

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

APPEAL NO. E029 OF 2025

- 1. GEOFFREY ITEBA**
- 2. GILBERT MALOBA**
- 3. VICTOR BARAKA**
- 4. ATHUR AUOR**
- 5. ALI NDILO**
- 6. OSCAR WAUDI**
- 7. JUSTUS WAMBA**
- 8. HASSAN MILKAU**
- 9. BRAISON OPALA**
- 10. JOEL KATAKA APPELLANTS**

VERSUS

CYKA MANPOWER SERVICES LIMITED RESPONDENT

**[Being an appeal from the judgment of M. Nabibya delivered on 11 February 2025 in
Mombasa CMELRC No. E363 2021]**

JUDGMENT

The appeal arises from the judgment delivered on 11 February 2025 in Mombasa CMELRC No. E363 of 2021. Aggrieved by the judgment, the appellants are seeking that the judgment be set aside on the basis that the trial court erred in finding that they had admitted to being employed as casuals to the respondent by failing to submit evidence of continuous employment for more than a month. It was an error to find that the appellants morphed their employment into a term contract; hence, there was no unfair termination of employment. The claims made were dismissed without considering the evidence, the written submissions and the law.

The appellants claimed that they were employed by the respondent, earning Ksh. 21,000, save for the 8 appellants who were earning Ksh. 27,900 per month. Employment was

terminated on 31 March 2021 unlawfully and without payment of terminal dues, which included;

- a) Leave pay,
- b) Notice pay,
- c) Salary arrears,
- d) Unlawful deductions,
- e) House allowance,
- f) Public holiday,
- g) Compensation for summary dismissal.

In reply, the respondent admitted that the applicants would be engaged on a piece rate basis during the period the respondent had a contract to provide manpower services to Tata Magadi Chemical, which contract ran from 21 June 2018 to 31 March 2021, when the contract expired and was not renewed. The appellants were not permanently employed by the respondent and only engaged on a needs basis, and during this period, they would be paid for work done. Upon the expiry of the contract with Tata Magadi Chemicals in Mombasa, no work was offered. The appellants were always aware of the employment relationship, and this was not a redundancy as alleged. The contract ended due to the effluxion of time. The claims made are therefore not justified.

The appellants submitted that the respondent employed them. The 1st appellant was employed in 2012, while the 2nd, 7th, 9th, and 10th appellants were employed in 2010. The 3rd and 5th appellants were employed in 2017, and the 4th appellant in 2018. Their employment was terminated on 31 March 2021.

The respondent admitted that it had employed the appellants during its contract with Tata Magadi Chemicals, which was not renewed, resulting in the termination of their employment. The findings that they were not casual employees and hence not entitled to the claims made were in error. In the case of **CYKA Manpower Services v Makau Nzuki & others Appeal E046 of 2024**, the court held that where an employee works continuously under casual terms for work that is not likely to end, they are protected under section 37(1) of the Act.

The respondent admitted that the appellants worked between 2017 and 31 March 2021. The only records produced were daily casual engagement forms from September 2019. These included records for 1, 6, 9, 17, 27 and 28 September 2019. No other documents were produced. In the case of **Kenyatta University v Maina [2022] eKLR**, the court held that an

employer cannot have an employee under the guise of being casual because it has peak and off-peak sessions. Subjecting the employee to such treatment is unfair because being laid off during off-peak season does not guarantee the employee permanency.

The claims should be reassessed and costs awarded.

The respondent submitted that the trial court assessed the claims on the merit and the appeal has no merit. The respondent employed the appellants subject to the existence of its main contract with Tata Chemicals. The appellants would be engaged on tasks as piece rate workers on a daily basis depending on the availability of work. This is explained by variations of pay and reasons why there was no need for a termination process or payment of terminal dues.

The trial court was justified in finding that the evidence adduced by the applicants did not prove that they were engaged continuously for an aggregate period of more than a month or that their employment changed into a term contract. The claim of unfair termination did not exist. No due process was necessary due to the nature of the engagement. There was no merit in the claim that there was unfair dismissal.

There was no cogent reason to show any continuous employment from 2012 to 2021 as alleged. No documents or payments were submitted to support the claim of employment. The bank statements, which show debits on diverse dates, were not consistent with regular figures as would be the case for a term employee employed on a regular basis.

The respondent submitted that there was a conflict over the nature of the engagement and the period, and the evidence adduced during the hearing was at variance. Such conflict cannot be applied to support the claims made as held in **Gachuma Gachru v Maina Kabuchwa [2016] eKLR**. The trial court was justified in dismissing the claims for lack of evidence.

The respondent was able to demonstrate that it had a contract with Tata Magadi Chemical which lapsed on 31 march 2021. The appellant's did not prove that they had term contracts to claim as done. No party should be allowed to go outside its pleadings as held in **Raila Amlo Odinga & Another v IEBC & 2 others [2017] eKLR**. The appellant cannot be allowed to apply new matters and evidence outside their pleadings. The appeal is without merit, and the judgment of the trial court should be upheld as held in **Mohamed Mohamud Jabane v Highlands Butty Tongui Olenja**.

Determination

This is the first appeal; the court is called upon to re-evaluate all the material on record and arrive at its conclusions on the disputed facts. However, the court must keep in mind the fact that there was no opportunity of assessing the demeanour of the witnesses as did the trial magistrate, as held in **Top Tank Company Limited v Amos Ondiek Wandaye [2018] eKLR**.

The appellants claimed that they were employed at various times by the respondent and worked continuously until 31 March 2021, when their employment was terminated without payment of terminal dues.

The respondent admitted that the appellants were engaged on a piece rate basis during which period it had a contract with Tata Magadi Chemical from 21 June 2018 to 31 March 2021, when the contract expired and was not renewed. The respondent asserted that there was no permanent employment as alleged and the only engagement was on a needs basis. Once the Tata Magadi Chemicals contract ended, there was no work to allocate. However, three consultations were held, and the contracts ended due to the passage of time. The labour officer was informed.

There is an admission of employment on a piece rate basis. However, there is no evidence of such employment as required under Section 18 of the Act.

What the respondent produced from the evidence were Daily Casual Engagement sheets for different days. These include sheets for 17, 2, 8, 9, 6, 1, 30, 27, and 28 September 2019.

Section 37(1) of the Act provides that:

- (1) Notwithstanding any provisions of this Act, where a casual employee—***
(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or
(b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days, amounting in the aggregate to the equivalent of three months or more,

These provisions are in two parts. The first protects an employee who works for a continuous period which, in the aggregate, amounts to not less than a month. The second part is where the employee performs work that cannot reasonably be expected to be completed within a specified period, such as several days, and which amounts in the aggregate equivalent to 3 months. In such cases, the employee is protected.

The essence of the decision in **Kenyatta University v Maina [2022] KECA 1201 (KLR)** and **Keen Kleeners Limited v Kenya Plantation and Agricultural Workers' Union [2021] KECA 352 (KLR)** is that the dignity of the employee, whether casual, piece rate or otherwise, must be upheld.

The casual nature of hiring employees as chattels is contrary to the constitutional protections under Article 41 of the Constitution, which demands fair labour practices.

In this case, the respondent, having employed the appellants, failed to reduce their employment into writing. They were handled casually but continued to enjoy their labour under their contract with Tata Magadi Chemical, which ran from 2018 to 2021.

The appellants became protected under Section 37 of the Act. They had rights and benefits under the law.

Termination of employment devoid of due process was unlawful and unfair under sections 41 and 45 of the Act. The trial court's findings on this point are incorrect to this extent.

The claim for compensation and notice pay is justified. This will be calculated based on the last wage earned.

The appellants worked under different periods and lost their employment on 31 March 2021. They were not paid their terminal dues. They were treated as casuals and hence denied employment benefits. A fair compensation of 3 months each is hereby found appropriate.

Notice pay for one month is awarded.

On the claim for unlawful deductions, there are no details of what they contained.

Leave pay is due where a protected employee's rights under section 28 of the Act are not addressed. However, under section 28(4) of the Act, accrued leave days should not accumulate beyond 18 months. In this case, each appellant has 33 leave days based on the last basic wage due.

On the claim for a house allowance, the last paid appellant was earning Ksh.21 000 per month, under the Wage Orders, such pay is over and above the minimum, and to claim a house allowance is without justification.

On public holidays, these are not particularized. These are not general days and must be gone into for the court to assess and allocate.

On costs, the appeal is with merit. The trial court failed to address the claim before it. There was unfair termination of employment, and the claim by the appellants was well-founded. Costs are due.

Accordingly, judgment in Mombasa CMELRC No. E363 of 2021 is hereby set aside and the following Orders issued;

- a) Employment terminated unfairly;
- b) Each appellant is awarded 3 months' compensation;
- c) Each appellant is awarded one month's notice pay;
- d) Each appellant is awarded 33 leave days;
- e) Costs of the appeal and the trial court proceedings;

1. GEOFFREY ITEBA

- a) Notice pay Ksh. 21,000
- b) Compensation Ksh.63,000
- c) Leave pay Ksh. 23,100

2. GILBERT MALOBA

- a) Notice pay Ksh. 63,000
- b) Compensation Ksh.63,000
- c) Leave pay Ksh. 23,100

3. VICTOR BARAKA

- a. Notice pay Ksh. 21,000
- b. Compensation Ksh.63,000
- c. Leave pay Ksh. 23,100

4. ATHUR AWUOR

- a. Notice pay Ksh. 21,000
- b. Compensation Ksh.63,000
- c. Leave pay Ksh. 23,100

5. ALI NDILO

- a. Notice pay Ksh. 21,000
- b. Compensation Ksh.63,000
- c. Leave pay Ksh. 23,100

6. OSCAR WAUDI

- a. Notice pay Ksh. 21,000
- b. Compensation Ksh.63,000

- c. Leave pay Ksh. 23,100
- 7. JUSTUS WAMBA
 - a. Notice pay Ksh. 21,000
 - b. Compensation Ksh.63,000
 - c. Leave pay Ksh. 23,100
- 8. HASSAN MILKAU
 - a. Notice pay Ksh. 27,900
 - b. Compensation Ksh.81,000
 - c. Leave pay 29,700
- 9. BRAISON OPALA
 - a. Notice pay Ksh. 21,000
 - b. Compensation Ksh.63,000
 - c. Leave pay Ksh. 23,100
- 10. JOEL KATAKA
 - a) Notice pay Ksh. 21,000
 - b) Compensation Ksh.21,000
 - c) Leave pay Ksh. 23,100.

Orders accordingly.

Delivered in open court at Mombasa, this 8 day of August 2025

M. MBARŨ

JUDGE

In the presence of:

Court Assistant: Japhet

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