



**Wanyonyi v Agricultural Development Corporation (Appeal
E005 of 2024) [2025] KEELRC 1597 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1597 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE
APPEAL E005 OF 2024
MA ONYANGO, J
MAY 22, 2025**

BETWEEN

TITUS WASIKE WANYONYI 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. E007 of 2022)*

JUDGMENT

1. The Appellant herein was the Claimant in Kitale CMELRC No. E007 of 2022 wherein he had sued the Respondent vide a Memorandum of Claim dated 23rd May 2022 seeking compensation and terminal dues for alleged unfair termination of his employment.
2. After hearing the parties, the trial court delivered its judgment on 26th June 2024 and held that the Appellant was not entitled to the reliefs he sought since his claim had not been proved on a balance of probabilities. The Appellant's suit was dismissed with an order that each party bears its own costs.
3. The Appellant being dissatisfied with the said Judgement instituted the instant appeal vide the Memorandum of Appeal dated 24th July 2024 on the following grounds of appeal:
 - i. The learned trial magistrate erred in law and fact in finding and holding that the Appellant did not prove his case against the Respondent
 - ii. The learned trial magistrate erred in law and fact in finding and holding that the Appellant was not entitled to the reliefs sought
 - 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 against the overwhelming evidence on record
- 4. The Appellant prayed that this appeal be allowed with costs, the trial court’s judgment and decree be set aside and the same be substituted with a judgment allowing the Appellant’s claim against the Respondent.
- 5. 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 2025.

Analysis

- 6. This being a first appeal, this court is guided by the principles espoused in several decisions on the duty of a court of first appeal among them, *Selle & Another Vs Associated Motor Boat Co. Ltd & Another* (1968) EA 123, to re-evaluate and re-examine the evidence adduced in the trial court in order to reach its own finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified.
- 7. Vide his Memorandum of Claim dated 23rd May 2022, the Claimant (now the Appellant) averred that he was employed by the Respondent as a casual laborer from 2015 to 12th January 2021 when he was wrongfully and unfairly terminated from employment without a justifiable cause.
- 8. It was the Appellants case that during the course 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, he had accumulated wages of Kshs. 64,800 for the period between 10th September 2021 to 12th January 2022.
- 9. He contended that due to his continuous service, his employment had converted from casual to regular term in terms of section 37(1) of the *Employment Act* and was therefore entitled to terms and conditions of service as a regular employee.
- 10. It was his case that he had been treated as a casual laborer during which period he was grossly underpaid and was never issued with written contracts, not allowed to go on annual leave, given medical benefits or paid housing allowance. That the Respondent also failed to remit any NSSF or NHIF statutory requirements.
- 11. He averred 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*.
- 12. The Appellant contended that he was unfairly and illegally terminated from employment without being paid his terminal dues which he tabulated as per the minimum wage guidelines in force as hereunder:
 - i. One month’s pay in lieu of notice ... Kshs 12,522.70
 - ii. Leave pay Kshs 70,801.41
 - iii. House allowance Kshs 157,786.02
 - iv. Service payKshs 48,829.45
 - v. Compensation for unfair termination .. Kshs 150,272.40
 - Total Kshs 590,988.12



13. 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 paragraph 12 above
 - iii. A declaration that the Respondent had engaged in unfair labour practices
 - iv. Salary arrears of Kshs. 64,800
 - 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 Honourable Court may deem fit and just to grant
14. The Respondent on its part filed a Statement of Response and a Counterclaim on 12th July 2022. In its defence the Respondent disputed the claim by the Appellant and 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's pay lieu in of notice and compensation for unfair termination, the Respondent asserted that the Appellant was not entitled to the same as he absconded duty after the Respondent's audit team initiated investigations into loss of coffee at the Appellant's place of work. With regard to 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.
15. 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. 1,500 per kg.
16. The Respondent claimed Kshs. 120,000 from the Appellant being the value of the lost 80kgs bags of coffee.
17. The Respondent urged the trial court to dismiss the Claimant's claim and that its Counterclaim be allowed. It also prayed for costs of the suit.

The Evidence adduced

18. At trial the Appellant testified as CW1 and adopted his witness statements recorded on 22nd June 2022 as his evidence in chief. He also produced and relied on the documents he filed in support of his case as his evidence.
19. In his testimony, the Appellant denied any involvement in the theft of the Respondent's coffee in January 2022 and stated that he was not charged in court for the offence of stealing by servant. He also stated that he worked for the Respondent in the coffee section for 7 years continuously.
20. On cross examination, the Appellant stated that he worked for the Respondent for 7 years and was paid a daily wage of Kshs 283 per day as a casual which according to him was an underpayment. The claimant stated that his last day at work was 12th January 2022 and that he was orally terminated from employment on allegations that he was involved in the theft of coffee.



21. 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.
22. From the record, directions were given for the evidence of RW1 in Kitale CMELRC No. 6 of 2022 in cross examination to apply to this case.
23. In E006 of 2022, RW1 on cross examination, stated that from the muster roll produced as Dexb 1(a to j), the claimant worked as a guard and in the coffee section in 2020. She also stated that he worked from April 2021 to January 2022. According to RW1, the muster roll is not consecutive since the claimant was not working continuously. That he worked on 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 but he was paid the arrears in May 2022.
24. On re-examination, RW1 asserted that the Claimant did not work consecutively but worked on need basis. She also contended that as a casual labourer, the Claimant would not have been subjected to a disciplinary hearing.
25. After hearing the parties, the trial court delivered its judgment on 26th June 2024 dismissing the Claimant's suit. The impugned judgment reads in part as follows: -
 10. The Respondent has contended that the claimant was employed as casual employee on a need to need basis. The respondent availed proof through the Muster roll and payment forms as exhibits, that the claimant never continuously worked for a period of 6 days in a row or two months continuously as required by section 37 of the *Employment Act* to convert the claimant's casual employment to a regular one. In addition, during cross examination, the claimant admitted that he had only availed proof of working for the respondent for three (3) months. This court makes a finding that the Claimant's employment cannot be converted to a regular term employment under section 37 since it is clear from the evidence before court that the claimant was a casual employee of the respondent.
 11. With regard to the second issue, having declared that the respondent(sic) was a casual employee then it follows that he was not entitled to such terms and conditions of service provided for term employees under the *Employment Act*. I find that in view of the finding above that the claimant was a casual employee, he was incapable of being unfairly terminated under section 45 of the *Employment Act*.
 12. The claimant being a casual employee on daily wage is not entitled to salary in lieu of notice and compensation for unfair termination under Section 49 of the Act. Further, the claims for leave and service pay are dismissed for lack of evidence to prove that the claimant qualified for the same.
 13. The upshot of the above is that the claimant is not entitled to the relief sought since his claim has not been proved on a balance of probabilities. Accordingly, the claimant's case is dismissed with directions that each party bears their own costs for the suit.
 14. The aggrieved party has a right of appeal within 30 days from the date of this judgement."
26. Those are the orders that provoked the instant appeal.

Appellant's submissions

27. The Appellant in his submissions faulted the trial court for relying on the muster roll for the period between December 2021 and January 2022 produced in evidence by the Respondent. According to



the Appellant, the muster roll relates to pulping, grading and drying of coffee activities only yet the appellant testified that as a casual laborer, he used to be assigned in different capacities including slashing, grading, pulping, spraying and loading depending on the priority needs of a given period of time. The Appellant thus submitted that the muster roll is therefore inconclusive in so far as the duties performed by the Appellant during the period claimed is concerned.

28. The Appellant further submitted that the Respondent failed to produce the muster roll for the period between 2015 to November 2021 to enable the court to verify the Respondent's claim, despite admitting that the Appellant worked in 2020, 2021 and 2022.
29. It is the Appellant's case that a necessary presumption therefore arises that the Appellant continuously worked for the Respondent from 2015 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.
30. The Appellant thus submitted that the trial court erred in relying of the muster roll from a single section of the company for the year 2021 period only, to find and hold that the Appellant did not work for the Respondent for a continuous period of more than one month.
31. The court was urged to find and hold that the Appellant worked for the Respondent for continuous period of 7 complete years hence more than 13 months therefore entitled to awards for service pay and unfair termination of employment.
32. Further, the Appellant submitted that pursuant to the finding that the Appellant was a term contract employee, he was entitled to fair and due process before termination of his service. The Appellant submitted that in his testimony before the trial court, he stated that he did not participate in the alleged theft of coffee and further, that DW1 confirmed that due process was not followed as the Respondent considered the Appellant as a casual employee not deserving of due process.
33. The Appellant submitted that in the absence of valid reasons for termination of his employment and the failure by the Respondent to take him through a disciplinary process, he is entitled to compensation in terms of the reliefs he sought in his Statement of Claim. The Appellant asserted that his claim for underpayment is based on Kshs. 283 that he was paid per day contrary to the minimum wage of Kshs. 600 per day.
34. With regard to the Respondent's counterclaim, the Appellant submitted that there is no proof that he was involved in the alleged loss of coffee and that the exact amount of coffee cannot be objectively ascertained. The Appellant therefore urged the court to allow the appeal and the judgment of the trial court be substituted with a judgment allowing the Appellant's claim in its entirety as pleaded and particularized in the Memorandum of Claim.

The Respondent's submissions

35. On its part, the Respondent submitted that the muster roll it produced at trial as Dexb2a-f showed that the Appellant was engaged intermittently and not for a continuous period exceeding 7 years as claimed.
36. According to the Respondent, in the year 2020, the Appellant worked for 62 days in a period of six months and he earned a wage of Kshs 17,677; that in the year 2021, the Claimant worked for 24 days in the month of December and earned a wage of Kshs 5,094 and in the year 2022, the Claimant worked



for 9 days in the month of January and earned a wage of Kshs 7,641 which amounts were processed and paid to him.

37. According to the Respondent, its witness testified that the Appellant held an account with KCB and Post Bank where his cumulative wage arrears would be deposited. It was submitted that as evidenced in the muster rolls and pay rolls, the appellant's wages were calculated daily and paid fortnightly.
38. The Appellant submitted that even though the appellant contends that he worked for the Respondent for 7 years, the terms of engagement were not continuous but intermittent. That the Appellant was engaged as a casual on seasonal basis during the season of coffee pulping and grading.
39. 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 had demonstrated through evidence of muster roll and pay rolls that indeed the Appellant worked intermittently for a period which is not envisaged in Section 35(5) of Employment Act 2007.
40. In the end, the Respondent submitted that the Appellant's appeal lacks merit and prayed that it be dismissed with costs to the Respondent.

Analysis and determination

41. From the Record of Appeal and the submissions by both parties, the grounds of Appeal can be crystallized into the following issues:
 - i. Whether by dint section 37 of the Employment Act, the Appellant's casual employment converted into a term contract
 - ii. Whether the Appellant's employment was unlawfully terminated
 - Whether by dint section 37 of the Employment Act, the Appellant's casual employment converted into a term contract
42. Section 37 of the Employment Act empowers the Employment and Labour Relations Court to convert a contract of service of an employee engaged on casual basis to one where such an employee is deemed to have been engaged under a contract of service and thereby entitling him/her to monthly wages and other benefits such as leave and certificate of service.
43. Section 2 of the Employment Act defines the term "casual employee" to mean:

“.. an individual 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”.
44. A casual employee is therefore an employee who is engaged for twenty four hours at a time. As per the provisions of section 35(1)(a) of the Employment Act, such engagement is terminable by either party at the end of the day, without notice.
45. It was the Appellant's case that he was employed by the respondent with effect from 2015 as a general laborer and worked continuously up to 12th January 2022 when he alleges to have been dismissed from employment.
46. On its part, the Respondent produced the muster roll for the period between April 2021 and January 2022 to counter the assertions of the Appellant by demonstrating that he was not in the Respondent's employment regularly and continuously from April 2021 to 12th January 2022.



47. The Appellant (CW1) on cross examination stated that he worked continuously for the Respondent for 7 years until he was unlawfully terminated from employment by the Respondent. In support of this position, the Appellant produced bank statements for three months.
48. I have perused the muster rolls and the casual payment roll produced by the Respondent and particularly the casual payroll for coffee section from January 2020 to May 2020, the payroll for the months of June, September, October, November and December 2020. From the said documents, it is clear that indeed the Appellant worked for the Respondent intermittently.
49. I am unable to disagree with the findings of the trial court that the Claimant was a casual employee.
50. For the aforesaid reasons, I see no reason to interfere with the decision of the trial court dismissing the claim with no order as to costs.
51. Consequently, this appeal lacks merit and is hereby dismissed with an order that each party bears their own costs.
52. Judgment accordingly.

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

MAUREEN ONYANGO

JUDGE

