



**Equator Bottlers Limited v Sidede (Appeal E046 of 2024)
[2025] KEELRC 1439 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1439 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E046 OF 2024
NZIOKI WA MAKAU, J
MAY 15, 2025**

BETWEEN

EQUATOR BOTTLERS LIMITED APPELLANT

AND

TIMOTHY OKOTH SIEDEDE RESPONDENT

(Being an appeal from the judgment and decree of Hon. Robert Mobisa Oanda (SPM) in WINAM SPMEELRC No. E014 of 2023 delivered on 15th August 2024)

JUDGMENT

1. The Appellant was sued by Mr. Timothy Okoth Sidede (the Respondent herein) through a suit before the Magistrate's Court at Winam, alleging unlawful dismissal and seeking payment of salary in lieu of notice, severance pay, as well as leave allowance. The Respondent claimed that he had been employed in February 2019 as a load builder, earning a monthly salary of Kshs. 18,000/- and that he had served the Appellant diligently until 21st June 2022, when he was summarily dismissed without justification. He asserted that he had never been issued with warning letters or a notice to show cause prior to his termination.
2. In response to the suit, the Appellant denied the allegation of dismissal, asserting instead that the Respondent's contract had simply ended by effluxion of time. It further averred that the Respondent had been paid a consolidated salary, rendering his claim misconceived and an abuse of the court process.
3. After considering the matter, the Magistrate delivered a judgment on 15th August 2024, where he held that the Respondent's employment had, in fact, been converted from casual to permanent status in accordance with section 37 of the Employment Act. The Magistrate further found that the Respondent's dismissal was unlawful, unprocedural, and irregular. Consequently, the court awarded the Respondent the following reliefs:
 1. Kshs. 18,000/- as one months' salary in lieu of notice;



2. Kshs. 216,000/- being 12 months' salary as damages for unlawful termination;
 3. Kshs. 36,000/- as benefits in lieu of service;
 4. Kshs. 72,000/- as leave allowance;
 5. A Certificate of service;
 6. Costs and interests of the suit.
4. Dissatisfied with the outcome, the Appellant lodged a memorandum of appeal with this Court contending that:
- i. The Learned Magistrate failed to find and hold that in the absence of a specific pleading by the Respondent for conversion of casual employment to permanent employment the issue did fall for determination.
 - ii. The Learned Magistrate erred by awarding "benefits in lieu of service" which is alien to the *Employment Act*.
 - iii. The Learned Magistrate erred by adopting the sum of Kshs. 18,000/- as the Respondent's monthly salary notwithstanding that the Respondent had not led an iota of evidence to establish the same. Awarded general damages were consequently presumptuous and grossly erroneous.
 - iv. The Learned Magistrate failed to consider and to hold that there were no particulars supplied of leave days so as to merit an award.
 - v. The learned magistrate failed to find and to hold that the Respondent had not led any evidence of termination of employment by the appellant thereby arriving at a wholly erroneous conclusion that the Respondent had unlawfully terminated.
 - vi. The Learned Magistrate failed 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.
 - vii. The judgment of the magistrate was against the weight of evidence adduced and was in the circumstance a gross miscarriage of justice.
5. Consequently, 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. Alternatively, it prayed for the vacation of the award for "benefits in lieu of service," reassessment and reduction of damages for unlawful termination, and an award of costs both in the appeal and before the Magistrate's Court.
6. Pursuant to this Court's directions to dispose of the appeal by way of written submissions, the Appellant filed its submissions on 28th March 2025, while the Respondent filed his submissions slightly earlier, on 27th March 2025.

Appellant's Submissions

7. The Appellant urges this Court to be guided in 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 case of *Mursal & another v Manesa* (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. Regarding the conversion of the Respondent's employment status from casual to permanent in the judgment, the Appellant submits that this was erroneous. It submits that no such plea for conversion was contained in the Respondent's claim. To support this position, the Appellant asserts the principle that parties are bound by their pleadings, citing several authorities, chief among them being the case of Adetoun Oladeji (NIG) Ltd v Nigeria Breweries PLC S.C. 91/2002, NGSC 1 (18 October 2012) in which it was emphasized that pleadings define the issues upon which a court may pronounce itself, and that any evidence inconsistent with pleadings should be disregarded. The Appellant further points out that the Respondent's testimony contradicted his own pleadings, particularly the claim that he was a contract employee.
 9. Additionally, the Appellant submits that issues cannot be introduced or expanded through submissions. It relies on the decision in Augustine Kinyua Ita v Ndi Mubothi & 2 others [2018] eKLR, where it was held that parties cannot enlarge the scope of issues for determination through evidence or submissions not grounded in the pleadings. Regarding the award of "benefits in lieu of service," the Appellant submits that such an award is not contemplated under the *Employment Act*, and that the Learned Magistrate lacked jurisdiction to make such an award. To support this argument, the Appellant cites the case of Jamal Salim v Yusuf Abdulahi Abdi & another [2018] eKLR, which, cited with approval, the case of Motor Vessel M.V. Lilian "S" v Caltex Oil (Kenya) Limited [1989] KLR 1, holding that jurisdiction must be conferred by statute, charter, or commission and that inferior courts must establish the existence of jurisdictional 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 the case of 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 without basis. It submits that the Respondent failed to prove that he earned such a salary, and highlights that the testimony before the Learned Magistrate indicated the Respondent was paid a daily wage of Kshs. 653.10. It submits that the Learned Magistrate erred in adopting a figure inconsistent with the evidence, relying on the decision in Independent Electoral and Boundaries Commission & another v Stephen Mutinda & others [2014] eKLR.
 11. Regarding the award for leave days, the Appellant submits that the claim was unsupported by evidence. It asserts that it is particularly baffling that the Magistrate awarded leave for six years, whereas the Respondent's evidence indicated that he had only been employed for two and a half years. Furthermore, the Appellant asserts that even assuming the Respondent was entitled to leave days for six years, such a claim would be time-barred under the three-year limitation period set out in section 90 of the *Employment Act*. It cites the case of George Francis Simiyu v Attorney General & 4 others [2021] eKLR which referred to the case of Thuraira Karauri v Agnes Ngeche Civil Appeal at Nyeri 192 of 1996 [1997] eKLR, to the effect that courts lack jurisdiction to hear statute barred suits.
 12. In respect of summary dismissal, the Appellant submits that the Respondent failed to meet the evidential burden required under section 47(5) of the *Employment Act*. The Appellant maintains



that the Respondent neither established the circumstances leading to his loss of employment nor provided evidence to prove a case of summary dismissal. It submits that the Respondent was simply asked to "rest" due to a reduced workload, a term that should not have been assigned any complex meaning. With regard to the award of 12 months' salary as compensation, the Appellant submits that there was no justification or reasoning provided for the quantum of the award. It emphasizes that although the award is discretionary, it should not be made capriciously or with a punitive intention. The Appellant relies on sections 49(4) and 50 of the *Employment Act* and the case of Kenya Union of Commercial Food & Allied Workers v Kisii Bottlers Nakuru CACA No. 17 of 2017 [2021] KECA 402 (KLR) to underscore this point. Additionally, the Appellant submits that since the Respondent was remunerated on a daily wage of Kshs. 653.10, there was no monthly salary basis upon which the award could be calculated. Consequently, the Appellant submits that if the Court is inclined to grant any award under this head, it should limit it to no more than three months' wages, considering that the Respondent worked for 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 Mwititi 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 decisions in 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 Mwititi Ntiritu & 4 others [2018] eKLR, in which the courts whilst referring to 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 decision in Judith Atieno Owuor v Sameer Agriculture & Livestock Limited [2020] eKLR which cited with approval the case of Walter Ogal Anuro v Teachers Service Commission [2013] eKLR, underscored 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 required to reconsider the evidence, evaluate it afresh 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 reconsidered the pleadings, the testimony adduced as well as the submissions herein and the law in coming to this



determination. It is sufficiently warned it never saw nor heard the parties therefore giving latitude for this.

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 though the sum used as a multiplicand was erroneous. The Court calculates 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 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.
20. The Appellant correctly 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 its entirety as it was not capable of being granted.
21. 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 submitted 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

