



**Omondi v Vishva Builders Limited (Appeal E052 of 2022)
[2025] KEELRC 1633 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1633 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
APPEAL E052 OF 2022
MA ONYANGO, J
MAY 29, 2025**

BETWEEN

ERICK OMATA OMONDI APPELLANT

AND

VISHVA BUILDERS LIMITED RESPONDENT

*(Being an appeal against the Judgment of Honourable R. Odenyo, Senior
Principal Magistrate delivered on 24th November, 2022 in Eldoret CMC ELRC
No. 131 of 2019 between Erick Omtata Omondi v Vishva Builders Limited)*

JUDGMENT

1. The Appellant herein sued the Respondents at the lower court seeking the following remedies:
 - a. Declaration that the claimant's services were unprocedurally, unlawfully and unfairly terminated and in the circumstance the claimant is entitled to compensation of her terminal dues as outlined above;
 - b. In the alternative the sum of Ksh.276,387.92/= in terminal benefits as set out above
 - c. Exemplary damages
 - d. Certificate of Service
 - e. Cost of this suit and interest at court rates form time of filing the suit until payment in full and
 - f. Any other relief the Honourable Court may deem just and fit to grant.
2. The Respondent filed a Memorandum of Defence denying that it unlawfully terminated the Appellant's employment as alleged in the Memorandum of Claim and averred that the Appellant was employed as a casual employee and deserted duty. Upon hearing the parties the trial court found that



the Appellant did not prove that an employee of the Respondent or that he was terminated unfairly as alleged and dismissed the suit.

3. The Appellant (Claimant in the lower court) was aggrieved by the said judgment and filed the instant appeal vide the Memorandum of Appeal dated 30th November, 2022 on the grounds that:
 - a. The learned Magistrate erred in law and in fact by failing to direct his mind properly on the provisions of the [Employment Act](#), 2007.
 - b. The Learned Magistrate erred in law and in fact in his judgment that the Appellant was not entitled to remedies sought in his statement of claim.
 - c. The learned Magistrate erred both in law and fact by holding that the Respondent did not engage in unfair labour practices against the Appellant.
 - d. The Learned trial Magistrate erred both in law and in fact in dismissing the Appellant's statement of claim in its entirety citing grounds in his judgment.
 - e. The Learned trial Magistrate erred both in law and in fact in failing to consider of give proper attention to the evidence adduced in court by the Appellant in support of his claim.
 - f. The Learned trial Magistrate erred both in law and in fact in falling to evaluate, analyze, consider and determine all the issues raised during the trial therefore arriving at an erroneous judgment.
 - g. The Learned trial Magistrate erred both in law and in fact in misdirecting himself and deciding on extraneous issues which were neither pleaded nor proved.
 - h. That the Learned magistrate is in the circumstance misconceived, unfair and unjust
 - i. The learned trial magistrate exhibited bias in his judgment against the Appellant's case.
4. Consequently, the Appellant seeks the following orders:
 - a. This appeal be allowed.
 - b. The Judgment of the Honourable R. Odenyo, Senior Principal Magistrate delivered on 24th November, 2022 in the Chief Magistrates court at Eldoret be set aside and/or varied.
 - c. The costs of this appeal be awarded to the Appellant.
 - d. This Honourable court makes such and further orders as it deems fit and just to meet the ends of just.
5. The appeal was disposed of by way of written submissions. The Appellant filed his written submissions dated 5th September, 2024 while the Respondents filed its submissions dated 9th September, 2024.

Analysis and Determination

6. This being a first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified. See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123.
7. The Appellant filed his Statement of Claim dated 30th October, 2018 seeking to be compensated for the alleged unfair and unlawful termination of his employment. He averred that he was employed by the Respondent on the 19th February, 2017 as a welder earning a daily wage of Kshs. 350 per day which had been increased to Kshs. 400 per day at the time of termination of his employment. He



averred that he served the Respondent until 11th December, 2017 when the Respondent wrongfully, unprocedurally and unlawfully terminated his employment without valid reason and refused to pay his terminal benefits.

8. It was the Appellant's case that the Respondent terminated his employment after he sustained an injury while at work on grounds that he was not performing optimally. The Appellant averred that the termination was procedurally and substantively defective as it violated sections 41(1), 44(4), 45(2) and 43 of the Employment Act.
9. The Appellant further averred that the termination violated the provisions of Article 41 of the Constitution which expressly provides for fair labour practices and reasonable working conditions.
10. According to the Appellant, upon termination of his employment he was entitled to terminal dues which he tabulated as hereunder:
 - i. One month pay in lieu of notice
Section 36 of the Employment Act
LN NO. 112 of 2017
Minimum wage = Ksh.11926.40/=
Basic salary + House Allowance
11,926 + 15% of 11926 Ksh. 13,714.90/=
 - ii. Compensation for unfair termination
Section 49 (1) © of the Employment Act
Gross pay x 12 months
13714.90 x 12 months Ksh.164,578.80/=
 - iii. Leave dues
Section 28 of the Employment Act
21 days' pay per annum
From 19-2-2017 to 31-11-2017
21 x 11926.40 x 0.91 years ÷ 30 Ksh.7,597.12/=
 - iv. Underpayment
From February to April 2017
LN No. 117/2015
(10496.90-8400) x 3 months Ksh.6,290.70/=
From May to December 2017
LN No. 112/2017
(11926.40 – 9600) x 8 months Ksh.18,611.20/=
 - v. House allowance
15/30 x 11926.40 x 11 month Ksh.65,595.20/=TOTAL KSH.276,387.92/=



11. The Appellant prayed for the following reliefs in his Statement of Claim:
 - a. Declaration that the claimant's services were unprocedurally, unlawfully and unfairly terminated and in the circumstance the claimant is entitled to compensation of her terminal dues as outlined above;
 - b. In the alternative the sum of Ksh.276,387.92/= in terminal benefits as set out above
 - c. Exemplary damages
 - d. Certificate of Service
 - e. Cost of this suit and interest at court rates from time of filing the suit until payment in full and
 - f. Any other relief the Honourable Court may deem just and fit to grant.
12. The Respondent on its part filed a Response to the Claimant's Claim dated 9th July, 2019 denying the averments made in the Statement of Claim. The Respondent averred that it employed the Appellant as a casual employee assigned to the Workshop Department and not as a welder on permanent terms as alleged in the Statement of Claim.
13. The Respondent admitted that the Appellant was injured on 28th October, 2017 while on duty, that it took the Appellant to Eldoret Hospital for treatment and paid for all the medical expenses arising from his treatment. The Respondent further averred that the Appellant received full compensation for the injury under Work Injury Benefits Act. the Respondent further averred that the Appellant was given sick off and was supposed to report back to work after full recovery.
14. The Respondent avers that the Appellant recovered and reported back to work then left employment without giving notice. The Respondent denied that the Appellant's employment was unfairly terminated and averred that he deserted work and absconded without notice.
15. The Appellant filed a Response to the Respondent's Response to Claim dated 30th July, 2019, reiterating the averments in his Statement of Claim.

The Evidence adduced

16. At the hearing the Appellant testified as PW1. He reiterated the averments in his Statement of Claim and stated his employment was terminated on 11th December, 2017 without notice. He denied that he absconded duty.
17. Under cross examination he stated that according to the muster roll he did not work from 21st May to 3rd June, 2027.
18. Under re-examination he stated that he worked continuously. That the Respondent had building contracts which ended from time to time but he did odd jobs whenever there was no contract.
19. The Respondent called Christopher Wanyonyi Masinde who testified as DW1. He adopted his witness statement and documents filed on behalf of the Respondent.
20. DW1 testified that he was the Appellant's supervisor, that the Appellant was a casual paid weekly, that the Appellant's employment was not terminated because he got injured and that the Appellant stopped reporting for work in December, 2017. That he was not dismissed.



21. Under cross examination DW1 testified that the Appellant started working on 12th June, 2017 as per muster roll. He testified that a casual worker was issued with a card which lasted one week. That he is the one who made entries in the master roll and that the Appellant worked for only 3 months.
22. He stated that when the Appellant was employed he was not asked for his telephone number. That after he absconded duty the Respondent looked for him and found him through those who know him. That the Appellant was paid all his outstanding dues at the office of the Manager.
23. In the Judgment the trial court that the Appellant did not prove that he was an employee of the Respondent or that he was terminated.

The Appeal

24. In his submissions the Appellant framed the following issues for determination in the appeal:
 - i. Whether the appellant was an employee of the Respondent;
 - ii. Whether the Appellant's services were unlawfully and unprocedurally terminated from employment;
 - iii. Whether the trial magistrate failed to consider the evidence adduced by the Appellant;
 - iv. Whether the appellant's case was proved on a balance of probability and whether the lower court erred in granting judgment in his favour. (sic)
25. On the first issue, the Appellant submitted that there was no written contract between the Appellant and the Respondent but there was an admission by the Respondent that the Appellant was its employee. That the trial court therefore erred in finding that the Appellant had not proved that he was an employee of the Respondent.
26. On the second issue the Appellant submitted separately on procedural fairness and on substantive justification. On the former the Appellant submitted that the Respondent failed to issue a show cause letter and invitation to disciplinary hearing as provided under section 41 of the *Employment Act*. That as such the threshold for procedural termination was not met by the Respondent.
27. On substantive justification the Appellant submitted that no opportunity was given to the Appellant to be heard through a disciplinary hearing and therefore there was no opportunity to prove that the allegations that the Appellant absconded duty were true or not. The Appellant relied on the decision in *Rebecca Ann Maina and 2 others v Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR and *Donald Odeke v Fidelity Security Limited* [2012] eKLR.
28. On the issue no. 3 the Appellant submitted that the Respondent ought to have adduced evidence to prove the fairness of the termination which it failed to do. It was submitted that the Respondent's witness testified that there was no disciplinary hearing before the Appellant's services were terminated. The Appellant relied on the decisions in *James Okeyo v Maskant Flower Limited* [2015] eKLR and *Godfrey Anjere v Unique Suppliers Limited* [2015] eKLR.
29. On the 4th Issue the Appellant submitted that having proved the termination of the Appellant's employment was unlawful he is entitled to one month's pay in lieu of notice, compensation for unfair termination, leave dues, underpayment and house allowance.
30. For the Respondent it was submitted that the trial court correctly held that the Appellant failed to prove that his services were unlawfully terminated and urged the court to hold as such. The Respondent identified the issues for determination to be:



- a. Whether the Appellant was unfairly terminated
 - b. Whether the Appellant is entitled to the relief sought.
31. On the first issue the Respondent submitted that the Appellant was not unfairly terminated as correctly held by the trial court. That from the pleadings and evidence tendered the Appellant was engaged in piece-work form of employment periodically wherever the Respondent got a construction site and he was paid in accordance with the work done. That payment was done at the end of every week. The Respondent relied on section 18 of the *Employment Act* which, it submitted, gave the Respondent the option to either pay at the end of each day in proportion to the amount of work done or on completion of work, whichever was earlier.
 32. It was submitted that the Appellant confirmed during the hearing that he was being paid on a weekly basis. That the Appellant further confirmed that the Respondent was engaged in building business on contract basis and all employees were discharged upon completion of the work.
 33. It was submitted that the Respondent's position was that the Appellant was a casual employee who was called upon by the Respondent whenever there was work and that his work depended on availability of work to be done.
 34. The Respondent relied on the decision in *Martin Juma Kundo v Kemu Salt Packers Production Limited* [2016] eKLR and *BOC Kenya Limited v Amos Manoa Erastus* [2017] eKLR.
 35. On the second issue the Respondent submitted that the trial court was right in holding that the Appellant was not entitled to the reliefs sought as he had not proved that his services were unlawfully terminated. The Respondent relied on the cases of *Charles Kariuki Mwangi v Intersecurity Services Limited* [2018] eKLR; *Phillip Waweru Gitu v Straight Security Services Limited* [2019] eKLR and *Wilfred K. Onyango v DHL Excel Supply Chain Kenya Limited* [2017] eKLR.

Analysis and Determination

36. Upon analyzing the Memorandum of Appeal, the Record of Appeal and the rival submissions of the parties herein, I find that the issues that fall for this court's determination in the appeal are:
 - i. Whether the Appellant was an employee of the Respondent;
 - ii. Whether the Appellant's employment was terminated unfairly by the Respondent; and
 - iii. Whether the Appellant is entitled to the reliefs sought
37. In dismissing the Appellant's claim the trial court held that the Appellant did not prove that he was an employee of the Respondent. The evidence on record in both the pleadings and the testimonies of the witnesses is however contrary to this holding.
38. In the Response to the Claim at page 21 of the Record of Appeal the Respondent stated at paragraph 3 that "the Claimant was at one time its employee and was assigned at the Workshop Department as a casual labourer". It was further the pleading of the Respondent at paragraph 4 of its defence that the Appellant was injured while in the course of its employment on 28th October, 2017.
39. There is thus admission in the Defence to the Claim that the Appellant was an employee of the Respondent, albeit, on casual basis. The Respondent further produced evidence of Muster roll, medical treatment and payment records, work injury forms and a salary voucher, all of which prove that the Appellant was its employee.



40. The issue therefore should not be whether the Appellant was or was not an employee of the Respondent, but the nature of his employment. The Appellant claimed that he was a regular (or permanent employee as he put it) while the Respondent's position was that the Appellant was a casual employee.
41. Although the Appellant alleged that he worked for the Respondent from 19th February to 11th December, 2017, the Respondent's position was that he worked from 12th June to December, 2017.
42. From the Muster Roll filed by the Respondent which covers the period May to December, 2017, it is indicated that the Appellant was present at work from 12th June 2017. He was marked as on treatment from 13th November to 16th December, 2017. He was thereafter at work from 18th to 21st December, 2017.
43. From this analysis, the Appellants averment that he was dismissed on 11th December, 2017 cannot be correct. I would therefore agree with the Respondent that the Appellant went on sick off after his injury and then reported back to work briefly before disappearing. For these reasons I agree with the trial court that the Appellant did not prove that he was dismissed by the Respondent on 11th December, 2017.
44. It is further evident from the Muster Roll that the Appellant was engaged continuously from 12th June to 21st December, 2017 and was paid on weekly basis.
45. Under the Labour Institutions (Building and Construction Industry) (Wages) Order, 2012 all employees in the Building Industry are paid on daily basis with the exception of clerical, soil laboratory, draftsmen and supervisors who are paid on monthly basis. This is in recognition of the nature of work in the building industry which lasts only until work in a specific site is concluded.
46. The fact that the Appellant was in employment from June to December does not convert his employment to regular or monthly terms under section 37 of the Employment Act and the requirements of section 41, 43 and 45 do not apply to him as his category of employment is by nature not permanent or regular unless specifically agreed by the parties in writing.
47. This therefore takes care of the issue whether the termination of the Appellant's employment was unfair or unlawful.
48. On the remedies, the Appellant is not entitled to pay in lieu of notice as he did not prove that his employment was terminated by the Respondent. In any event had he proved the same, what he would be entitled to would have been one week's pay in accordance with section 35(1)(b) of the Employment Act. As I have stated, he is not entitled to pay in lieu of notice.
49. On the prayer for leave, under the Building and Construction Industry Order annual leave is 2 days per completed month of service. Having worked for 6 completed months, the Appellant was entitled to 12 days leave which I award him.
50. The Appellant was entitled to a daily wage which under the Building and Construction Industry Order was exclusive of 20% house allowance. However, in view of the fact that the rates under the Building and Construction Industry Order were overtaken by the General Order, the Appellant's pay was under the General Order where the daily rate of pay is inclusive of housing allowance.
51. From the evidence on record the Appellant was a general labourer as he did not prove his averment that he was qualified as a welder. I therefore agree with the position of the Respondent as per DW1 that he was a welder's helper, which is a general labourer.



52. The daily rate for a general labourer in 2017 was Kshs. 571.45. Payment for the 12 days leave earned by him is therefore 571.45x12 being Kshs. 6,857.40.
53. On underpayments, the Appellant was paid Kshs. 400. He was therefore underpaid by Kshs. 171.45 per day which for 26 days a month would be Kshs. 26,746.20 which I award the Appellant.
54. In conclusion, I set aside the decision of the trial court dismissing the Appellant's claim in its entirety and substitute therefore the following:
- a. The Appellant did not prove that his employment was unfairly terminated by the Respondent.
 - b. The appellant is not entitled to compensation for unfair termination. The prayer is declined.
 - c. The Appellant is not entitled to pay in lieu of notice. The prayer is declined.
 - d. The Appellant is awarded pay in lieu of annual leave of Kshs. 6,857.40.
 - e. The prayer for house allowance is declined as the Appellant was paid a daily wage inclusive of house allowance.
 - f. The Appellant is awarded Kshs. 26,746.20 on account of underpayment of wages.
55. In view of the award herein the Appellant is awarded costs in the trial court but each party shall bear its costs on the Appeal
56. Orders accordingly.

CONCLUSIONS

DATED, SIGNED AND VIRTUALLY AT ELDORET ON THIS 29TH DAY OF MAY 2025

MAUREEN ONYANGO

JUDGE

