**

*(Being appeal from the judgment of Hon. G. Sogomo delivered on 16 August  
2024 in Mombasa CMELRC Cause No.E018 of 2023 and No.E015 of 2023)*

**JUDGMENT**

1. The appeals herein are consolidated under Appeal E188 for Determination as the events leading to the cause of action are similar, they relate to the same appellant and the trial court heard the claims together. The orders herein apply to both appeals on ELRCA E188 of 2024 and ELRCA E187 of 2024.
2. The appeal arises from the judgment delivered on 16 August 2024 in Mombasa CMELRC E018 of 2023 and E018 of 2023. The appellants are seeking that the judgment be varied or set aside with costs.
3. The background of the matter is a claim filed by the respondent stating that on 1 October 2008, he was employed by the appellant as a general worker/loader at a daily wage of Ksh.635 and later Ksh.735 in May 2022. On 1 October 2022, the appellant unilaterally altered the terms of the contract and demanded that the respondent execute a fixed-term contract. This would erase the respondent's 14 years of service. The respondent claimed that there were no consultations before the proposed changes to his employment. On 21 November 2022, he reported to work but was informed by the supervisor that he would not be allowed to work without a signed contract. He was then directed to leave the premises leading to summary dismissal contrary to Sections 40, 41, 43 and 45 of the *Employment Act*. The respondent claimed the following dues;



- a. Wage arrears for 18 November 2022 Ksh.735;
  - b. Wage arrears for 19 November 2022 Ksh.735;
  - c. Underpayments;  
May 2018 to April 2022 for 48 months at Ksh.653.10 instead of Ksh.635 claim for Ksh.26,064;
  - d. Notice pay Ksh.20,050;
  - e. Leave pay from October 2008 to November 2022 Ksh.214,805.75;
  - f. Damages for unfair termination of employment Ksh.264,600
  - g. Certificate of service
  - h. Costs of the suit.
4. In reply, the appellant admitted that the respondent was employed as a casual on a daily wage when work was available. He was paid per the Minister Wage Orders applicable from 1 May 2018 at Ksh.655 instead of Ksh.653.10. Upon the review of the minimum wages on 1 May 2022, the appellant increased the wage to Ksh.735 instead of Ksh.731.50. The respondent deserted work on 19 November 2022.
  5. The response by the respondent was also that before 31 May 2017, the respondent was engaged under Ready Consultant which was providing labour to the appellant under an outsourcing agreement. The alleged employment from 1 October 2008 does not apply. The appellant offered the respondent a fixed-term contract but he declined to execute it and opted to remain on casual employment whenever work was available. There was no summary dismissal as alleged since the respondent was a casual employee and deserted work and the claims made are not justified. The appellant paid the respondent for days worked.
  6. The learned magistrate heard the parties and delivered judgment on 16 August 2024 and held that there was an unfair termination of employment and ordered;
    - a. Payment of compensation Ksh.264,600;
    - b. Notice pay Ksh.20,050;
    - c. Unpaid leave Ksh.214,803.75;
    - d. Wages for 18 November 2022 Ksh.735;
    - e. Wages for 19 November 2022 Ksh.735;
    - f. Costs of the suit.
  7. Aggrieved, the appellant filed the appeal because the learned magistrate erred in law and fact in holding that the respondent's employment was converted to a regular term contract by dint of Section 37 of the *Employment Act* and finding there was unfair termination of employment. The trial court erred in shifting the burden of proof under Section 47(5) of the *Employment Act*, where the respondent failed to provide evidence supporting his case. The award for annual leave from April 2014 to November 2022 was not justified, and the compensation at 12 months was excessive and without any legal basis. Notice pay was not due since the respondent was a casual employee and had been paid on 18 and 19 November 2022, and evidence was provided.
  8. Both parties attended and agreed to address the appeal through 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 made for days worked. The NSSF and NHIF records do not prove 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 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*. In the case of *Del Monte Kenya Limited v Kyengo [2024] eKLR*, the court 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 trial court's judgment should be varied or set aside and dismissed with costs.
13. The respondent submitted that under Section 37 of the *Employment Act*, there was conversion of employment upon the respondent's long and continuous service. Section 10 (7) of the *Employment Act* provides that the employer has to produce work records. The appellant failed to adhere to these provisions. Section 37 of the *Employment Act* provides that a casual worker who works continuously for at least one month converts into an employee under a contract of service requiring notice under Section 35 (1) (c) before termination.
14. The respondent submitted that In *Chemelil Sugar Company v Ebrahim Ochieng Otuon & 2 OTHERS [2015] eKLR*, the Court of Appeal held that;

Employees who, on the facts of that case, were initially engaged as casual employees and worked in various capacities for periods ranging between one year and fifteen years, had their respective contracts of service converted to term contracts by operation of law under section 37 of the *Employment Act*. Those provisions are self-explanatory. The respondent's employment with the appellant was automatically converted into term contracts by the operation of that provision.
15. The Respondent was a general labourer/loader working continuously from 1 October 2008 to 21 November 2021. The Respondent produced NSSF and NHIF statements to show proof of his employment with the Appellant. The NSSF statement identifies the Appellant as the employer, and the NHIF statement shows consistent payments made by the Appellant from January 2018 to October 2022. The Appellant led no evidence to disprove the NSSF and NHIF statements.
16. The appellant admitted that the Respondent was employed as a casual. There was no employment contract setting out the employment terms as casual. The Appellant relied on casual labourer vouchers



as proof of casual terms of employment. There was proof of continuous engagement of the respondent and hence protected under Section 37 of the *Employment Act* as held in *Kasera & 10 others v Bidco Africa Limited* [2022] eKLR.

17. The trial court's findings were based on the law, and there were reasons for them. The same should be confirmed with costs. The appeal is without merit and should be dismissed.

### **Determination**

18. As this is a first appeal, the court must do a fresh and exhaustive examination, re-evaluation and re-analysis of the entire record to draw our inferences and make independent conclusions on all the material before the court. However, pay a measure of deference to the trial court's findings but remain free to depart from them in appropriate cases where they are founded on no evidence, constitute a misapprehension of the law, or are wrong. In *Geoffrey Muthinja & Robert Banda Ngombe v Samuel Muguna Henry, John Jembe Mumba, John Maroo, John Columbus Gikunda M'mwanjah, Bernard Njiru Arozon, Samuel Chivatsi Munga, James Marangu M'muketha & 1750 others* [2015] KECA 304 (KLR).
19. The appellant argues that the respondent was employed as a casual when work was available. He was offered a term contract but declined and opted to remain on casual terms. The appellant also argues that before 31 May 2017, the appellant had outsourced labour to Ready Consultant and was not the respondent's employer.
20. The respondent, for his part, asserts that he was offered a fixed-term contract that would have resulted in him losing his 14 years of service and, hence, did not execute it. He was also denied access to the workplace.
21. A casual employee is defined under Section 2 of the *Employment Act* as one who is engaged daily. However, where the casual employee continues being involved in work that is not likely to end and remains on the shop floor each subsequent day, whether paid a daily wage or not, such an employee is protected under Section 37 of the *Employment Act*. In *Nanyuki Water and Sewerage Company Limited v Benson Mwititi Ntiritu and 4 Others* (2018) Civil Appeal No. 20 of 2017 and *Peter Wambugu Kariuki And 16 Others V Kenya Agricultural Research Institute* [2013] eKLR, the courts have held that where work does not end within a day, such an employee is protected under Section 37 of the *Employment Act*.
22. In this case, the appellant filed work records in the form of payments to the respondent for over a day. The work he was undertaking accrued daily, and hence, he became protected under the provisions of Section 37 of the *Employment Act* with rights and benefits thereof.
23. The cause of employment termination was the conversion of causal-term employment to fixed-term employment.
24. Indeed, the appellant was justified under Section 10 of the *Employment Act* in converting the respondent's employment to written terms. The respondent's decline to execute the contract issued was ignoring the lawful and proper directions of the employer. Such is defined under Section 44(4) of the *Employment Act* as gross misconduct subject to summary dismissal.
25. The appellant should not have allowed the respondent to insist on casual employment. Where any claims arose from casual employment, such should have been addressed separately and outside the fixed-term contract. Allowing the respondent to stay on under casual terms only exposed the appellant. The refusal to execute the fixed-term contract should have been sufficient cause to initiate the procedures under Sections 41 and 44 of the *Employment Act*. That is the due process designed to protect the employer and employee.



26. In this case, the appellant failed to address the due process of the law, leading to unfair termination of employment contrary to Sections 41, 44, and 45 of the *Employment Act*. The trial court's award of notice pay and compensation was justified.
27. The respondent was last earning Ksh.735 per day. Notice pay due is Ksh.20, 050.
28. On compensation due, the award of 12 months is the maximum available. It should only be issued in exceptional cases and justification given as held in Kenya Broadcasting Corporation v Geoffrey Wakio [2019] KECA 65 (KLR) and Peter Kamau Mwaura & Peter Njanja Njuguna v National Bank of Kenya [2020] KEELRC 291 (KLR).
29. In this case, the appellant tried to convert causal term employment to written terms as required under Section 10 of the *Employment Act*. The respondent declined. Such refusal should have been a good cause for initiation of termination of employment through the due process of the law. Considering the provisions of Section 45(5) of the *Employment Act*, the court finds the award of 12 months excessive and unjustified. This is reviewed to one (1) month of pay at Ksh.20, 050 in compensation.
30. On the alleged underpayments from May 2018 to April 2022, the respondent had relied on the Wage Orders. From 1 May 2018, the minimum wage was Ksh.653.10, but the appellant paid the respondent Ksh.635. However, a claim of underpayments is a continuing injury that accrues each day or month end. Such must be claimed within 12 months from the date of cessation as held in The German School Society & another v Ohany & another [2023] KECA 894 (KLR).  
The respondent filed his claim on 27 January 2023.
31. The alleged underpayments relate to April 2022 backward. They should have been addressed within 12 months of the due date.
32. The respondent can only justify his claims for underpayments back to January 2022.
33. From the records filed, the wage paid until April 2022 was Ksh. 655, not 635, as alleged. This is a wage above the minimum due; hence, there was no underpayment.
34. On the claim for leave pay, under Section 28 of the *Employment Act*, an employee protected in law is allowed 21 leave days each year. The appellant took the respondent as a casual employee and did not allocate annual leave. Based on the findings above, the respondent was a protected employee, and his right to annual leave is justified. However, annual leave cannot be accumulated for periods beyond 18 months unless approved by the employer under Section 28(4) of the *Employment Act*.
35. In this regard, the respondent is entitled to 33 leave days based on the last wage of Ksh.735 out of the total due of Ksh.24, 255.
36. A certificate of service is due at the end of employment, whatever the reason for termination. Upon clearance, the respondent should be issued his certificate in terms of Section 51 of the *Employment Act*.
37. The respondent's claims on costs are partially justified. He is entitled to the costs awarded by the trial court.
38. For the appeal, each party should pay its costs on the analysis above.
39. 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.  
And
- f. The Orders above as apply in ELRCA E187 of 2024 as consolidated.

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

**M. MBARŪ**

**JUDGE**

