



**Chic Fashions Limited v Maundu (Employment and Labour Relations Appeal E136 of 2022) [2024] KEELRC 1043 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1043 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E136 OF 2022**

**MN NDUMA, J**

**APRIL 25, 2024**

**BETWEEN**

**CHIC FASHIONS LIMITED ..... APPELLANT**

**AND**

**DANCUN KALUMU MAUNDU ..... RESPONDENT**

**JUDGMENT**

1. The appeal is against a judgment of Hon. Mr. Paul K. Rotich, SPM delivered on the 29<sup>th</sup> July 2022 in which the court aquo declared that the respondent's termination of employment by the appellant was wrongful and unfair and awarded the respondent Kshs.14,700.00 being month's salary in lieu of notice; Kshs. 176,400.00 being the equivalent of twelve (12) months' salary in compensation for the unlawful and unfair termination of employment; interest at court rates from date of judgment till payment in full and costs.
2. The appellant dissatisfied with the judgment has appealed against the judgment on the grounds that the learned trial magistrate erred in law and fact by failing to sufficiently consider the evidence adduced by the appellant that shows that the termination was lawful and fair.
3. That the trial magistrate mis-directed himself by finding that the respondent's terms of engagement were converted from casual employment to permanent status pursuant to section 37(3) of the *Employment Act*, 2007.
4. The trial court in its judgment found that the respondent was in the appellant's employment from 2008 up to 3<sup>rd</sup> July 2020 a period of 12 years.
5. That the respondent having worked for the appellant for a period of 12 years, then his employment was deemed to have been converted into a contract where wages were paid monthly under section 37 of the *Employment Act* 2007.



6. The court found that the respondent prior to terminating the employment of the respondent did not issue the respondent with a letter of termination and did not afford the respondent a disciplinary hearing before the termination.
7. The court found that it was not in dispute that the appellant had from the year 2008 up to the year 2020 given the respondent daily tasks and paid him daily. That the respondent signed for the payment. However, the employment was continuous.
8. The appellant on the other hand submits that there was clear and unequivocal evidence on record that the respondent was employed by the appellant, as a contracted daily paid worker in the position of mass production machinist. That the respondent had specific daily tasks and daily contracts. That the trial magistrate ignored this evidence to find that the engagement was converted under section 37 (3) of the Employment Act, 2007 to continuous monthly employment.
9. The appellant further submits that the documentation produced by the appellant, which was overlooked by the trial court included the daily contracts from 22/2/2016 to 3/7/2020 and the correspondence between the appellant and the union which clearly indicate that the finding of the court was erroneous in law and in fact.
10. That the court ought not to have found that the respondent was initially employed as a casual employee but in fact was a daily paid contracted worker in the position of mass production machinist and not a machine operator as the court found.
11. The appellant submits further that copies of telephone records itemizing the appellant's engagement with the respondent and copies of SMS communication messages between the appellant and the respondent are admissible as evidence that prove that the respondent absconded work and was not dismissed from employment as alleged or at all.
12. That the court do consider the totality of the aforesaid evidence and set aside the judgment of the trial court and find that the respondent absconded from work and was not dismissed as found by the trial court or at all.
13. That the electronic communication which is admissible in terms of section 106(B) of the Evidence Act, Cap 80 Laws of Kenya is clear testimony that the appellant made sufficient effort to find the whereabouts of the respondent with a view to get the respondent to resume work in vain.
14. That the findings of the trial magistrate that the appellant never provided certified call logs/transcripts from Safaricom or Airtel to show that the appellant's representative called the respondent asking him to resume work is a misdirection on the part of the trial magistrate.
15. That the court do uphold the appeal and set aside the judgment of the trial court.

### **Determination**

16. The court has considered the appeal record in its entirety together with the submissions by the parties and has delineated the following issues for determination:
  - i. Whether the trial court erred in fact and law by finding that the respondent was terminated from employment by the appellant unlawfully.
  - ii. Whether the deeming of the respondent as a monthly paid employee was a misdirection of law and fact by the trial magistrate.
  - iii. What remedy if at all should the court provide to the appellant.



17. The court will deal with issues (i) and (ii) together bearing in mind the principles set out by the Court of Appeal in the case of *Selle versus Associated Motor Boat Company Ltd* 1968 eKLR to reconsider the evidence adduced before the trial court and re-evaluate it so as to draw its own independent conclusion and to satisfy itself that the conclusions reached by the trial magistrate are consistent with evidence adduced and the law applicable.
18. The record of appeal shows that the respondent testified that he was employed as a casual by the appellant in January 2008. That he continued working as such until the year 2010, when he was appointed on permanent basis. That he worked 5 days a week and was paid Kshs.735 per day until the last day of work on 3/7/2020, when the supervisor of the respondent one Mr. Njau told the respondent to go home and that he would be recalled.
19. That previously, the workers would be recalled through telephone, but this time he was not recalled. That he went back to the company and was told that there was no more work. That he reported the matter to the union and was not helped and so instructed his advocate to file suit.
20. The respondent testified that no disciplinary hearing was held before the dismissal. That he was never given leave while he worked and sought compensation for the unlawful dismissal.
21. Under cross-examination, the respondent stated that in 2010, he was made permanent and was enrolled with NSSF. That he was paid daily and signed a document whenever he was paid. That he had no contract of employment. That at times he would be sent away and then recalled as happened during COVID-19 pandemic when he was sent away for several months since the company had closed down.
22. The respondent said he had a Safaricom number 0729829922 and had one airtel number 0738719483. That no messages were sent to him to go back to work after 3/7/2020 as alleged by the appellant. The respondent said he would not be paid when he did not report to work.
23. RW1, Francis Njau testified for the appellant. The attempt by RW1 to produce telephone records dated 12/1/2022 was met with objection from Mr. Njuru for the respondent. The court upheld the objection and the supplementary list of documents was not produced and the witness was stood down to allow filing of a certificate under section 106A of the *Evidence Act* at a later stage of the trial.
24. RW1 testified that the respondent was a daily paid employee from February 2010. He produced daily task contracts from the year 2010. That in the year 2020 the appellant suspended operations due to COVID-19. That 70 employees requested for cash loan including the respondent. That the appellant resumed work on 20<sup>th</sup> May 2020. The respondent then worked until 3/7/2020. That from 3/7/2020, respondent did not return to work.
25. RW1 said that on 18/7/2020, he sent money to the respondent to resume work but the respondent said he was in the village.
26. That the respondent had two numbers 0729829992 and 0738719483. That the respondent requested for transport money to resume work on 23/7/2020. RW1 said he did not send him the Kshs.500.00 he had requested for. That the respondent never returned back to work. That his employment was not terminated.
27. RW1 said that the appellant paid NSSF for the respondent from February 2010 until when the respondent left in 2020, a period of 10 years. RW1 said that he did not issue the respondent with a show cause letter. RW1 said that the respondent worked continuously. That the respondent was a general labourer. That no disciplinary hearing was held and no notice was issued because the respondent simply did not resume work.



28. The learned trial magistrate in his judgment analysed the evidence by the respondent and that by RW1 and found that the respondent had proved that the respondent was employed by the appellant in 2008 and worked until 3/7/2020, a period of 12 years.
29. RW1 had testified that from February 2010 up to 3/7/2020, the respondent worked continuously and the appellant paid NSSF contribution for the respondent for a period of 10 years.
30. It is common cause that the appellant had suspended operations in the year 2020 due to the COVID-19 pandemic. According to RW1, the respondent resumed work on 20/5/2020 until 3/7/2020 when he stopped working.
31. The onus is on the respondent to prove on a balance of probabilities that his employment was terminated on 3/7/2020.
32. It is apparent that the appellant regarded the respondent as a daily paid temporary employee and so it is not farfetched that RW1 simply told the respondent to go away on 3/7/2020 and did not recall him again.
33. The court finds that, it being common cause that between February 2010 and 3/7/2020 the respondent worked continuously for the appellant and paid for NSSF contributions on a monthly basis, the learned trial magistrate was correct in finding that, although the respondent was paid daily, he had converted to a monthly paid employee in terms of section 37(3) of the [Employment Act, 2007](#).
34. The respondent was therefore entitled to at least 28 days' notice of termination and his employment could only be terminated for a valid reason following a fair procedure.
35. The trial magistrate had the advantage of evaluating the credibility of the evidence of the respondent vis a vis that by RW1 having had the advantage of listening to both directly. The magistrate believed the evidence by the respondent that he was asked by RW1 to go home and would be recalled but did not happen and that when he visited the appellant to find out when he would resume work, he was told there was no more work for him.
36. Accordingly, the trial magistrate correctly found that the employment of the respondent was terminated by the appellant for no valid reason and without following a fair procedure.
37. The appellant did not convince the court that the respondent had absconded work. The electronic evidence having not been produced during the trial for failure to adhere to section 106A of the [Evidence Act](#), Cap 80 Laws of Kenya cannot be admitted at this stage only to demonstrate that RW1 had communicated with the respondent after 3/7/2020.
38. The issue of absconding did not arise, the magistrate having correctly found that the appellant had terminated the employment of the respondent on 3/7/2020 because the appellant wrongly regarded the respondent as a temporary employee not protected under sections 36, 41, 43 and 45 of the [Employment Act](#) 2007.
39. The court finds that the appeal lacks merit in its entirety and is dismissed.
40. In the final analysis, the court upholds the judgment of the trial court and confirms the reliefs granted by the trial court as follows:
  - a. Kshs. 14,700.00 in lieu of one month notice.
  - b. Kshs. 176,400.00 being compensation for the unfair termination of employment.
  - c. Provision of certificate of service.



- d. Interest at court rates from date of judgment of the trial court till payment in full.
- e. Costs of the appeal and the trial court proceedings.

**DATED AT NAIROBI THIS 25TH DAY OF APRIL, 2024**

**MATHEWS NDERI NDUMA**

**JUDGE**

**Appearance:**

**Mr. Kadere for appellant**

**Mr. Njiru for respondent**

**Mr. Kemboi, Court Assistant**

