



Odhiambo v Fast-Track Management Consultants Limited (Appeal E188 of 2023) [2025] KEELRC 1392 (KLR) (5 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1392 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E188 OF 2023
NJ ABUODHA, J
MAY 5, 2025**

BETWEEN

DANIEL OCHIENG ODHIAMBO APPELLANT

AND

FAST-TRACK MANAGEMENT CONSULTANTS LIMITED RESPONDENT

(Being an appeal from the Judgment of the Honourable Wendy K. Micheni delivered on 29th September 2023 in Nairobi MCELRC NO. 2166 of 2019 between DANIEL OCHIENG ODHIAMBO VS FAST-TRACK MANAGEMENT CONSULTANTS LIMITED)

JUDGMENT

1. Through the Amended Memorandum of Appeal dated 19th February, 2024, the Appellant appeals the Judgment of Honourable Wendy K. Micheni against the whole of the said Judgment delivered on 29th September, 2023.
2. The Appeal was based on the grounds that:
 - i. The Learned Magistrate erred in law in her judgment dated 29th of September, 2023 by dismissing the Claimant's suit.
 - ii. The Learned Magistrate erred in law in her judgment dated 29th of September, 2023 by holding that the Respondent had shown that the Appellant on numerous occasions failed to show up to work.
 - iii. The Learned Magistrate erred in law in her judgment dated 29th of September, 2023 by holding that the Appellant had not served continuously as a machine Operator.
 - iv. The Learned Magistrate erred in law in her judgment dated 29th of September, 2023 by holding that the Appellant was not employed as a machine operator from the year 2004.



- v. The Learned Magistrate erred in law in her judgment dated 29th of September, 2023 by holding that the Appellant was not entitled to house allowance as he was paid a daily wage basis from the year 2008.
 - vi. The Learned Magistrate erred in law and fact in her judgment dated 29th of September, 2023 by holding that the termination of the Claimant by the Respondent was procedural.
3. The Appellant prayed that the appeal be allowed with costs; the judgment of the subordinate court delivered on 29th September, 2023 be set aside and the Honourable Court allow the Claimant's Amended statement of Claim dated 4th of April 2022 as prayed.
 4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant's Advocates RBZ Advocates LLP filed written submissions dated 21st November, 2024. Counsel submitted that the role of the first Appellate court was to consider the evidence produced before the trial court and reach its own conclusion and relied on the case of Muthoni (Suing as Legal Representatives of the Estate of Michael Anjere) -vs- Namadi & Another (Environment and Land Appeal E024 of 2023) (2024) KEELC 7421(KLR) (7 November 2024) (Judgment).
6. On the issue of whether the trial court erred by holding that the termination of the Claimant by the Respondent was procedural, consequently dismissing the Claimant's suit counsel submitted that the trial court relied on the testimony of Rachael Wambui who stated that the Appellant was perpetually late and the court relied on that as a ground for lawful termination. That no single evidence was adduced in terms of warning letters, notice to show cause, hearing and minutes of hearing and at least a termination letter.
7. Counsel submitted that the appellant's termination was unfair and the allegation that he had absconded duties was not supported by evidence maintaining that his absence from duty followed his suspension from duty. Counsel relied on Black's Law Dictionary (Ninth Edition) on definition of desertion. Counsel also relied on the South African case of Seabolo v Belgravia Hotel (1997) 6 BLLR 829(CCMA) where the court distinguished desertion from unauthorized absence from duty.
8. On the issue of whether the Appellant was guilty of desertion as contended by the Respondent counsel, submitted that the Respondent had suspended the Appellant to pave way for investigations a fact not disputed by the Respondent. That even if she had absconded she was entitled to a fair disciplinary process as set out under section 41 of the Act. Counsel relied on the case of Felistas Acheha Ikatwa v Charles Peter Otieno (2018) eKLR on efforts to be made by employer to reach the deserting employee.
9. Counsel relied on the case of Walter Ogal Anuro v Teachers Service Commission (2013) eKLR on requirement of both substantive and procedural fairness for termination to pass fairness test. That there was no evidence of either desertion of duty or fair termination by the Respondent. That the termination was unfair both substantively and procedurally. Counsel relied on the case of Bernard Kariuki Gatumu v Everest Enterprises Limited (Cause 1610 of 2012) (2017) KEELRC 274(KLR) (Employment and Labour)(20 November, 2017) (Judgment) that absence of evidence from employer of hearing makes the termination unlawful.
10. On the issue of whether the trial Magistrate erred by holding that the Respondent had shown that the Appellant on numerous occasions failed to show up counsel submitted that the *Employment Act* and *the Constitution* places a burden on the employer to establish and justify reasons for termination. That the Respondent's allegation of absconding duties without justification as submitted above went



against the court of Appeal decision in Pius Machafu Isindu v Lavington Security Guards Limited (Civil Appeal 301 of 2015) (2017) KECA 225 (KLR) (CIV) (3 November, 2017) (Judgment).

11. Counsel submitted that the provisions are in tandem with article 41 of *the Constitution* on rights and fairness in labour relations. That section 47(5) of the *Employment Act* provides for the respective burdens of the employer and employee.
12. On the issue of whether the trial court erred by holding that the Appellant was not entitled to house allowance as he was paid a daily wage basis from the year 2008 counsel submitted that despite the Appellant working continuously as is evidenced by the KRA PAYE payments and NSSF returns the Appellant was fraudulently forced to sign fixed terms 3 months contracts fashioned to show that there was a break after three months employment with a daily wage rate of 693. That the same talks of no house allowance but stated that the same was subject to statutory deductions.
13. Counsel submitted that the same was governed by section 31 of the *Employment Act* and the court of Appeal in Grain Pro Kenya Inc. Ltd v Adrew Waithaka Kiragu (Civil Appeal 228 of 2017) (2019) KECA 563(KLR) (Civ) (28 June 2019) (Judgment) held that where house allowance is not provided for in the contract the same must be paid over and above the daily or monthly wages.
14. On the issue of whether the trial court erred by holding that the Appellant was not employed continuously as a machine operator counsel submitted that from the KRA statutory payments and NSSF returns the Appellant was a permanent employee contrary to what the Respondent made him sign. The trial court erred and the Appellant should be treated as a permanent employee and treated as such.

RESPONDENT'S SUBMISSIONS

15. The Respondent's Advocates JNN Advocates LLP filed written submissions dated 27th November, 2024. Counsel agreed with the role of the first appellate court as submitted by the Appellant while submitting that where facts are clear and documented and undisputed it was the Respondent's submission that they should be so taken.
16. On the issue of whether the trial court erred by holding that the termination of the Claimant by the Respondent was procedural, consequently dismissing the Claimant's suit counsel submitted that the Appellant cannot allege unfair termination when he had been unable to prove in the first place that there was a termination by the Respondent. That there was no credible evidence provided to show that the Appellant was terminated by the Respondent which was confirmed by the testimony of Rachel Kamau the supervisor which was not controverted.
17. Counsel relied on section 47(5) of the *Employment Act* on the burden of the Appellant to prove that termination occurred and the Respondent to justify the reasons once the Appellant first discharged his burden. Counsel further relied on section 107(1) of the *Evidence Act* on burden of proof on the party alleging as well as sections 109 and 112 of the same act on evidential burden of proof.
18. Counsel submitted that from the onset the Respondent maintained that it did not terminate the services of the Appellant but that the Appellant deserted duties. That there was no credible evidence as to who terminated him and when he was terminated. That the Appellant had a habit of not showing up to work which was not an issue as he was being paid on a daily wage basis and so his failure to report to work was not something out of the ordinary at the workplace as there were other employees who also worked as machine operators and therefore work went on.
19. Counsel submitted that the Respondent was not aware that the Appellant did not intend to ever show up to work and only came to realize this after receiving a demand letter from the Appellant alleging



unfair termination when he absconded duty. That the court should note that the time period between the day on which the Appellant failed to show up to work and his advocate authoring a demand was one day which gave the impression that the sequence of events was preconceived and stage-managed to take advantage of the Respondent. That the Appellant reported to work up to 22nd October, 2019 failed to show up on 23rd and then proceeded to have his advocate write a demand letter to the Respondent the next day 24th October. That the speed of the events was questionable.

20. Counsel submitted that the quick sequence of events made it impossible for the Respondent to initiate a disciplinary process. That the communication by the Appellant's advocates left no doubt as to his whereabouts and the Respondent asked the Appellant through his advocates to avail himself at work which he refused/ neglected to do. That the Appellant on numerous occasions failed to show up to work and a reference to the list of daily shifts at the client's premises showed a register which was evidence that the Respondent paid their employees including the Appellant on the basis of KShs 693 per day. That the attendance register was necessary in computing the salary for the Appellant and other employees of the Respondent.
21. Counsel submitted that the Appellant could not clearly identify the person who verbally terminated his services on the date he alleged of 17th October, 2019 yet he even reported to work on the 22nd of the same month and was paid his dues for the work he did including the hours he worked on 22nd October, 2019. That section 41 and 45 of the *Employment Act* as quoted by the Appellant do not apply in this case as the Appellant deserted on his own and was unable to prove that there was an unfair termination as required under section 47 of the Act.
22. Counsel submitted that as per section 47 of the act the Appellant had the burden of proving whether there was termination of his services by the Respondent before even delving in to whether the alleged termination was fair or unfair but he failed to do so. That there was no official communication from his employer asking him not to report to work but he absconded duties. Counsel relied on the case of Pius Machafu Isindu v Lavington Security Guards Limited Civil Appeal No 310 of 2015 on the respective burden of proof. That the trial court did not err by dismissing the Appellant's suit.
23. On the issue of whether the trial court erred by holding that the Appellant was not employed continuously as a machine operator from 2004 counsel submitted that the said issue did not add any value to the Appellant case. That the Appellant as well as other employees of the Respondent working at Bata Shoe Company were employed on a fixed term contract basis of 3 months and evidence of the fixed term contracts was provided by both parties. That this was the position because work at the Respondent's premises was uncertain as the Respondent is an outsourcing company and only outsources labour when there is availability of work and that section 10(3) (c) of the *Employment Act* recognizes an employer's right to engage an employee on a fixed term contract.
24. Counsel submitted that fixed term contracts are not against the provisions of law while relying on the case of Transparency International Kenya v Omondi (Civil Appeal 81 of 2018) (2023). That the trial court did not err by holding that the Appellant was employed continuously as a machine Operator and therefore could not be regarded as a permanent employee as such contracts however long they do not become permanent.
25. On the issue of when the Respondent first contracted the services of the Appellant counsel submitted that the Appellant failed to prove that he started working for the Respondent in 2004. That he referred the court to the recommendation letter written by the Respondent as a testimony of his character which letter shows that he had worked for the Respondent from 2008 which was the first time he was given the first fixed term contract of three months and not to mean that he had been working



continuously for the Respondent since 2008. That this was also the first time the Respondent entered in to outsourcing agreement with Bata Shoe Company.

26. On the issue of whether the trial court erred by holding that the Respondent had shown that the Appellant on numerous occasions failed to show up to work counsel submitted that the documents the Appellant produced did not support his assertions he made but instead supports the position of the Respondent that he was occasionally and habitually absent from work.
27. Counsel submitted that the Appellant was absent from work on various occasions during his employment and that the Respondent provided evidence that the Appellant was paid cash in lieu of leave for all his leave proving that the days were not leave days taken. That the Appellant's absenteeism from work is also evidenced by the inconsistencies in his total monthly pay as the Appellant and all other employees were paid on a day rate.
28. Counsel submitted that this points to the reason why the Respondent never acted when the Appellant failed to show up to work on 23rd October, 2019 since they were used of the Appellant not showing up one or two days in a week and he was paid on daily rate. That this was an issue of fact and not law and the trial court did not err on this issue.
29. On the issue of whether the trial court erred by holding that the Appellant was not entitled to house allowance as he was paid a daily wage basis from the year 2008 counsel submitted that under Regulation of Wages and Conditions of Employment Act (General) Order daily pay was inclusive of house allowance and this makes the Appellant ineligible for a separate house allowance. That in the Appellant's existing fixed term contract of 1st September, 2019 to 30th November, 2019 it indicated that the Appellant was to be paid a daily rate of Kshs 693 subject to all statutory deductions. That Kshs 693 pay was consistent with the Regulation of Wages and Conditions of Employment Act (General Order) that was in existence at that particular time.
30. Counsel further submitted that for convenience the pay was paid fortnightly subjected to statutory deductions and a pay statement issued. Counsel relied on the case of Julius Arisi & 90 Others v Research International Africa Limited (2019) eKLR while submitting that employees on daily rates pay was inclusive of housing allowance. That the trial court did not err in holding that the Appellant was not entitled to the same.

Determination

31. The principles which guide this court in an appeal from a trial court are now well settled. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that;

“[A]n appeal to this Court from a trial by the High 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 allowances in this respect”
32. In this case, the Judgment of the trial court was that the court found no merit on the Claimant's case as he failed to prove that he was unfairly terminated and the same was dismissed with each party bearing the costs of the suit. The Appellant was aggrieved by the entire judgment and proposed the 6 grounds of Appeal in his Amended Memorandum of Appeal which this court will reduce to three grounds:-
 - a. Whether the trial court erred in finding that the Appellant was engaged on fixed term contracts and not employed continuously as a machine operator to assume permanent employment.



- b. Whether the trial court erred in finding that the Appellant termination by the Respondent was procedural hence dismissing the suit.
- c. Whether the trial court erred in not awarding the terminal dues claimed by the Appellant.

Whether the trial court erred in finding that the Appellant was engaged on fixed term contracts and not employed continuously as a machine operator to assume permanent employment.

33. This court notes that the Appellant was employed by the Respondent from 2008 to 2019 as machine operator involved in mass production of shoes when the Respondent outsourced its services to Bata shoe Kenya where the Appellant was initially working. The NSSF statement shows that the Appellant was employed in July, 2007 on the other hand. Whereas the Respondent alleged that the Appellant's services were not continuous as he was engaged in various fixed term contracts the Appellant alleged that he was continuously engaged by the respondent for 15 years.
34. The court notes that the Appellant was on three-month fixed term contracts where he was paid on daily rates every fortnight. This court therefore agrees with the lower court that the Appellant was on fixed term contracts. Whereas the NSSF statements showed some continuity where remittances were made from July to November, 2007 then from April 2008 with June and August skipped from 2009 it was continuous up to July, 2019. The KRA returns for 2018 were also continuous. This meant that his employment was continuous.
35. The court is therefore tasked with the question of whether the fixed term contracts which were continuous could assume permanency. The court is guided by Section 2 which defines contract of service as follows:
- ‘means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies;
36. The Court in the case of *Krystalline Salt Limited vs Kwekwe Mwakele & 67 Others* [2017] eKLR defined the different engagements as follows:-
- “The *Employment Act* recognizes four main types of contracts of service: contract for an unspecified period of time, for a specified period of time, for a specific task (piece work) and for casual employment...The decision to elect which form of employment to go for, either as an employee or employer will depend on a number of factors, but the dominant consideration is, for the employee, the earnings and other physical conditions of employment, and on the other hand, savings for the employer.”
37. This means that the Act appreciates fixed term contracts. In the case of *East Africa Sea Food Limited v Mwazito* (Appeal E013 of 2020) [2023] KEELRC 1257 (KLR) (20 April 2023) (Judgment) the court had this to say:-
- Whether to issue a fixed term contract or not is regulated under the provisions of Section 10(3) (c) of the Act. An employer is allowed the prerogative to employ an employee under a fixed term contract with a start and end date. The self-executing contract is lawful and valid in employment and labour relations.
38. From the foregoing it is deducible that a fixed term contract is a lawful form of employment and cannot assume permanency just because it has been renewed over time. The *Employment Act* under section



37 only recognizes casual employment as a form of employment which is capable of conversion to permanency and not fixed term contract.

39. The Appellant was all along in fixed term contracts which were independent with start and end dates. That the same could not be converted to permanent contracts. This court does not agree with the Appellant that his fixed term contracts assumed permanency since he signed all those contracts all the years. In any event he has never raised any issue with the nature of the engagement with the Respondent. This ground of Appeal therefore fails.

Whether the trial court erred in finding that the Appellant termination by the Respondent was procedural hence dismissing the suit.

40. The Appellant alleged that he was terminated on 17th October, 2019 when he reported late around 6 pm instead of 3.30pm because his younger sister who was travelling from rural area got lost and he had to trace her. That his supervisor wanted to hear none of the explanations. The Respondent on the other hand alleged that the Appellant reported late on 22nd October, 2019 and never appeared again while the Respondent's witness alleged that the Appellant reported on 21st October, 2019 late being rude and worked up to 11.30pm and he refused to see her on 22nd October, 2019 until his contract expired.
41. The trial court found that the Appellant did not prove that he was unfairly terminated as the Respondent proved that he would not show up one or two days in a week and he wrote to the Respondent just one day after being absent from the Respondent work.
42. Whereas this court appreciates that under section 47(5) of the *Employment Act* the employee has a burden to prove that termination occurred which was unfair and the employer has a burden to justify the termination this court will scrutinize this issue around when and how parties parted ways. Whereas the Appellant alleged that he was terminated on 17th October, 2019 the pay slips attached for week 42 shows that the Appellant was paid Kshs 693 for 17th and 18th October, 2019 which means then this is not the date of separation.
43. Whereas the Respondent alleged that the Appellant reported late on 22nd October, 2019 the pay slip for week 43 shows that he was paid Kshs 370 for 22nd October and there is no other payment made since then. From the records therefore, it is clear the last day of engagement must have been 22nd October, 2019 when the Appellant reported late. The Appellant just one day after wrote a demand letter to the Respondent on 24th October, 2019 claiming his unfair termination. To this court this was too soon bearing in mind that the Appellant reported late on 22nd October, 2019 and did not show up on 23rd October, 2019.
44. Whereas there was no official communication from the Respondent that his services were terminated on account of being late on 22nd October, 2019 this court agrees with the trial court that the Appellant did not prove that he was terminated in the first place before the court even addresses the issue of the unfairness of the same. This court appreciates that the Appellant had worked with the Respondent for some long period of around 15 years and there was no way failure to show up of one day by the Appellant who from records could fail to show up in a day and still come back and work would enable the Respondent to take the necessary steps to reach him and know his whereabouts.
45. The Respondent must have believed that the Appellant as usual since he was paid on daily rate would still show up. There was no room therefore to initiate any disciplinary actions as the events were highly rushed by the Appellant. This court agrees with the trial court that the termination was procedural as the Appellant terminated his own contract.



Whether the trial Court erred in not awarding the terminal dues claimed by the Appellant.

46. This court having found that the Appellant was engaged on fixed term contracts and that he was terminated procedurally, the issue of terminal dues for reasons advanced above, does not arise. In conclusion, the appeal is found without merit and is hereby dismissed with costs.

47. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF MAY, 2025

DELIVERED VIRTUALLY THIS 5TH DAY OF MAY, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

