Apopo v Chic Fashions Limited (Appeal E099 of 2023)
[2025] KEELRC 512 (KLR) (24 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 512 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E099 OF 2023

NJ ABUODHA, J

FEBRUARY 24, 2025

BETWEEN

LEONARD OGUTU APOPO ..... APPELLANT

AND

CHIC FASHIONS LIMITED ..... RESPONDENT

(Being an appeal arising from the Judgment and orders of Honourable L.M Njora (SPM) delivered in Milimani Chief Magistrates Court, MC. ELRC No. E1339 of 2020 on 18th May, 2023)

JUDGMENT

1. Through the Memorandum of Appeal dated 16th June, 2023, the Appellant appeals against the whole of the Judgment of Honourable L.M Njora (SPM) delivered on 18th May, 2023.

2. The Appeal was based on the grounds that:

   i. The Learned Magistrate erred in law and in fact in failing to find that the Appellant was a regular term employee by dint section 37 of the *Employment Act*, 2007 and was thus entitled to protections afforded by the Act.

   ii. The Learned Magistrate erred in law and in fact in failing to find that the Respondent unilaterally changed and/or revised the Appellant's terms of employment by sending the employees, including the Appellant home on 24th April,2020 without pay and for an indefinite period of time without any mutual agreement contrary to section 10(5) of the *Employment Act*, 2007 and later purporting to place employees on rotational shift without any mutual agreement.

   iii. The Learned Magistrate erred in law and in fact in failing to find that the Appellant was terminated from employment.

iv. The Learned Magistrate erred in law and in fact in finding that the Respondent demonstrated efforts to contact whereas the Appellant testified under oath that he went to the Respondent's offices severally asking to be called back to work but was turned away and even complained to their union but still the Respondent was adamant to call him back to work.

v. The Learned Magistrate erred in law and in fact in failing to appreciate that the purported phone calls and SMS were a mere gimmick, a red herring and an afterthought meant to sanitise the Appellant's unlawful termination.

vi. The Learned Magistrate erred in law and in fact in finding that the Respondent demonstrated efforts to contact whereas no certified call or SMS transcripts from Safaricom was produced in evidence.

vii. The Learned Magistrate erred in law and in fact in failing to find that even if the Appellant had refused to return to work as alleged or absconded duty or absented himself from the workplace then he ought to have been taken through the due process notification and hearing as codified in section 41 of the *Employment Act*, 2007 prior to his termination.

viii. The Learned Magistrate erred in law and in fact in failing to find that the Appellant was not afforded the due process of notification and hearing as codified in section 41 of the *Employment Act*,2007 prior to his termination.

ix. The Learned Magistrate erred in law and in fact in failing to properly analyse the evidence laid before her by the Appellant.

x. The Learned Magistrate erred in law and in fact in totally disregarding the Appellant's pleadings and submissions.

3. The Appellant prayed that the Appeal be allowed with costs of the lower court and this appeal and the judgment and orders of L.M Njora (SPM) at Milimani in MC. ELRC NO. E1339 of 2020 delivered on 18th May,2023 be set aside and substituted with an order allowing the suit together with costs and interests.

4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant's Advocates Njuru & Co. Advocates filed written submissions dated 8th October, 2024. Counsel submitted that the Appellant worked for the Respondent for 18 years with loyalty and diligence until 24th April, 2020 when all employees were sent away due to COVID-19. That when the Appellant resumed on 11th May,2020 he was again sent away where some employees were taken back while others like 8 were not taken back. That he reported the issue to his Union Tailors and Textiles Workers Union and a letter dated 15th July,2020 was written. That the Respondent responded to the union letter vide their letter dated 23rd July,2020 stating that they considered the Appellant a contracted daily paid worker hence could hire and fire him at will and he was not entitled to protections afforded to employees under the *Employment Act*.

6. Counsel submitted that the Respondent alleged that they were placing employees on rotational shift and no employee had been terminated. That there was no evidence adduced in court that there was an agreement with the Appellant or his union to place the employees on rotational shift. That section 10(5) of the *Employment Act* prohibited an employer from revising the terms of employment unilaterally. That this section agreed with MOU between COTU & FKE clause 3(f) that any measure

to be taken due to Covid-19 pandemic the same was to be mutually agreed upon, be in writing and filed with the Labour Commissioner.

7. Counsel submitted that the Respondent did not comply with the above provision while relying on a among others the supreme court decision of Gatuma vs Kenya Breweries Ltd Petition No. E023 of 2023 that any unilateral variation of the terms of an employment contract may be deemed as a repudiation of contract which if leads to termination it may be deemed as constructive dismissal. That in case of any change of terms the employee ought to be consulted.

8. Counsel submitted that the Respondent's contention that the Appellant was a daily paid contract worker hired and fired daily and that he absconded duties while adducing 2 missed calls allegedly made on 17th August,2020 and 18th August,2020 and a text message on 4th December, 2020, should be rejected as it was made many months in between after the alleged absconding of work. That the Respondent's assertion that the Appellant was a daily paid worker who was not entitled to protections under the Act should be rejected because he worked for the Respondent for 18 years as could be seen from NSSF statement. That he was to be protected from unilateral change of his terms and to be fairly and procedurally terminated as per section 41,43 and 45 of the Act.

9. Counsel submitted that the trial magistrate erred by finding that the Appellant was a daily paid worker whereas his employment had converted to a monthly paid employee under section 37(3) of the Act. Counsel relied on among others the case of ELRCA/E094/2023 Chic Fashions Limited vs Stephen Mwivithi Miwa while submitting that the court should find that the Appellant's employment had converted to a term contract under section 37 of the Act and he was entitled to protections afforded under the act including right to be taken through due process before termination.

10. Counsel submitted that the Respondent ought to have taken the Appellant through disciplinary process as required under section 41 of the Act if he absconded duties. That the Respondent never issued the Appellant with a show cause letter, disciplinary hearing and a termination letter. Counsel relied on among others the case of Judith Atieno Owour v Sameer Agriculture and Livestock Limited (2020) eKLR on the need for employer to take the absconding employee through a disciplinary process. That the missed call was not enough evidence to demonstrate that the Respondent acted justly, equitably in its dealings with the Appellant as required under section 45(4) & (5) of the Act. That the Respondent ought to have issued a notice to show cause and afforded him an opportunity to be heard before termination.

11. Counsel further submitted that the Appellant testified that he had gone to the Respondent's offices severally seeking to be allowed to work but had always been turned away which prompted him to make a complaint to their union which evidence was never controverted. That the purported missed calls and messages made many months apart could not be relied as the Respondent never demonstrated that it made efforts to reach the Appellant through his union or other co-workers.

12. Counsel submitted that the Respondent had little regard to the welfare of their employees by keeping the Appellant as a daily paid worker for 18 years which was placing him under servitude. Counsel relied on the case of Nemuel Nyageri v Laboratory & Allied Limited(2015) eKLR where the court pronounced itself on Temporary Daily Paid Worker Contract which the Appellant and other employees signed, as poor labour relations. That on 4th December,2020 when the Respondent allegedly sent a message claiming that they had resumed work and the Appellant should call them, a demand letter dated 10th November,2020 had already been issued to the Respondent and a Response sent to the Appellant's advocates on 12th November,2020. That the request to call him back ought to be channeled through his advocate.

13. On the issue of whether the Appellant was entitled to terminal dues counsel submitted that the trial court ought to have determined the Appellant's dues of leave and underpayment irrespective of whether she found he was terminated unfairly as those reliefs were independent. That the Appellant was entitled to compensatory damages since under section 43 of the Act the Respondent did not justify the reasons for termination where the Appellant had worked for 18 years. That the Appellant was entitled to 12 months compensation and one month's notice pay of Kshs 17,606/=.

14. On the relief for underpayments counsel submitted that the Appellant was entitled to the same as he was underpaid contrary to Basic Minimum wage Regulations over the years for a machine operator. That the court should award him his underpayments as prayed while relying on the case of Philemon Oseni Kidavi v Brinks Security Ltd (2018) eKLR.

15. On the relief of accrued leave pay counsel submitted that the Appellant was entitled to the same at Kshs 190,943.80/= as per section 28 of the act. That the Respondent as the custodian of employment records as per section 74 of the Act did not produce any documents to the contrary that the Appellant ever proceeded on leave.

16. Counsel concluded on submitting on the role of first appellate court while relying on the case of Selle & Another v Associated Motor Boat Co. Ltd 7 Others (1968) EA 123 and asked this court to set aside the trial court judgment.

Respondent's Submissions

17. The Respondent's Advocates S.K OPIYO & Co. Advocates filed its submissions dated 1st November, 2024 and on the issue of whether the learned Magistrate was accurate by finding that the Appellant absconded duty and placed himself in the predicament he faces counsel submitted that the Appellant was employed on a contract and not a casual employee. He was paid on daily basis as a contracted daily paid worker/ Mass production Machinist with specific daily tasks provided for vide the Regulation of Wages(General) Order.

18. Counsel submitted that the documents produced by the Appellant proved the Appellant was not a casual employee but a daily contracted worker and a mass production machinist and not a machine operator. That the Respondent would pay the Appellant daily wages that would far exceed the minimum wage which were inclusive of leave pay. That the Appellant would be called by the Respondent and informed on the availability of work as and when the same was available through his phone number.

19. Counsel submitted that the Respondent due to Covid-19 was forced to momentarily shut down operations and place all its employees on rotating employment shifts. That there was nothing on record to show that the Appellant was engaged as casual employee and that he was a machine operator.

20. On the issue of whether the trial magistrate properly considered and appreciated the uncontroverted evidence counsel submitted that the trial magistrate was correct in considering the allegations of the Appellant absconding duty then alluded by the Respondent counsel submitted that although the Appellant denied receiving the numerous missed calls and messages as sent by the Respondent the Respondent's records from Safaricom as submitted confirmed that indeed the calls and messages were made and sent to his phone Number 0710598058. That this evidence was admitted on account of certificate of affirmation of electronic Record Pursuant to section 106(B) of the *Evidence Act* hence admissible as the call logs were certified by Safaricom.

21. Counsel further submitted that the Appellant having admitted that the telephone number belonged to him he was estopped vide section 120 of the *Evidence Act* from denying that he never received the

messages sent through the same medium. That section 106(B)(1) vitiates the need for the production of the original documents as required by section 35 of the *Evidence Act*. Counsel relied on the case of Peter Ngethe Ngari T/A PNN Funeral Services v Standard Group Limited PLC & Another (2020) eKLR on this assertion.

22. Counsel submitted that the trial court correctly found that the Appellant was a contracted daily paid worker/ Mass Production Machinist with specific daily tasks as provided under the regulation of wages (General) Order. That the court could not rewrite parties contracts and the fact that the Respondent submitted that the Appellant at no time completed more than three months' continuous service shows that the presumption in relation to conversion could not be applied in this instance. Counsel relied on the case of Feba Radio(Kenya) Limited t/a Feba Radio V Ikiyu Enterprises Limited(2017) eKLR on this assertion.

23. Counsel further submitted that the trial court rightfully found that the burden of proving unfair termination rested with the Appellant which he failed while relying on the case of Dewdrop Enterprises Limited vs Maria Kagai Ligawambugu Wambui Angeline T/A A.W Kinuthia & Company Advocates (2016) eKLR.

24. On the issue of whether the trial magistrate properly considered the submissions cited by parties counsel submitted that the Respondent availed the Appellant' s employment records. That the Appellant being a daily paid contracted employee the contract prevailing at the material time governed the relationship between the parties. That the specific task daily paid contracts were not ambiguous and bound the Appellant. That the said contracts placed no obligation upon the Respond to maintain Appellant's services upon the expiry of the day. That it was untrue that the Respondent altered his employment terms.

25. Counsel further submitted that Clause 3(g) of the MOU was clear that the employees could be subjected to working on shifts as a way of mitigating the spread of Covid-19 pandemic. That it was upon the employee to prove unfair labour practices as was held by this court in Sinohydro Corporation Ltd V Odour(Appeal E005 of 2024) (2024) KEELRC 1377 (KLR).

26. On the issue of whether the Appellant satisfied the principles of Appealing the trial court's decision with a prima facie, case counsel submitted that the Appellant was not entitled to the orders sought in the Appeal as the Respondent made reasonable attempts of communicating to the Appellant through text messages and calls to resume employment.

27. On the issue of whether the Appellant was entitled to prayers sought in his claim counsel submitted on the role of the first Appellate court as was held in Selle's case above that the court had power to subject the whole evidence that was tendered before the trial court and make its own conclusions bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. That the Appellant was not entitled to the prayers sought.

28. Counsel submitted that on underpayments, that the Appellant as a mass Production Machinist, his wages were regulated by the Regulation of Wages Order which from 2012 which included leave pay and that his pay included leave pay which was above recommended scale. That a glance at the order shows that Machine Operator did not include overlock Machine as machines listed therein as it is a sewing machine. That with regard to the applicable order counsel submitted that the Appellant wages did not fall within the Regulation of wages (Knitting Mills) Order as he was not an employee within the cadre. That the Appellant or Respondent were not involved in Knitting business and the appropriate order was the Regulation of Wages (Tailoring, Garment Making and Associated Trades Wages Council Establishment) Order. That the Appellant was neither a machinist nor a knitter but a mass production machinist who stitched T-Shirts and Baby Nappies.

29. On the prayer for one month pay in lieu of notice counsel submitted the Appellant being on a specific task daily paid contracts the relationship between parties herein ended at the end of the specific task and provision of payment thereof done hence issue of notice did not arise. On the issue of accrued leave pay counsel submitted that in the specific task daily paid contracts leave was paid pro rata which the Appellant received. That the Appellant was not entitled to compensation for wrongful termination as he was not unfairly terminated.

30. Counsel in conclusion submitted that on the authority relied by the Appellant that the same was not binding as it was made by the court of concurrent jurisdiction as the same will be appealed in court of appeal as court failed to consider electronic evidence which was the subject of review and a decision rendered in 31.10.2024 with the Appeal being dismissed.

Determination.

31. The court has considered the pleadings and submissions filed by the both parties herein and proceeds to analyse them as follows. The principles which guide this court in an appeal from a trial court are now well settled. In Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, the Court of Appeal stated that;

> "[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect"

13. In this case, the Judgment of the trial court was that the Claimant's suit was dismissed with no orders as to costs because the Claimant failed to prove his case on the required standard. The court also held that the Appellant was a daily contract worker paid at the end of the day. The Appellant appeals on the whole of the Judgment. The court finds that the issues placed by the parties for determination in the appeal are with regard to whether the trial court was right when it held that the Appellant was a daily contract worker, that he did not prove his case as required standard of proof hence fairly terminated and if he was entitled to reliefs sought.

14. This court has therefore come up with three main issues;

    i. Whether the trial magistrate erred by finding that Appellant was a daily contract worker hence not entitled to protections under the *Employment Act*

    ii. Whether the trial magistrate erred in not finding that the Appellant was unfairly terminated

    iii. Whether the trial Magistrate erred in not awarding the Appellant his terminal dues.

Whether the trial magistrate erred by finding that Appellant was a daily contract worker hence not entitled to protections under the *Employment Act*

13. It is not in dispute that the Appellant was an employee of the Respondent who was on daily paid contracts. The Appellant alleged that he worked for the Respondent from 2002 to 2020 which was 18 years as a daily contracted worker. A closer look at the said contracts which were termed as specific task daily contract with daily payment on completion showed that they had a clause that the pay was with leave and that no notice of termination was required.

14. The Appellant alleged that having worked for those years he should have been deemed as a casual employee whose engagement changed to permanent term by dint of section 37 of the *Employment Act*. The Respondent maintained that the Appellant was a daily contracted worker and he was never a casual employee for this conversion to apply. The trial court held that the Appellant was a daily contract worker.

15. The Court in the case of Krystalline Salt Limited vs Kwekwe Mwakele & 67 Others [2017] eKLR defined the different engagements as follows:-

> " The *Employment Act* recognizes four main types of contracts of service: contract for an unspecified period of time, for a specified period of time, for a specific task (piece work) and for casual employment.....The decision to elect which form of employment to go for, either as an employee or employer will depend on a number of factors, but the dominant consideration is, for the employee, the earnings and other physical conditions of employment, and on the other hand, savings for the employer."

16. The Act therefore recognises either a casual employee or piece work employee on specific task and the Appellant has to fall between the two as the Act does not recognise daily paid contracts. The Respondent alleged that the Appellant was daily paid contract worker and not a casual employee who never worked for consecutive three months to be converted to a permanent employee as per section 37 of the *Employment Act*. Section 37(1) of the *Employment Act* provides as follows:-

> (1) Notwithstanding any provisions of this Act, where a casual employee——
>
> (a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or
>
> (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, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service.

17. The Respondent has maintained that the Appellant never worked for a full month as he was paid on daily basis as and when there work whereas the Appellant alleges that he worked 5 days a week. The Black's law dictionary 9th Edition defines a casual employment as 'work that is occasional, irregular and for a short period.' In addition, section 2 of the *Employment Act* defines a casual employee as 'means a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time'

18. The court notes that the parties relationship although termed as daily paid contract falls within the description of a casual employee who was paid daily whose contract could therefore convert to term contract after three months. It is not in dispute that the Appellant worked for a cumulative period which was more than the required 3 months of 18 years.

19. This court is also curious to note that the Respondent was using the daily paid contracts to shield itself from any liability. Why would the Respondent put the Appellant on such arrangement for 18 years unless this was a mere practice of unfair labour practices. The Respondent did not illustrate if the Appellant was on piece work arrangement which still to this court their arrangement fits more or less

a casual arrangement. This court faced with similar facts in the case of *Chic Fashions Limited v Miwa (Appeal E094 of 2023)* [2024] KEELRC 700 (KLR) (14 March 2024) (Judgment) held as follows:-

> From the material before the trial court, the appellant did not demonstrate that the respondent was a piece rate worker. The appellant merely relied on the contract between the parties that described the respondent as such without more. For the appellant to maintain that the respondent was not a casual worker yet continue with him on daily pay arrangement was deliberately intended to circumnavigate the provisions of section 37 of the *Employment Act*.

20. The court adds nothing to this assertion. It is interesting to note that the same Respondent made NSSF remittances for the Appellant from 2011 to 2020 April. Why was the Respondent making the remittances if the Appellant was paid on daily basis when work arose? The court reads a mischief in the Respondent's actions to avoid converting the Appellant in to term employee as per the *Employment Act*.

21. There was no way the Appellant could work for 18 years as a daily paid contract worker or a casual employee as this would clearly amount to unfair labour practices. The *Employment Act* came in to place to protect such employees who were at the mercy of the employer to remain as daily contracted/ casual employees with loss of their terminal benefits.

22. From the above, the trial court erred when it came to the conclusion that the appellant was a contract term employee and could be terminated without following the provisions of the *Employment Act*. The Court therefore sets aside the finding of the trial court that the Appellant was a daily paid contract employee who was not entitled to rights under the Act.

23. Whereas the Court appreciates the need for conversion of casual employees to term employees was introduced by the *Employment Act*, 2007 which was not applying retrospectively, the claimant's claim under the Act can only attach from June, 2008 when the Act came into operation.

Whether the trial magistrate erred in not finding that the Appellant was unfairly terminated.

24. The Respondent alleged that the Appellant absconded duties despite efforts to call and text him he never resumed work. The trial court on the other hand found that the Respondent demonstrated efforts to reach the Appellant upon absconding hence the termination was fair.

25. The courts have always held that for termination to pass fairness test there should be both substantive and procedural fairness. This court refers to the holding in Janet Nyandiko versus Kenya Commercial Bank Limited (2017) eKLR among others.

26. This court is of the view that in as much as the employee had a duty under section 47(5) of the *Employment Act* to prove that termination occurred the burden shifts to the employer once a defence of absconding of duties is raised. It is not in dispute that the Respondent issued a memo sending away the employees from 24th April, 2020 to 20th May,2020 and employees were paid Kshs 4,500/= to sustain them due to Covid-19. The Appellant alleged that he went back to office severally asking for work but he was turned away which necessitated him making a complaint to his union in July. The union wrote to the Respondent and they responded stating that the employees were daily contracted employees.

27. The court notes that if the Respondent was to resume on 20th May,2020 the calls made to the Appellant were on 17th and 18th August,2020 three months later. The screenshot shows that the Appellant was then unreachable. The message sent to the Appellant was done on 4th December,2020 after the

Respondent had received a second demand letter in November, 2020 about the same issue. If the Respondent could not find the Appellant why did it not communicate with his advocate or his union?

28. The phone number belonged to the Appellant as per Safaricom records produced by the Respondent. The only issue this court has with the attempts is the duration taken from May to August to call the Appellant if at all he had absconded duties. The court is also curious why the Respondent made the attempts after the Appellant made complaint to his union and Advocate despite the Appellant serving them for 18 years. It is also noteworthy that no show cause letter was sent to the Appellant cautioning him that the Respondent was contemplating taking disciplinary action due to the alleged absconding of work.

29. Under Section 44(4) (a) of the *Employment Act* 2007, absconding duty by an employee constitutes gross misconduct and renders an employee liable for summary dismissal. The Appellant has relied on the defence of desertion that the Respondent had no intention of returning to the place of work.

30. The court is well guided by the sentiments in the case of Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School [2015] eKLR, where the court held that:-

> Desertion can only take place where an employee leaves employment with the intention of not returning or formulating such intention not to return after leaving. Such intention may be demonstrated by showing absence of communication from the employee, duration of absence, impact of the absence and nature of employee's duties.

31. The Appellant claims desertion/absconding of duty since April 2020 yet the Respondent did not demonstrate that it commenced any disciplinary action against the Appellant under Section 41 of the *Employment Act* after he allegedly failed to report on duty.

32. It was held in the case of Richard Kiplimo Koech Vs Yuko Supermarket Ltd [2015] eKLR that absconding duty is an act of misconduct on the part of the employee, in which case the requirements of Section 41 of the *Employment Act* obtain.

33. In Joseph Nzioka v Smart Coatings Limited [2017] eKLR Nduma J. observed that

> " Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employer concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties."

34. In this present case, the Court is not satisfied that the Respondent has on a balance of probabilities discharged its onus of establishing that the Appellant absconded/deserted duty. The attempts were made many months after the said absconding. The trial court therefore erred in finding that the Respondent sufficiently demonstrated that efforts were made to call back the Appellant to work. The Appellant who had worked for 18 years could not start absconding duties unless there was an underlying issue.

35. On the procedural fairness as provided for under section 41 of the *Employment Act* this court notes that the same was never adhered to as the Respondent did not issue any show cause letter to the Appellant on the issue of deserting/absconding of duties, the Appellant was never invited for any disciplinary hearing hence the Respondent violated the clear provisions of section 41 of the Act. In the case of

Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR that: -

> 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.

Whether the trial Magistrate erred in not awarding the Appellant his terminal dues.

36. This court having found that the Appellant was unfairly terminated proceeds to award him compensation for unfair termination and one month's salary in lieu of notice. The court notes that the award for compensation under section 49 is discretionary but the court is guided by considerations set out under section 49(4) of the *Employment Act* in awarding the damages herein.

37. In this case the Appellant had worked with the Respondent for 18 years which was a long time and he did not contribute to his termination. An award of 10 months' salary would be reasonable in the circumstances considering that Covid-19 effects may have contributed to this separation.

38. The award of one month in lieu of notice was also justified after finding the Respondent was unfairly terminated without notice as provided for under section 35 of the *Employment Act*.

39. On the claim for leave pay and underpayment this court first notes that the same are in nature continuing injuries which the Claimant must file their suit within 12 months after cessation of employment as per section 90 of the *Employment Act*. This court notes that the employment relationship herein ended in April,2020 and the claim was filed in the same year in December,2020 hence within the limitation period of continuing injuries.

40. In the court of Appeal in G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR the court held as follows:-

> Regarding 'a continuing injury', the proviso to Section 90 of the *Employment Act* requires that the claim be made within 12 months next after the cessation thereof. The learned Judge did not determine when the continuing injury ceased, for purposes of computing the twelve month period. In the absence of a defined period, the learned Judge erred in concluding that the claims had no limitation of time. Further, upon the claimant's dismissal, any claim based on a continuing injury ought to have been filed within one year failing which it was time barred.

41. From the above decision it is clear those reliefs fall under continuing injury which were filed within 12 months. On leave pay the specific tasks contracts showed that the pay was inclusive of leave and this issue could only be determine after finding out if the Appellant was underpaid in the first instance. On underpayment, the court must ascertain the correct order to use on the Regulation of wages. The Appellant alleged that he was engaged as a machine operator where he was using the overlock stitching machine while the Respondent alleged that the Appellant was a mass production machinist. The specific tasks contracts did not show what role the Appellant performed, no contract of employment was produced by the Respondent as the custodian of employment records as per section 74 to show that the Appellant was a mass production machinist and not a machine operator.

42. The court notes that at the end of the day a sewing machine which is overlock was used by the Appellant and wonders if he fell under machine operator or mass production machinist. This court faced with

the same scenario in the case of *Chic Fashions Limited v Miwa (Appeal E094 of 2023*) [2024] KEELRC 700 (KLR) (14 March 2024) (Judgment) had this say

> On the issue of underpayment, the appellant stated that the respondent was employed as a mass production machinist. The appellant never distinguished clearly the difference between mass production machinist and a machine operator. The trial court was therefore justified in treating the respondent as a machine operator.

43. The court will therefore deem the Appellant as a machine operator as alleged. The same will only date back to when the *Employment Act* came into force which was in June, 2008 under conversion of casual employees into term employees was provided for under section 37.

44. The minimum wages laws started with the Regulation of Wages (General) Amendment) Order 2010 going forward. The Appellant was therefore entitled to the underpayments claimed. On the issue of leave pay, since there was underpayment, and the Respondent alleged that the same was inclusive of leave the same cannot stand since the Respondent did not prove that the Appellant went on leave. The Respondent did not produce attendance schedule or leave application forms hence the Appellant was entitled to the same. The same dates back to the commencement of the *Employment Act* in June 2008. The Appellant is therefore entitled to leave pay of Kshs. 170,363.80/= after subtracting accrued leave before 2008.

45. In the upshot the Appeal is found merited and the judgment of the trial court dismissing the appellant's claim is hereby substituted with an order setting aside the said judgment as substituting therewith a judgment in favour of the appellant as follows:

    a. 10 Months salary compensation for unfair termination.....Kshs 176,060/=

    b. One Month notice pay.....Kshs 17,606/=

    c. Underpayments.....Kshs 282,672/=

    d. Unpaid leave.....Kshs 170,363.80/=

    Total Kshs 646,701.80/=

13. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2025

DELIVERED VIRTUALLY THIS 24TH DAY OF FEBRUARY, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION