



Vishva Builders Limited v Wekulo (Employment and Labour Relations Appeal E001 of 2021) [2025] KEELRC 2077 (KLR) (10 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2077 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS APPEAL E001 OF 2021
MA ONYANGO, J
JULY 10, 2025**

BETWEEN

VISHVA BUILDERS LIMITED APPELLANT

AND

SAMSON WEKULO RESPONDENT

(Being an appeal from the Judgment of Honourable S. WEWA, Senior Principal Magistrate delivered on 25th January, 2021 in Eldoret CMELRC No. 198 of 2019 Samson Wekulo v Vishva Builders Limited)

JUDGMENT

1. The Appellant herein is a company registered in Kenya and is a building contractor. The Respondent was the Appellant's employee.
2. The Respondent herein sued the Appellant at the lower court seeking the following reliefs:
 - a. A declaration that the Claimant's termination process was unlawful.
 - b. Compensation for unlawful termination.....Kshs.72,000.00
 - c. Payment in lieu of notice.....Kshs. 6,000.00
 - d. Un paid salary March,2019.....Kshs. 3,000.00
 - e. Service pay.....Kshs. 39,000.00
 - f. The Respondent be compelled to issue the Claimant a certificate of service under the mandatory provisions of the *Employment Act*,2007.
 - g. Costs of the suit h) Interests on b ,c, d and e herein above at court rates from the date of filing this suit and on (g) from the date of judgment until payment in full.



- h. Any other relief(s) this Honorable court may deem just and fit to grant.
3. The Appellant filed a Memorandum of Defence denying that it unlawfully terminated the Respondent's employment as alleged in the Memorandum of Claim and averred that the Respondent was employed as a casual employee and was released when the project in which he was working ended.
4. Upon hearing the parties the trial court found that the Respondent proved his case on a balance of probabilities and gave judgment in favour of the Respondent as prayed.
5. The Appellant (Respondent in the lower court) was aggrieved by the said judgment and filed the instant appeal vide the Memorandum of Appeal dated 5th February, 2021 on the grounds that:
- i. The learned trial magistrate erred in law and fact in failing to evaluate, consider and determine all issues raised in the Respondent's pleadings, evidence, submissions, and authorities hence an erroneous judgment.
 - ii. The learned trial magistrate erred in law and fact in failing to dismiss the Claimant's claim and to hold that the Claimant's pleadings were at variance with the evidence adduced.
 - iii. The learned trial magistrate erred in law and fact in failing to hold that the Claimant worked for the Respondent as a casual mason and not a night guard.
 - iv. That the trial magistrate erred in law and fact in making a one sided finding based on the Claimant's side of the story leading to unfounded judgment which is a replica of the Respondent's Statement of Claim without any basis.
 - v. That the learned magistrate erred in law and fact in holding that the Appellant unfairly and/or unlawfully and/or wrongfully and/or unprocedurally terminated the Respondent's services without any basis and/or evidence in support of the finding hence an erroneous decision that is neither supported by the pleadings nor the evidence on record.
 - vi. That the learned trial magistrate erred in law and fact in failing to hold that the Appellant had sufficiently demonstrated to the court that the Respondent was a casual labourer who was from time to time engaged by the Respondent whenever there was work to be done and was dully paid for the services rendered.
 - vii. That the learned trial magistrate erred in law and fact in applying wrong principles of law in determining the suit hence an erroneous judgment that is not evidentially and legally supported.
 - viii. That the trial magistrate erred in law and fact in failing to properly apply the law in making its decision hence an erroneous judgment that does not reflect the correct set of facts on record.
 - ix. That the learned trial magistrate erred in law and fact in awarding the Respondent costs of the suit and interest without any basis and or justification.
 - x. That the learned trial magistrate erred in law and fact in awarding the Respondent the sum of Kshs. 120,000/=without any legal basis and or justification contrary to the law.
 - xi. That the learned trial magistrate erred in law and fact in awarding the Respondent compensation for unlawful termination of Kshs. 72,000/= when there was very clear evidence that the Respondent was not a permanent employee of the Appellant.



- xii. That the trial magistrate erred in law and fact in openly displaying biasness and impartiality by granting the Respondent all the prayers in the statement of claim without evaluating the prayers in line with the evidence on record and the law.
 - xiii. That the learned trial magistrate erred in law and fact in failing to take into account and comply with the requirements set under Order 21 rule 4 of the Civil Procedure Rules as to judgments.
 - a. The Appellant prays that the appeal be allowed with an order dismissing the Claimant's Claim with costs to the Appellant.
6. The appeal was disposed of by way of written submissions. The Appellant filed its written submissions dated 5th May, 2024 while the Respondent filed his submissions dated 20th May, 2024.

Analysis and Determination

7. This being a first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified. See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123.
8. The Respondent filed a Statement of Claim dated 10th July, 2019 seeking to be compensated for the alleged unfair and unlawful termination of his employment. He averred that he was employed by the Respondent from October, 2005 until 15th March, 2019 as a general worker and night guard earning a monthly salary of Kshs. 6,000 per month. He averred that the Respondent wrongfully, unprocedurally and unlawfully terminated his employment without valid reason and refused to pay his terminal dues.
9. The Appellant filed a Response to the Memorandum of Claim dated 9th August, 2019 denying the averments made in the Statement of Claim. The Respondent averred that it employed the Appellant as a casual labourer subject to availability of work. The Appellant stated that its business is seasonal and is dependent on the construction projects it is employed to do. That it declined to take up the Respondent's services upon completion of the project it was undertaking and notified the Respondent of that fact two months in advance in December, 2018. That upon the lapse of the project it secured the Respondent an alternative job with its business counterpart on the Respondent's request.
10. The Appellant denied that the Respondent was employed as a general labourer and night guard as alleged in the Memorandum of Claim. It further denied that it paid the Respondent Kshs. 6000 per month as alleged.

The Evidence

11. At the hearing the Respondent adopted his witness statement dated 16th July, 2019 and testified that he was a mason and worked for the Appellant from 2004 to 2019. He produced NSSF Statement. He testified that his employment was terminated suddenly. That he was not paid and no certificate of service was issued to him.
12. Under cross examination the Respondent stated that he was a "fundi" (artisan) in the company but also worked as a watchman for both night and day. He stated that as mason he was paid Kshs. 4500 per week and as watchman he was paid Kshs. 6000 per month. He was shown payment vouchers filed by the Appellant which he admitted were for payments made to him.
13. The Appellant called Christopher Wanyonyi Masinde who testified as DW1 and adopted his witness statement and documents filed on behalf of the Appellant.



14. DW1 testified that he was the Appellant's supervisor and storekeeper. He testified that the Respondent was a casual as the Appellant has no permanent projects. That they called workers when there was a new project.
15. DW1 testified that the Respondent was never a night watchman. That he was a mason and was paid weekly according to days worked as is evident from the payment vouchers filed by the Appellant.
16. DW1 testified that on 14th March 2019 the Respondent was paid and told that work had reduced. That the Respondent was referred to another construction firm and given a recommendation letter dated 28th June, 2019.
17. Under cross examination DW1 testified that the Respondent worked from 2005 to 14th March, 2019. That from 2005 to 2018 the Respondent worked in other sections. That the Respondent was paid leave from 2013 to 2018. That as per Master Roll the Respondent worked for 7 days. He stated that the Master Roll was from 2018.
18. Under re-examination DW1 stated that the Respondent started working at Foran Construction on 15th March, 2019. DW1 stated that the Appellant does not employ watchmen as the service is contracted.
19. In the Judgment the trial court held that there was an employment relationship between the Respondent and the Appellant, that there was no evidence that the Respondent was notified of termination or that the Respondent was issued with certificate of service. That the procedure for termination was not complied with before termination of the Respondent's employment. Judgment was entered against the Appellant and the Respondent awarded as prayed in paragraphs (a) to (h) of Claim.

The Appeal

20. In the submissions the Appellant framed the following issues for determination in the appeal:
 - i. Whether the Respondent was unfairly terminated
 - ii. Whether the Respondent is entitled to the relief sought.
21. On the first issue, the Appellant submitted that the Respondent was not terminated. That the Respondent was engaged in piece rate whenever the Appellant had construction contracts and was paid daily in accordance with work done and payment was made at the end of the week. Relying on the provisions of section 18 of the *Employment Act* the Appellant submitted that the Respondent was paid on piece rate. For emphasis the Appellant relied on the decision in *Martin Juma Kundu v Kemu Salt Packers Production Limited* [2016] eKLR.
22. On the second issue the Appellant submitted that the Respondent is not entitled to compensation as the issue of termination does not arise. That for the same reason the Respondent is not entitled to pay in lieu of notice as his employment was not terminated.
23. For the Respondent the issues for determination were identified to be:
 - a. Whether the Respondent was unfairly terminated;
 - b. Whether the Respondent is entitled to the reliefs sought.
24. On the first issue the Respondent submitted that it is not in dispute that he was an employee of the Appellant. That the Muster Roll at pages 34 to 95 of the Record of Appeal show that the Respondent



- worked for the entire period and he did not fall into the category of casual employee as alleged by the Appellant.
25. It was submitted that the Appellant confirmed during the hearing that he was paid on a weekly basis. That the Appellant further confirmed that the Respondent was engaged in building business on contract basis and all employees were discharged upon completion of the work.
 26. It was submitted that the Respondent was paid weekly or at the end of two weeks. That the NSSF statement at page 12 of the Record of Appeal further proves that the Respondent was not a casual employee.
 27. The Respondent submitted that his employment converted under section 37 of the Act. For emphasis the Respondent relied on the decision in *Silas Mutwiri v Haggai Multi-Cargo Handling Services Limited* [2013] eKLR and *Kesi Mohamed Salim v Kwale International Sugar Co. Ltd* [2017] eKLR.
 28. It was submitted that the Respondent deserved to be accorded a fair termination which the Appellant failed to do. That the termination was unfair. The Respondent also relied on the decision in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR.
 29. It was submitted that the Respondent was entitled to the compensation awarded for unfair termination and that the appeal has no merit.

Analysis and Determination

30. I have considered the Memorandum of Appeal, the Record of Appeal and the rival submissions of the parties. The issues that fall for this court's determination in the appeal are:
 - i. Whether the Appellant's employment was terminated unfairly by the Respondent; and
 - ii. Whether the Appellant is entitled to the reliefs sought.
31. The Appellant insisted that the Respondent was a casual employee on piece rate while the Respondent avers that he worked continuously over the years and his employment converted from casual to regular employment under section 37 of the *Employment Act*.
32. From the submissions by the Appellant, it is evident that the Appellant does not seem to appreciate the distinction between a casual employee and an employee on piece rate. A casual employee as defined in section 2 of the Act is an employee employed and paid at the end of the day and whose contract does not go beyond a day. According to the wording of the Act, a casual is "a person 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." The contract of a casual ends at the end of the day so that if the person is engaged the following day it would be on a new, fresh contract.
33. Piece rate on the other hand is defined to mean "any work the pay for which is ascertained by the amount of work performed irrespective of the time occupied in its performance."
34. A piece rate worker is, according to section 18(1)(b) of the Act, "to be paid by his employer at the end of each month in proportion to the amount of work which he has performed during the month, or on completion of the work, whichever date is the earlier."
35. From the evidence on record the Respondent was neither a casual employee nor a piece rate worker. The Respondent was in the employment of the Appellant, by its admission, from 2005 to 2019. The NSSF statement at page 12 of the Record of Appeal reflects remittances continuously from May 2013 to February, 2019. The employer in the NSSF statement is stated to be Vishva Builders, the Appellant herein.



36. Further, the Appellants own records at page 22 to 96 of the Record of Appeal disclose continuous employment of the Respondent with pay in lieu of annual leave made for the years 2013, 2014, 2015, 2016, 2017 and 2018.
37. Excerpts from the evidence of DW1 during cross examination show that he stated at page 143 to 145 of Record of Appeal "... In 2005 he was employed since then he worked from 14th March, 2019 (sic). ...from 2005 – 2018 he used to work in other sections. ... leave is paid from 2013 – 2018..."
38. It is evident that the Respondent was in the employment of the Appellant from 2005 to 2019 by the Appellant's own evidence on record. From 2013 to 2019 the Respondent was in continuous service of the Respondent.
39. From the evidence on record, it is not clear how the employment of the Respondent terminated. It is however evident that the Appellant referred the Respondent to another company. From the record I do not find evidence of unfair termination. There is however evidence that there was termination which was not based on discipline. The Respondent did not explain how his employment was terminated.
40. From the evidence on record there is no proof of unfair termination of employment. The Respondent was thus not entitled to compensation for unfair termination.
41. The Respondent was entitled to pay in lieu of notice as there is no evidence that he was given notice before the termination of his employment. RW1 gave conflicting evidence about the notice and no document was produced to prove that any notice was given before termination. Under the Building and Construction Industry Order, the Respondent having worked for more than 4 years continuously, was entitled to 2 months' notice.
42. The Respondent only prayed for one month's salary in lieu of notice. However, by virtue of section 48(1) of the *Labour Institutions Act*, he would be entitled to 2 months' salary in lieu of notice as provided for in the Building and Construction Industry Order. The section provides:
48. Wages Order to constitute minimum terms of conditions of employment
- (1) Notwithstanding anything contained in this Act or any other written law—
- (a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order applies and may not be varied by agreement;
- (b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.
- (2) An employer who fails to—
- (a) pay to an employee to whom a wages regulation order applies at least the statutory minimum remuneration; or
- (b) provide an employee with the conditions of employment prescribed in the order, commits an offence.



43. According to payment vouchers produced by the Appellant, the Respondent was paid Kshs. 4500 per week. Pay in lieu of notice for 2 months is therefore Kshs. 36,000 which I award the Respondent.
44. The Respondent further prayed for salary for March, 2019. I find no proof that the same was not paid.
45. The Respondent prayed for service pay. Having been a member of NSSF as reflected in his NSSF statement, he is by virtue of section 35 of the Act not entitled to service pay.
46. The Respondent is entitled to certificate of service which the Appellant is directed to issue to him.
47. From the foregoing, it is my finding that the decision of the trial court was not based on the evidence adduced before the court. Further, the court did not analyze each item in the prayers to make a finding that the Respondent had proved the same before granting the award as prayed.
48. This court has stated before, and it is necessary to repeat the same, that all prayers in an employment dispute are subject to proof. Whether termination is found to be fair or unfair, the court must make a finding on each item in the reliefs prayed for in the claim. This is because whether or not termination is found to be unfair, items like annual leave earned but not taken, salary for days worked and overtime would be payable upon proof of entitlement to the same. These benefits are earned and are rightfully payable to the employee irrespective of the manner in which employment is terminated, be it by resignation, normal termination or unfair termination. In employment matters not all prayers are dismissed because a claim for unfair termination is dismissed. Similarly, not all prayers are awarded as prayed because there is proof of unfair termination. Each prayer must be specifically proved and such finding stated in the judgment.
49. Based on my findings above, the judgment of the trial court is set aside and judgment entered as follows:
 - a. The Respondent did not prove unfair termination of his employment;
 - b. The prayer for compensation is dismissed;
 - c. The Respondent is awarded 2 months' pay in lieu of notice, Kshs. 36,000;
 - d. The prayer for unpaid salary for March, 2019 is dismissed;
 - e. The prayer for service pay is dismissed;
 - f. Appellant to issue certificate of service to Respondent.
50. Each party shall bear its costs on both the trial court and in the Appeal.
51. Orders accordingly.

DATED, SIGNED AND VIRTUALLY AT ELDORET ON THIS 10TH DAY OF JULY 2025

MAUREEN ONYANGO

JUDGE

