



Omukanga v Agricultural Development Corporation (Employment and Labour Relations Appeal E003 of 2024) [2025] KEELRC 1512 (KLR) (22 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1512 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE
EMPLOYMENT AND LABOUR RELATIONS APPEAL E003 OF 2024**

MA ONYANGO, J

MAY 22, 2025

BETWEEN

JOHN OMUKANGA APPELLANT

AND

AGRICULTURAL DEVELOPMENT CORPORATION RESPONDENT

*(Being an appeal from the Judgment of Hon. S.N. Makila,
delivered on 26th June 2024 in Kitale CMELRC NO. E008 of 2022)*

JUDGMENT

1. The Appellant herein being dissatisfied with the trial court’s judgment delivered on 26th June 2024 in Kitale CMELRC No. E008 of 2022 preferred this Appeal by way of Memorandum of Appeal dated 24th July 2024 on the following grounds of appeal:
 - i. The learned trial magistrate erred in law and fact in failing to find that the Appellant worked for the Respondent for a continuous period of more than 13 months
 - ii. The learned trial magistrate erred in law and fact in finding and holding that the Appellant was not entitled to service pay and damages for unfair termination
 - iii. The learned trial magistrate erred in law and fact in failing to appreciate the pleadings, evidence and submissions on record
 - iv. The learned trial magistrate erred in law and fact in dismissing the Appellant’s claim for service pay and damages for unfair termination of employment against the overwhelming evidence on record
2. The Appellant prayed for the following orders that: -
 - a. This the appeal be allowed with costs



- b. The trial court's judgment and decree dismissing the Appellant's claim for service pay and damages for unfair termination be set aside and the same be substituted with a judgment allowing the Appellant's claim for service pay and damages for unfair termination of employment.
3. Pursuant to the directions of this court, the appeal was disposed of by way of written submissions. The Appellant filed its written submissions dated 13th February 2025 while the Respondent's submissions are dated 12th March 2024.

Analysis

4. The Court of Appeal in *Selle & Another v Associated Motor Boat Co Ltd* [1968] EA 123 set out the guiding principle in dealing with a first appeal in the following words:-

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 allowance in this respect..."

5. From the above decision, it is clear that my role as a first Appellate Court is to re-evaluate and re-examine the evidence adduced in the trial court in order to reach my own finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified.
6. Vide his Memorandum of Claim dated 23rd May 2022, the Claimant (now the Appellant) averred that he was employed by the Respondent as a general casual laborer from the year 2019 to 12th January 2021 when he was wrongfully and unfairly terminated from employment without a justifiable cause.
7. The Appellant contended that during the cause of his employment with the Respondent, he was paid a daily wage of Kshs 283 against the established minimum wage. He also stated that by the time he was unlawfully terminated from employment, he had accumulated wages arrears of Kshs 57,600, being wages for the period between 10th September 2021 to 12th January 2022.
8. According to the Claimant, due to his continuous service, his employment had converted from casual to regular terms pursuant to the provisions of section 37(1) of the *Employment Act* and he was therefore entitled to terms and conditions of service as a regular employee.
9. The Appellant averred that he had been treated as a casual labourer during which period he was grossly underpaid and was never given written contracts, annual leave, medical and housing allowance. The Appellant also contended that the Respondent failed to remit NSSF and NHIF statutory dues.
10. It was the Appellant's case that his dismissal from employment was illegal, unfair and unlawful as it violated section 47(1), 44(4), 43 and 45(2) of the *Employment Act* and that he was not paid his terminal dues which he tabulated as hereunder:
 - i. One month's pay in lieu of notice.....Kshs 12,522.70
 - ii. Leave pay.....Kshs 30,343.46
 - iii. House allowance.....Kshs 67,622.40
 - iv. Service pay.....Kshs 18,814.05



- v. Compensation for unfair termination.....Kshs 150,272.40
- Total.....Kshs 279,575.01

11. The Appellant prayed for the following reliefs:

- i. A declaration that section 37 of the *Employment Act* applies to the Claimant to the effect that his casual employment was converted into a contract of service hence entitled to such terms and conditions of service as he would be entitled to under the Act had he not initially been employed as a casual employee
- ii. A declaration that the Claimant's employment was unlawfully, unprocedurally and unfairly terminated from employment and in the circumstances the claimant is entitled to compensation as prayed for in the Memorandum of claim
- iii. A declaration that the Respondent had engaged in unfair labour practices
- iv. Salary arrears of Kshs 57,600,
- v. Costs of the suit and interest at court rates from time of filing this suit until payment in full
- vi. A certificate of service as per section 51 of the *Employment Act*
- vii. Any other relief that the court may deem fit and just to grant

12. The Respondent on its part filed a Statement of Response and a Counterclaim on 12th July 2022. In its defence, the Respondent disputed the allegations made by the Appellant that he was unfairly and unlawfully dismissed from employment hence entitled to compensation. The Respondent contended that the Appellant was not employed on continuous service and as such, he was not entitled to the reliefs he sought. On the claims for one month lieu in notice and compensation for unfair termination, it was the Respondent's case that the Appellant was not entitled to the same as he absconded duty after the Respondent's audit team initiated investigations into the loss of coffee at his place of work. On the prayer for leave days, house allowance and service pay, the Respondent maintained that the Appellant was not entitled to such reliefs as he was a casual employee.

13. In the Counter Claim, the Respondent averred that the Claimant was at the place of work on 12th January 2022 when the Respondent lost 80kgs of coffee worth Kshs 1500 per kg.

14. The Respondent claimed Kshs 120,000 from the Appellant being the value of the lost 80kgs bags of coffee

15. The Respondent thus urged the trial court to dismiss the Claimant's claim and that its Counterclaim be allowed. It also sought for costs of the suit.

The Evidence adduced.

16. At trial the Appellant testified as CW1 and adopted his witness statement recorded on 22nd June 2022 as his evidence in chief. He also relied on his list of documents dated 23rd May 2022 in support of his case.

17. In his testimony, the Appellant stated that he was not given any notice before he was terminated from employment and was not paid his salary arrears. He denied any involvement in the theft of coffee in January 2022 and stated that he was not charged in court for the offence of stealing by servant.

18. On cross examination, the Appellant stated that he worked for the Respondent from 2018 to January 2022 as a general casual worker at a daily wage of Kshs. 283. He stated that the Respondent did not pay NSSF and NHIF on his behalf. He denied knowledge of the loss of coffee.



19. From the record, directions were given for the evidence of RW1 in Kitale CMELRC No. E006 of 2022 in cross examination to apply to this case.
20. In cause No. E006 of 2022, the Respondent called Damaris Chesaina, its Human Resource Officer who testified as RW1. She adopted her witness statement recorded on 28th February 2023 as her evidence in chief.
21. On cross examination, the Respondent's witness stated that from the muster roll produced as Dexb 1(a to j), the Claimant worked on a need basis. RW1 maintained that the Claimant absconded duty after the Respondent's coffee got lost. She stated that as at 12th January 2022, the Claimant was owed salary arrears which monies were eventually paid in May 2022.
22. On re-examination, RW1 asserted that the Claimant did not work consecutively but worked on a needs basis. She also contended that as a casual laborer, the Claimant would not have been subjected to a disciplinary hearing.
23. After hearing the parties, the trial court delivered its judgment on 26th June 2024 which read in part as follows: -

“ 14. Pursuant to the above cited provision, this court finds and holds that the Claimant's employment by the Respondent graduated by operation of law from casual employment to regular services as at July 2021. It therefore follows that as from 1st August 2021, the Claimant ought to have been subjected to such terms and conditions of service as he would have been entitled to had he had not initially been employed as casual worker. Any termination of his employment, therefore, ought to have been subjected to the provisions of sections 41(4), 44(4), 43, 45(2) of the Employment Act.

15. It is further evident that the claimant was not subjected to any disciplinary process in regard to the allegations of loss of the 80kgs of coffee. Moreover, the Respondent witness confirmed that they were unable to contact the claimant after the alleged incident. This court further finds that procedure for termination of the claimant's services was not followed. The claimant was thus unlawfully, and unprocedurally terminated.

16. As to the reliefs, the claimant's terminal benefits shall be calculated in accordance with the Legal Notice No. 2 of 2019. The same shall be prorated to the period worked continuously by the Claimant, that is from June 2021 to January 2022 which is six months. The same are calculated as follows: -

- i. One month's pay in lieu notice Kshs. 12,522.70
- ii. Leave pay
21 days x 6/12x 12,522.70/26.....Kshs. 5,057.24
- iii. House allowance
15%x12522.70x6/12x12.....Kshs.11,270.16

17. The Claim for unfair compensation fails pursuant to Section 45(3) of the Employment Act. Service pay is payable for every year worked and since the claimant only worked continuously for less than a year, he is not entitled to the relief.



18. The Claimant has also prayed for salary arrears of Kshs.57,600/= . They have not produced any evidence to prove this claim. On the other hand the Respondent has produced D.Exh 2(b) demonstrating that the claimant was paid his arrears due. The claimant is therefore not entitled to the same.
19. As to whether the counterclaim is merited. This court finds that this is not the proper forum for issues raised in the counter claim. The same is hereby dismissed with costs.
20. In the upshot the claim is hereby allowed in the following terms: -
 - a. A declaration is hereby issued that section 37 of the *Employment Act* applies to the claimant to the effect that his casual employment was converted to a contract of service
 - b. A declaration is hereby issue that the Claimant’s employment was unlawfully and unprocedurally terminated.
 - c. The claimant is entitled to the following reliefs:-
 - i. One month's pay in lieu notice Kshs. 12,522.70
 - ii. Leave Pay Kshs 5,057.24
 - iii. House Allowance Kshs 13,148.84

Total.....Kshs 31,571 together with costs and interests of the suit
21. The aggrieved party has a right of appeal within 30 days hereof”

24. It is the said judgment that is now the subject of this appeal.

Appellant’s submissions.

25. The Appellant in his submissions faulted the trial court for relying on the muster roll for the period between January 2021 and January 2022 produced in evidence by the Respondent. According to the Appellant, the muster roll produced by the Respondent was not conclusive as the Respondent did not produce muster rolls for the different sections that the Appellant claims to have worked in for the entire period between 2019 and January 2022.
26. The Appellant asserted that despite the court finding that the appellant only worked from July 2021, the said muster roll confirmed that the appellant was at work the entire period between January 2021 to January 2022.
27. It was submitted that the Appellant testified that as a casual laborer he used to be assigned in different capacities including slashing, grading, pulping, labelling, spraying and loading, depending on the priority needs of the Respondent at the given period of time.
28. It is the Appellant’s case that a necessary presumption therefore arises that the Appellant continuously worked the Respondent from 2019 to January 2022 and a production of the muster rolls for the entire period claimed and for the other sections and duties alleged by the appellant would have prejudiced the Respondent's case. While relying on section 10(7) of the *Employment Act* and the case of Ouma v Steel Makers *Limited (Cause 259 of 2015)* [2022] KEELRC 12737 (KLR) (4 October 2022) (Judgment),



- the Appellant contended that the failure by the Respondent to adduce in evidence the muster rolls for entire period claimed by the appellant and for the different sections cited by the Appellant should be interpreted in favour of the Appellant.
29. The court was urged to find and hold that the appellant worked for the respondent for continuous period of 3 years hence more than 13 months therefore entitled to awards for service pay and unfair termination of employment. In support of this position, the Court of Appeal case of Gogni Rajope Construction Company Limited & another v Omondi (Civil appeal 321 of 2019) [2025] KECA 161 (KLR) (7 February 2025) Judgment) was cited.
 30. The Appellant therefore submitted that he is entitled to the reliefs sought, including a claim for unfair termination even if it were to be found that he worked for less than 13 months.
 31. The Appellant also urged the court to exercise its discretion and adjust the amounts awarded by the trial court regarding leave pay and house allowance to cover the entire period of 3 years pleaded as opposed to the 7 months decreed by the trial court.
 32. In sum, the Appellant prayed for the Appellant's appeal be allowed and the judgment of the trial court be substituted with a judgment allowing the Appellant's claim in entirety as pleaded and particularized in Memorandum of Claim as well as for an award of costs of the Appeal.

The Respondent's submissions.

33. On its part, the Respondent submitted that the Muster roll it produced as Dexb2a-f showed that the Appellant was engaged intermittently and not for a continuous period exceeding 3 years as claimed.
34. According to the Respondent, in the year 2019, the Appellant worked for 22 days as a casual where he earned a wage of Kshs 6,349; that in the year 2020, the Appellant worked intermittently for 7 months earning a wage of Kshs 20,540; in the year 2021, he worked as a seasonal casual intermittently for a period of 263 days and was paid and that in the year 2022, the Appellant worked for 9 days in the month of January and earned a wage of Kshs 3,396 which was paid to him
35. The Respondent submitted the Appellant through his counsel did not object or deny the muster roll and pay rolls as far as field attendance and payment for the Appellant was concerned. It is the Respondent's submissions that the Appellant held an account with KCB and Post Bank where his cumulative wage arrears would be deposited and that the payrolls produced by the Respondent were acknowledged by the two banks through stamping, a clear indication that the payments casual workers was received by the banks.
36. It is therefore submitted that as evidenced in the muster roll, the Appellant's wages were calculated daily and paid fortnightly.
37. In addition, the Respondent submitted that even though the Appellant contends that he worked for the Respondent for 3 years, the terms of engagement were not continuous but rather intermittent. The Respondent therefore submitted that the Claim that the Appellant worked for the Respondent for more than 13 months continuously without evidence cannot suffice and he cannot be compensated for the period he never worked for the Respondent.
38. The Respondent further submitted that pursuant to Section 35 (5) of the *Employment Act* 2007, service pay is payable to an employee who has been engaged for a period of a year and more before his service is terminated and that in the instant case, the Respondent has demonstrated through evidence of muster roll and payment records that indeed the Appellant worked intermittently for



period which is not envisaged in Section 35 (5) of *Employment Act* 2007, hence the trial magistrate made the correct finding on this ground.

39. In the end, the Respondent submitted that the Appellant's appeal lacks merit and sought for it to be dismissed with costs to the Respondent.

Analysis and determination.

40. Upon analyzing the Appellant's Record of Appeal and the submissions by both parties, I find that the only issue that falls for my determination is whether the findings and the award of the trial court are in conformity with the pleadings and evidence adduced before it.
41. I will address the grounds of appeal in the order in which they have been set out in the Memorandum of Appeal.
42. In ground 1 of Appeal the Appellant faulted the trial magistrate for failing to find that he worked for the Respondent for a continuous period of more than 13 months.
43. In his submissions on Appeal, the Appellant submitted that the trial court in its judgment found that the Appellant only worked for the Respondent continuously for a period of 6 months between July 2021 and January 2022 hence could not be awarded service pay and damages for unfair termination of employment because he worked for less than 1 year.
44. In his pleadings and oral testimony before the trial court, the Appellant contended that he had worked for the Respondent for a period of 3 years. The Respondent in its defence averred that it engaged the Appellant as a casual employee to undertake some assignments from time to time and not under any circumstances as a full-time employee.
45. The Respondent produced muster rolls and payment records for the Appellant at pages 53-69 of the Record of Appeal which cover the period between August 2019 and January 2022. The records show that the Appellant worked as follows:

For 2019

TABLE

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No.

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Month

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Number of Days Worked

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August

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September

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November

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Total

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22

For 2020

TABLE

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NO.

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MONTH

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NUMBER OF DAYS WORKED

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January

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February

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March

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April

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September

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October

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Total

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71

For 2021



MONTH	NUMBER OF DAYS WORKED
January	21
March	16
April	25
May	22
June	23
July	23
August	24
September	23
October	26
November	25
December	25
Total	263

46. The Appellant did not complain that he was owed arrears of wages for the period 2019 and 2020. He further did not contest the averments of the Respondent that he was paid all outstanding wages for 2021 and 2022 in May, 2022.
47. From the evidence adduced by the Respondent based on payments made to the Appellant which he did not contest, the continuous employment of the Appellant was from March 2021 to 12th January, 2022 when the theft of coffee was discovered and the Appellant's employment ceased.
48. Under section 37 of the *Employment Act* his continuous service was therefore for 10 months. In this respect it is my finding that the trial court erred in holding that the continuous period of employment was 6 months.
49. The other grounds of appeal relate to the terminal dues. The Appellant faults the trial court for dismissing his claim for service pay and damages for unfair termination of employment.
50. Section 37 of the *Employment Act*, which provides for conversion of casual employment into monthly contracts specifically provide as follows:
37. Conversion of causal employment to term contract
- (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.
- (2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.
- (3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.
- (4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.
- (5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of this Act shall apply.
51. Having found that the Appellant's employment converted for only 10 months, he is not entitled to service pay, which, as the trial court correctly found, is payable for every completed year worked. I thus uphold the finding of the trial court that the Appellant is not entitled to service pay.
52. The Appellant further faulted the trial court for not awarding him damages for unfair termination. An employee is entitled to compensation for unfair termination when a finding has been made that the termination of their employment was unfair.
53. The trial court found that because the Appellant was not subjected to the provisions of sections 41, 44(4), 43, 20 and 45(2) the termination of his employment was unfair.
54. On the prayer for compensation. the circumstances under which the Appellant left employment were contested. The Appellant's position was that his employment was terminated verbally while the Respondent averred that the Appellant absconded duty after the theft of coffee was discovered.
55. According to the evidence of the Appellant before the trial court, the Respondent made false accusations against him so that he could be sacked. The Respondent on the other hand denied that the Claimant's employment was terminated. It was the Respondent's position that the Appellant stopped reporting for work when investigations on the loss of the coffee started.
56. From the evidence on record, I would agree with the Respondent that the circumstances under which the Appellant's employment ceased are such that it cannot be blamed for not subjecting him to disciplinary process. The Appellant was one of the employees on duty when the coffee was stolen and investigations revealed that there was collusion among all the employees on duty at the time, both the temporary (or casual) employees as they were referred to, and the regular employee of the Respondent. in the circumstances it is my finding that the Appellant did not prove that his employment was unfairly terminated.



57. In answer to ground 3 in the Memorandum of Appeal, it is imperative that the court addresses the reliefs sought by the Appellant in its Memorandum of Appeal and what was awarded by the trial court. The Appellant had prayed for one month's pay in lieu of notice, house allowance and service pay for the three years he was in employment and compensation for unfair termination.
58. In its judgment, the trial court awarded the Appellant one month's pay in lieu of notice, leave pay and house allowance for 7 months.
59. The Appellant in his submissions on appeal has urged the court to adjust the awards by the trial court regarding leave pay and house allowance to cover the entire period of 3 years as pleaded as opposed to the 7 months decreed by the trial court.
60. Section 28 of the *Employment Act* provides that leave is payable for every month worked at the rate of 1.75 days. In the instant case the Appellant did not quite complete any full month of service even though his employment was continuous. I will therefore aggregate the number of days worked and award him leave based on the said days.
61. The days worked by the Appellant as already stated in this judgment was 334. I will divide the days by 26 to take care of weekly rest day. This gives me an aggregate of 12 months. I therefore award the Claimant 21 days in respect of the 12 months which amounts to Kshs. 5,943 (283x21).
62. I have used the daily rate of pay of 283 which is what the Appellant was entitled to under the Regulation of Wages (Agricultural) Order for 2018 which was in force at the time of termination of his employment.
63. The award for pay in lieu of notice is revised to Kshs. 6,736 in accordance with the Regulation of Wages (Agricultural) Order for 2018 which was in force at the time of termination of his employment.
64. The award of house allowance is set aside as under the Regulation of Wages (Agricultural) Order there is no provision for house allowance. Further, the Claimant was paid a daily wage which even under the Regulation of Wages (General) Order, daily rate of pay is inclusive of house allowance.
65. In summary therefore I make the following orders:
 - i. The decision of the trial court in respect of the period the Appellant's service converted to monthly contract is set aside and replaced with 10 months
 - ii. The award of one month's salary in lieu of notice is reviewed from Kshs. 12,522 to Kshs. 6736
 - iii. The award of leave days is reviewed to Kshs. 5,943
 - iv. The award for house allowance is set aside
66. Each party shall bear its costs of the appeal.
67. Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 22ND DAY OF MAY 2025

MAUREEN ONYANGO

JUDGE

