



**Equator Bottlers Limited v Omanga (Appeal E045 of 2025)
[2025] KEELRC 1461 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1461 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E045 OF 2025
NZIOKI WA MAKAU, J
MAY 15, 2025**

BETWEEN

EQUATOR BOTTLERS LIMITED APPELLANT

AND

PHILIP OLUOCH OMANGA RESPONDENT

(Being an appeal from the judgment and decree of Hon. Robert Mobisa Oanda (SPM) in WINAM SPMEELRC No. E013 of 2023 delivered on 15th August 2024)

JUDGMENT

1. Through a memorandum of claim dated 17th July 2023 the Respondent (Philip Oluoch Omanga) impleaded the Appellant (Equator Bottlers Limited) before the Magistrate’s Court at Winam. He identified the issues in dispute as unlawful dismissal, pay in lieu of notice and leave allowance. He contended that he had been employed by the Appellant as a load builder in October 2017 and diligently served until 21st June 2022, when he was summarily and unjustifiably dismissed. He asserted that no warning letter or notice to show cause had been issued to him prior to his dismissal.
2. In its response to the primary suit, the Appellant averred that the Respondent’s contract had terminated through effluxion of time and that he had been duly paid his consolidated salary. Consequently, it stated that there was no requirement to issue a notice to show cause.
3. Upon hearing the matter, the Learned Magistrate delivered a judgment on 15th August 2024 and held that the Respondent’s employment status had, over time, been converted from casual to permanent, and accordingly held that his dismissal was unlawful. As a result, the Magistrate awarded the Respondent the following reliefs:
 - i. Kshs. 18,000/- as one month’s pay in lieu of notice,
 - ii. Kshs. 216,000/- as damages for unlawful termination of employment.



- iii. Kshs. 45,000/- as benefits in lieu of service.
 - iv. Kshs. 108,000/- annual leave allowance
 - v. Certificate of service
 - vi. Costs and interests of the suit.
4. Dissatisfied with this outcome the Appellant lodged a memorandum of appeal with this court contending that the Learned Magistrate erred by:
- a. Failing to find that, in the absence of a specific pleading by the Respondent regarding the conversion of casual employment to permanent employment, the issue did not fall for determination;
 - b. Awarding “benefits in lieu of service,” a remedy not recognized under the *Employment Act*;
 - c. Adopting the sum of Kshs. 18,000/- as the Respondent’s monthly salary without any evidentiary basis, thus rendering the award for general damages presumptuous and grossly erroneous;
 - d. Awarding leave pay without any particulars having been supplied to merit such an award;
 - e. Concluding that the Respondent had been unlawfully terminated despite no evidence having been led to that effect;
 - f. Failing to supply any basis for the exercise of discretion on his part to award twelve (12) months’ salary as compensation for unlawful termination of employment.
5. The Appellant further asserted that the judgment was against the weight of the evidence adduced and amounted to a gross miscarriage of justice. Accordingly, the Appellant urged the Court to set aside the Trial Court’s judgment entirely and substitute it with an order dismissing the Respondent’s suit. In the alternative, it prayed that the award for “benefits in lieu of service” be vacated, the damages for unlawful termination be re-assessed and reduced, and that it be awarded the costs of both the appeal and the suit before the Magistrate’s Court.
6. Following the Court’s directions for the disposal of the appeal by way of written submissions, the Appellant filed its submissions on 28th March 2025, while the Respondent filed his submissions a day earlier, on 27th March 2025.

Appellant’s Submissions

7. The Appellant urges this Court to be guided by its role as a first appellate court to re-evaluate the evidence presented before the Magistrate’s Court and arrive at its own findings, bearing in mind that it did not have the opportunity to observe the witnesses testify firsthand. In support of this position, the Appellant cites the decision in the case of Mursal & another v Manese (suing as the legal administrator of Daphline Kanini Manesa) (Civil Appeal E020 of 2021) [2022] KEHC 282 (KLR). The Appellant submits that the Respondent failed to discharge the burden of proof required under section 47(5) of the *Employment Act* to establish that an unfair termination of employment had occurred. It relies on the case of Pius Isindu Machafu v Lavington Security Guards Limited [2017] KECA 225 (KLR). The Appellant asserts that the Respondent neither identified the person responsible for his dismissal nor substantiated the period during which he was told to stay away from work.



8. Concerning the Magistrate's finding that converted the Respondent's employment status from casual to permanent, the Appellant asserts that this was erroneous. It maintains that no such plea for conversion appeared in the Respondent's Claim. In emphasizing that parties are bound by their pleadings, the Appellant cites several authorities, chief among them the decision in *Adetoun Oladeji (NIG) Ltd v Nigeria Breweries PLC S.C. 91/2002*) [2012] NGSC 1 (18 October 2012), which underscores that a trial court must limit itself to the issues raised in the pleadings and disregard evidence at variance with pleadings.
9. The Appellant further submits that parties cannot expand the scope of their pleadings through submissions. It relies on the decision in the case of *Augustine Kinyua Ita v Ndi Mubothi & 2 others* [2018] eKLR, where the Court held that issues for determination cannot be introduced through evidence or submissions. Regarding the Magistrate's award of "benefits in lieu of service", the Appellant submits that such a benefit is not contemplated under the *Employment Act* and that the Magistrate lacked jurisdiction to make such an award. To reinforce this submission, it cites the Court of Appeal decision in *Jamal Salim v Yusuf Abdulahi Abdi & another* [2018] eKLR which in referencing *Motor Vessel "Lillian S" v Caltex Oil (Kenya Limited)* [1989] KLR 1, stressed that jurisdiction is limited by statute, charter or commission under which the court is constituted and that inferior courts or tribunals must enquire as to the existence of facts giving it jurisdiction where jurisdiction depends on those facts.
10. Without prejudice to the foregoing, the Appellant submits that even if the award were to be construed under section 35 of the *Employment Act*, it would still be untenable because the Respondent was a registered member of the National Social Security Fund (NSSF). It draws the Court's attention to section 35(6) of the *Employment Act*, which disentitles NSSF members from service pay. The Appellant further cites the decision in *H. Young & Company (EA) Limited v Javan Were Mbango* [2016] eKLR, where the Court held that an employee is only entitled to gratuity if it is expressly provided for in a contract or collective bargaining agreement (CBA). On the adoption of Kshs. 18,000/- by the Magistrate as the Respondent's salary the Appellant submits that it was baseless. It asserts that the Respondent failed to prove that he earned such a salary, and highlights that the testimony before the Magistrate indicated the Respondent was paid a daily wage of Kshs. 653.10/-. It asserts that the Magistrate erred in adopting a figure inconsistent with the evidence, relying on *Independent Electoral and Boundaries Commission & another v Stephen Mutinda & others* [2014] eKLR.
11. In relation to the award for leave days, the Appellant submits that it was unsupported by evidence. It further asserts that it was perplexing for the Magistrate to award leave for a period of six years when the Respondent had only been employed for approximately two and a half years. With respect to the award of twelve months' salary as compensation, the Appellant submits that there was no explanation as to how the award was arrived at. It acknowledges that while such an award is discretionary, it must not be made capriciously or as a means of punishing an employer. In support, the Appellant cites sections 49(4) and 50 of the *Employment Act*, as well as the decision in *Kenya Union of Commercial Food & Allied Workers v Kisii Bottlers Nakuru CACA NO. 17 of 2017* [2021] KECA 402 (KLR)
12. Additionally, the Appellant submits that since the Respondent's wages were calculated on a daily basis at Kshs. 653.10/-, there was no monthly salary upon which a 12-month award could be properly based. Consequently, the Appellant urges that if the Court is inclined to make any award under this head, it should be limited to no more than three months' salary, taking into account that the Respondent's total period of employment was less than three years.



Respondent's Submissions

13. The Respondent submits that the onus was on the Appellant to prove that he was a casual employee. He asserts that the Appellant failed to produce any contract of service detailing the nature of his employment. In support of this position, the Respondent relies on *Nanyuki Water & Sewerage Company Limited v Benson Mwiti Ntiritu & 4 others* [2018] eKLR, where the court, relying on section 10(7) of the *Employment Act*, held that in the absence of a written contract, the burden of proving the terms of employment falls on the employer.
14. The Respondent further submits that his continuous service from 2018 to 2022, coupled with the submission of NSSF deductions, converted his employment from casual to permanent under section 37 of the *Employment Act*. To support this assertion, he cites the cases of *Esther Njeri Maina v Kenyatta University* [2020] eKLR, *Joseph Maina Mwangi v Gathare Bar, Hotel & Boarding House* [2021] eKLR and *Nanyuki Water & Sewerage Company v Benson Mwiti Ntiritu & 4 others* [2018] eKLR, in which the courts in referencing section 37 of the *Employment Act* held that conversion from casual to permanent employment status had occurred.
15. With respect to the salary figure of Kshs. 18,000/-, the Respondent submits that the Appellant did not tender any evidence to dispute this amount. He relies on section 74 of the *Employment Act*, which places an obligation on the employer to maintain accurate employment records. Regarding his termination, the Respondent submits that it was neither procedurally nor substantively fair. He asserts that he was not served with any notice or warning letters and was instead merely instructed to "take a rest." Additionally, he contends that the Appellant failed to present any evidence justifying the termination. In this regard, the Respondent relies on section 45(2)(a) of the *Employment Act*, which deems a termination unfair where the employer fails to prove that the reasons for termination are valid. He further cites the case of *Judith Atieno Owuor v Sameer Agriculture & Livestock Limited* [2020] eKLR which in citing the decision in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, the Court restated the importance of both procedural and substantive fairness in the termination process. In light of the foregoing, the Respondent urges the Court to find that his termination was unlawful and to dismiss the appeal with costs.

Disposition

16. The Court, as the first appellate court, is entitled to reconsider the evidence, evaluate it and draw its own conclusions but making allowance for the fact that it neither saw nor heard the witnesses. (See *Selle v Associated Motor Boat Company Ltd* [1968] EA 123. The Court has had a look at the testimony adduced as well as the pleadings filed, the submissions herein and the law in coming to this determination.
17. Where the contract of employment lead to the service of an employee initially employed on casual terms it can be converted to a term contract. The *Employment Act* under section 37(1) makes provision as follows:-
...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.



18. The Respondent served for a period which indeed converted his contract of employment to that covered under section 37 and 35. The learned Magistrate did not err in holding the Respondent had his term converted. In the claim, the Respondent averred he was paid a monthly salary. The Respondent in reply asserts the Respondent was paid a consolidated salary. There was therefore basis for the Learned Magistrate to hold, as he did, that the Respondent was entitled to a monthly salary. In this regard, the Court notes the monthly salary using the multiplicand the Appellant gave of Kshs. 653.10 it would aggregate to a monthly salary of Kshs. 16,980.60. As such the amount awarded was erroneous by an excess amount of Kshs. 1,019.40. The Respondent is thus only entitled to a notice of Kshs. 16,980.60.
19. The Appellant did not take the Respondent through any disciplinary action, no notice was served upon the Respondent nor was a hearing conducted. The Learned Magistrate after considering the evidence adduced held the Respondent was entitled to remedy being the compensation of 12 month's wages. In the decision rendered, the Learned Magistrate summed the evidence of the Respondent's witness thus:
- ...the Respondent's witness informed the court that the Claimant herein was not entitled to prior notice, was not entitled to terminal benefits and the Claimant was not served with a termination notice.
20. Casting this against section 49 of the *Employment Act*, it is apt that an award of compensation of 12 month's for the employee would suffice. The Respondent had worked for the Appellant from 2018 to 2022 per the pay advice produced in Court which was a period of 6 years. As such the award of 12 month's compensation was in order.
21. The Appellant challenged the award of benefits in lieu of service. Service is payable under section 35 of the *Employment Act*. The Respondent was not entitled to service pay. Benefits in lieu of service are not provided for in law and there was therefore no basis for the award. It is reversed. In regard to leave the Respondent would be entitled to only payment for 3 years out of the 6 he served as there was a limitation under section 90 in respect to the prior years. In the final analysis, the decision of the Learned Magistrate is set aside and substituted with a decision allowing the Respondent's claim to the following extent:
- a. A declaration that the termination of the Respondent was unfair and unlawful.
 - b. Compensation for the unlawful and unfair dismissal equivalent to 12 months salary – Kshs. $16,980.60 \times 12 = \text{Kshs. } 203,767.20$
 - c. Annual leave dues for 3 years – Kshs. 50,941.80
 - d. Certificate of service.
 - e. Costs and interest of the claim in the Magistrate's Court.
 - f. No order on the costs for the appeal.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MAY 2025

NZIOKI WA MAKAU, MCIARB.

JUDGE

