



Syengo v Mills (Appeal E260 of 2024) [2025] KEELRC 2115 (KLR) (17 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2115 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

APPEAL E260 OF 2024

M MBARŪ, J

JULY 17, 2025

BETWEEN

SAMUEL MUDHAMI SYENGO APPELLANT

AND

KITUI FLOUR MILLS RESPONDENT

*(Being an appeal from the judgment of Hon. L. Gacheru delivered
on 12 November 2024 in Mombasa CMELRC No. E782 of 2023)*

JUDGMENT

1. The appeal arises from the judgment delivered on 12 November 2024 in *Mombasa CMELRC No. E782 of 2024*. The appellant seeks to set aside the judgment and allow the claim with costs.
2. The background to the appeal is a claim filed by the appellant, who alleges that he was employed as a welder by the respondent on 8 February 2011 and was allocated duties at Majengo within Mombasa County at a wage of Ksh. 22,050 per month. He worked until 22 May 2023, when the respondent terminated his employment unfairly. He claimed that on 11 February 2023, he suffered a work injury while at the garage. He was treated at Sayyida Fatimah Hospital and later at Coast General Teaching and Referral Hospital. After a month, he was able to resume work. On 17 February 2023, the respondent notified the Director of Occupational Safety and Health Services (DOSHS) of the injury. On 22 May 2023, when the appellant returned to work, he was summoned by the garage manager, who instructed him to stop work and go home. The appellant sought clarification from the human resources director, who refused to intervene. This resulted in unfair termination of employment. The applicant claimed the following dues;
 - a. Notice pay ksh.22,050,
 - b. Unpaid salary for 22 days worked in May 2023 Ksh.120,000,
 - c. House allowances for 149 months, Ksh.492,817,



- d. Unpaid leave for 12 years ksh.185,220,
 - e. 12 months compensation Ksh.264,600,
 - f. Service pay for 12 years Ksh.132,300
 - g. Certificate of services,
 - h. Costs of the suit.
3. In response, the respondent denied the claims and stated that the appellant was employed as a casual worker at a daily wage of Ksh 735 from 11 December 2018 until he was permanently retained through an employment contract dated 1 May 2023. Before the contract was issued, the appellant worked intermittently for the respondent, being allocated work as needed but not on a full-time basis. There was no termination of employment on 22 May 2023, as alleged. The appellant sustained a work injury on 11 February 2023 while working as a casual labourer. He did not return to work on 11 May 2023 because, after his injury on 11 February 2023, he was allowed to resume employment in March 2023 and subsequently received an employment contract in April 2023, which he signed as acceptance. There was no termination of employment as claimed; instead, the appellant left his employment voluntarily without valid cause. At the time of the employment contract, the appellant was not entitled to annual leave, and wages paid were not subject to statutory deductions as a casual employee. The wages for May 2023 were paid in full for the days worked, and the claims made should be dismissed with costs.
4. The learned magistrate heard the parties and in judgment held that there was an employment relationship between the parties which was unfairly terminated, and hence the appellant was entitled to the following;
- a. notice pay at Ksh.19,110,
 - b. pay for May 2023 Ksh.16,170,
 - c. 2 months compensation Ksh.38,220,
 - d. Certificate of service,
 - e. 40% of costs.
5. Aggrieved by the judgment, the appellant's grounds of appeal are that the learned magistrate erred in law and fact by failing to find that he was employed from 8 February 2011 and worked for 12 years. The trial court erred in determining that the appellant was a casual employee despite the respondent indicating that he was a welder in the DOSH form and that his monthly wage was Ksh. 19,110; the contract dated 1 April 2023 for three months did not apply. The assessment of house allowance at Ksh. 5,292 was erroneous, and the award of compensation was too low and not commensurate with the appellant's 12 years of service. The award of costs at 40% lacked justification, and the appeal should be allowed with full costs.
6. The appellant also submitted that the question of employment was addressed in DOSH Form 1, where the respondent admitted that the appellant was a welder earning Ksh. 110 per month, and that the trial court's conclusion that he was a casual employee was in error. Under section 37 of the [Employment Act](#), when an employee works for a period or several continuous days for not less than a month, such employment converts to one protected under the law. In this case, the appellant was employed from 8 January 2011 to 22 May 2023. The respondent did not produce any work records for the period during which the appellant allegedly worked as a casual employee.



7. The appellant argued that the findings indicating employment started with the written contract on 1 April 2023 and ended on 22 May 2023, when employment was terminated, are incorrect. The contract submitted is signed on 23 May 2023, the very same day the appellant is alleged to have deserted his employment. The appellant testified that he was dismissed from his employment without notice or cause.
8. The claim for house allowance is due for 12 years, in addition to annual leave, service pay, and compensation. Since the claim was successful, the 40% costs were not justified.
9. The respondent submitted that the appellant was a casual labourer earning a daily wage of Ksh. 735. Work was not continuous until 1 April 2023, when a written contract was issued.
10. The appellant suffered a work-related injury on 11 February 2023. After recovery, he returned to work and was assigned duties. He subsequently voluntarily left his employment. The trial court correctly assessed the claims made, and the appeal should be dismissed with costs.
11. The respondent argued that relying on the DOSH Form 1 to verify employment is incorrect. The appellant was a casual labourer and did not work continuously, as alleged. The DOSH form cannot be used to confirm the nature of employment, as established in [Makau v Dinesh Construction Limited](#) [2023] eKLR. The appellant cannot invoke section 37 of the [Employment Act](#) because he never worked continuously to qualify under such provisions.
12. In the case of [Joseph Seif Deche v Mistry V. N. Mulji & Company](#) [2017] eKLR, the court held that under Section 9 of the [Employment Act](#), the employer is required to issue the employee with a written contract of employment, which the respondent failed to do in this case. The claim that he was a welder does not apply. The claims made should be dismissed with costs.

Determination

13. On the first appeal, the court is guided by the principle that it must review the entire record, reassess the findings, and draw a conclusion. However, the Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion as held in *Mbogo v Shah* [1968] EA and in *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123
14. The appellant's case is that he was employed as a welder from 8 February 2011 to 22 May 2023, when his employment was unfairly terminated. He thus claimed compensation, notice pay, unpaid house allowances, leave days not taken, and service pay. The respondent contested these assertions and stated that the appellant was employed as a casual, which was not continuous until 1 April 2023, when he was issued a written contract. On 22 May 2023, he voluntarily left his employment; hence, the claims are unjustified.
15. The respondent's admission that the appellant was a casual employee who worked intermittently until 1 April 2023 is crucial. However, without the work records to confirm the periods of casual employment, the appellant's account must be accepted as accurate. The rationale is that under Section 10(6) and (7) of the [Employment Act](#), the employer has a duty to keep work records, including those of casual employees.



16. In this case, without the respondent filing any work records, the appellant's employment status prior to the issuance of the contract dated 1 April 2023 is protected under Section 37 of the [Employment Act](#). He enjoys rights and benefits under the [Act](#).
17. Regarding the termination of employment, the trial court correctly analysed that when an employer claims an employee has abandoned their position, voluntarily left their job, or failed to fulfil their duties, the responsibility to terminate the employment relationship lies with the employer. When the appellant did not attend work after receiving the written contract, the respondent took no action. This resulted in an unfair termination of employment, which the learned magistrate addressed, providing compensation as an award.
18. This court finds no justification for interfering with the trial court's discretion to review the compensation award or notice pay.
Equally, the basis for awarding unpaid salary is well addressed.
19. The only contentious issue is the house allowance, annual leave, and service pay claimed for 12 years.
20. A protected employee under Section 37 of the [Employment Act](#) does not have a written employment contract. Continuous engagement as a casual worker is unlikely to end in a single day. Similarly, an employee paid a daily wage who consistently performs the same duties day after day is unlikely to find a single day when they are not required to do so.
21. In this case, the appellant argued that after his work injury on 11 February 2023, the respondent reported the incident to DOSH and stated that he was a welder earning Ksh.119, 110. As correctly pointed out by the respondent, the DOSH Form 1 does not establish employment. The [Employment Act](#) governs the Employment relationship, which applies whether there is a written or oral contract. If someone remains a casual employee for periods exceeding the 24 hours recognized under the law, they are protected under Section 37 of the [Employment Act](#).
22. Under the appellant, he was a casual employee until 1 April 2023, when he was issued a written contract. Any claims arising from the previous period of employment should have been addressed on their merits.
23. On the claim for house allowance, the respondent's case is that the appellant was on a daily wage of Ksh. 735 was not entitled to a house allowance or leave as a casual employee. However, as a protected employee, the rights under sections 31 and 28 accrued to the appellant.
24. A general labourer working in Mombasa in 2023 earned a minimum wage of Ksh. 15,201.65 as basic plus a 15% house allowance of Ksh.2, 280.15, for a gross pay of Ksh.17, 481.15.
The daily wage in the same category was ksh.731.50.
25. The appellant was paid Ksh.735, which is calculated monthly at Ksh.22, 050. This amount aligns with the appellant's claim in the Memorandum of Claim, confirming that he was paid above the minimum rate due, Ksh.17, 481.15, including the house allowance. Claiming any additional benefit or a house allowance exceeding what was paid amounts to seeking unjust enrichment.
26. Under section 28 of the [Employment Act](#), employees have the right to take annual leave of at least 21 days each year. In this case, the appellant was protected under the law and had this benefit.
27. There is no record of the appellant being granted annual leave under the mistaken belief that he remained a casual employee. Under section 28(4) of the [Act](#), any accrued annual leave could not be



carried forward beyond 18 months, and therefore, he is entitled to 33 days. At a daily wage of Ksh.735, the total leave pay due is Ksh.24, 255.

28. This was not allocated on the service pay claim since the respondent regarded the appellant as a casual employee. However, as analysed above, statutory remittances were mandatory once protected by law. Service pay is payable under section 35(6) of the *Employment Act* at 15 days for each year served. The appellant is entitled to Ksh.735 multiplied by 15 days for the 11 full years worked, amounting to Ksh.121, 275 in service pay.
29. The award of costs at 40%, under Section 12(4) of the *Employment and Labour Relations Court Act*, is at the court's discretion. The court finds no error in the manner in which the learned magistrate exercised this discretion.
30. Accordingly, judgment in *Mombasa CMEELRC No. E782 of 2023* is reviewed in the following terms;
 - a. notice pay at Ksh.19,110,
 - b. pay for May 2023 Ksh.16,170,
 - c. compensation Ksh.38,220,
 - d. leave pay ksh.24,255,
 - e. service pay Ksh.121,275,
 - f. Certificate of service,
 - g. 40% of costs.
 - h. Each party bears its costs for the appeal.

DELIVERED IN OPEN COURT AT MOMBASA, THIS 17 JULY 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

