



**Metal Cans and Closures Kenya Limited v Agutu (Civil Appeal  
E679 of 2023) [2024] KEHC 9726 (KLR) (Civ) (29 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9726 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E679 OF 2023**

**AC BETT, J**

**JULY 29, 2024**

**BETWEEN**

**METAL CANS AND CLOSURES KENYA LIMITED ..... APPELLANT**

**AND**

**SAMUEL ODIDA AGUTU ..... RESPONDENT**

*(Being an appeal from the decision and orders of the Honorable B.M. Cheloti  
PM delivered on 12th June 2023 at Nairobi in Nairobi CMCC NO.27 OF 2020)*

**JUDGMENT**

1. By an agreement dated 10.04.2018, the appellant company retained the services of the respondent as an independent contractor to provide maintenance and engineering services for the appellant's electrical machines. The contract was to run for a period of one year up to 10.04.2019. The respondent, who was designated as a consultant, was required to report to work like all the employees of the appellant company and the contract stipulated that he would be working from 7.30am to 5.30pm with the possibility of extra hours if need be. The respondent's remuneration was Kshs.120,000/=, payable monthly in arrears. The contract expressly stipulated that the respondent could not be considered an employee of the appellant.
2. The agreement was renewed for a further one-year period on 10.04.2018. On 29.11.2018, the appellant was served with termination notice informing him that his last day of working would be 7.12.2018.
3. The respondent then filed a suit against the appellant seeking special damages of kshs.480,000/= and general damages for breach of contract. The particulars of breach of contract were as follows: -
  - i. Failure to issue one month notice before unlawfully and wrongfully terminating the plaintiff's contract.



- ii. Failure to notify the plaintiff of the defendant's intention to terminate the plaintiff's contract.
  - iii. Unlawfully terminating the plaintiff's contract prematurely.
  - iv. Failure to compensate the plaintiff for unlawfully terminating his contract.
4. The appellant filed a statement of defence in which it denied the plaintiff's entire claim and averred that the contract came to an end by lapse of time. The appellant also averred that a renewal of the contract was not automatic but based on mutual agreement by the parties noting that such agreement was never reached between the appellant and the respondent. It was the appellant's defence that it was under no contract to give notice to the respondent and that it had paid him all sums due and owing under the contract.
  5. The parties filed written statements and list of documents and the matter proceeded to hearing after which the trial court found in favor of the respondent and granted him special damages of kshs.480,000/=, kshs.120,000 in lieu of notice, plus costs and interest.
  6. Aggrieved by the decision of the trial court, the appellant filed a memorandum of appeal with six grounds of appeal which in its own submissions, has been condensed into issues for determination: -
    - a. "Whether the learned principal magistrate erred in law and in fact in making an award of kshs.480,000/= in favor of the plaintiff and payment for the remainder of the contract period.
    - b. Whether the learned principal magistrate erred in law and in fact in making an award of kshs.120,000/= as payment in lieu of termination notice."
  7. The appeal was canvassed by way of written submissions as directed by the court.
  8. The duty of this court as a first appellate court is well established. It is to subject the whole evidence tendered at the trial court into a fresh scrutiny and re-evaluation in order to reach an independent conclusion bearing in mind the fact that it did not see and hear the witnesses firsthand. See the case of *Selle -vs- Associates Motorboat Company Ltd* [1968] EA 123.
  9. It is not in dispute that there was a consultancy contract between the appellant company and the respondent for provision of services that ran for one year with the option to terminate or renew. Clause 6 of the said contract states that the contract can be terminated in the following manner: -
    - a. Mutual agreement of the parties in writing, either party may terminate this agreement by giving one month notice.
    - b. Breach by either party. Nothing in this agreement shall be construed as alienating the right of metal cans and closures Kenya Limited to terminate and/or repudiate and rescind this consultancy contract for material breach should you fail to perform the company's expectation."
  10. It is also not in dispute that the appellant gave the respondent a written termination notice of eight (8) days. What is in dispute is whether the appellant unlawfully terminated the respondent's contract and whether he had been fully paid for his services in accordance with the terms of the contract.
  11. I have carefully considered the evidence adduced by the two parties. The respondent produced his pay-slip for the month of September 2018 to support his assertion that he was owed service pay for two (2) months. He produced a certificate of service dated 23<sup>rd</sup> June 2019 to support his assertion that he had worked for the plaintiff as an electrical planning and maintenance technician from February 2017 to April 2019. In support of his claim that there was an existing contract that was still in



force up to 10.4.2019 at the time he was unlawfully terminated, he produced a one year contract dated 10.4.2018. The contract was duly executed by the same parties who had executed the earlier contract (also produced) dated 10.04.2017 and ending 02.04.2018.

12. By the end of the respondent's case, there was no evidence adduced by the appellant to controvert the respondent's claim. The trial court then proceeded to make a finding that the respondent had been terminated by being given less than one month's notice in writing. This was a finding of fact and having analyzed the evidence afresh, I find no reason to disagree with the trial court. In the case of Nzoia Sugar Company Limited -vs- Capital Insurance Brokers Limited Civil Appeal No.6 of 2009, the Court had this to say: -

“..... A Court of Appeal will not normally therefore interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”

13. Guided by the above case, I am in concurrence with the trial court on the finding of facts based on the oral and documentary evidence that were adduced by the respondent. I have no reason to interfere with the said finding.

14. Turning now to the issues as framed for determination, this court needs to examine the law in order to establish whether the giving of 8 days' notice amounted to a breach of the contract and whether the award of special damages and one month's pay in lieu of notice was justified. To do so, the court needs to revisit the law of contract. It is trite law that a contract is a formal, legally binding agreement between two or more parties. It therefore creates mutual rights and obligations that are enforceable by law. A breach of contract is therefore deemed to have occurred when a party fails to perform their obligations under the contract or offers less than satisfactory performance of their obligations.

15. In the case of International Aircraft Group Sa -vs- Airway Kenya Aviation Limited [2020] KLR, the court stated as follows: -

“Parties to a contract that they have entered into voluntarily are bound by its terms and conditions.”

16. The contract between the appellant and the respondent was clear and unequivocal. It was a one-year service contract terminable by the giving of one month's written notice by either party, or by mutual agreement of the parties in writing. At the trial court, the respondent demonstrated that although he was served with written notice, it was for less than the stipulated period. This was a breach of the contract. It is my finding that the trial magistrate therefore did not err in holding that the respondent was in breach.

17. With respect to the award of damages, the respondent relied on an authority from the Industrial court, Bonventure Wanjala Kimasis -vs- Shanga Engineering [2014] eKLR to urge the court to affirm the trial court's award.

18. Although the contract between the two parties was a consultancy contract and the contract stipulated that it was not an employment contract and whereas the respondent was regarded as an independent contractor, he was paid his dues on a monthly basis. To all intents and purposes, the appellant treated him as an employee. The effect of the contract between the appellant and the respondent was only to deny the respondent the benefits of being an employee but in all other aspects, he was required to act and behave like an employee to the extent that Clause 5 of the contract stipulated that he report on duty as from 7.30am to 5.30pm and would be required to work overtime with no extra pay. Failure to



avail himself on time would constitute a gross breach of contract on the respondent's side. In my view, the appellant had an employee in all respects except by name. As the popular saying goes:-'if it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck.' The appellant clearly treated the respondent more like an employee than an independent contractor.

19. In Kenya Hotel And Allied Workers Union -vs- Alfajiri Villa Magufa Ltd [2014] eKLR the court held: -

“ An independent contractor's contract, in my view is a contract of work (contract for service) and not a contract of service, or to use ordinary language a contract of employment. The hallmarks of a true independent contractor are that the contractor will be a registered taxpayer, will work his own business, will be free to carry out work for more than one employer at the same time, will involve the employer each month for his/her services and be paid accordingly and will not be subject to usual employment matters such as deduction of PAYE (tax on income), will not get annual leave, sick leave and so on.”
20. In the present appeal, we note that the respondent voluntarily conceded to the terms of the contract as they were and this court is therefore bound by its terms.
21. Since the contract required either party to give the other one month's written notice of termination of the contract, the appellant was under obligation to give the mandatory one month's written notice or, despite the contract being silent on the alternative, one month's pay in the lieu of that notice. In the premises, I do find that the trial magistrate did not err in awarding the respondent kshs.120,000/= being one month's pay in lieu of notice.
22. The final determination regards the order for payment of kshs.480,000/= being payment for the remainder of the contract. If the respondent had been an employee of the appellant, he would have been considered as having been unlawfully dismissed from employment. Section 49(1) (c) of the Employment Act provides that where the court finds that termination of an employment contract or summary dismissal is unjustified, then it may award compensation not exceeding twelve month's gross salary of the employee at the time of dismissal. If it had not designated the respondent an independent contractor, the appellant would have found itself faced with a possibility of being ordered to pay the respondent the equivalent of twelve month's pay. In this instant, the respondent was an independent contractor. He can therefore only have recourse to the contract signed between him and the appellant. The contract is silent on the consequence of a breach.
23. The respondent suffered loss as a result of the breach of contract by the appellant. The respondent's services were terminated when he had another 4 months to run in accordance with his contract. He therefore lost his legitimate expectation of earnings through no fault of his own. In the case of Mwenda -vs- Climate and Energy Advisory Limited, Elrc Case No.1614 Of 2018 [2024] KEELRC 606 (KLR) the court found that an independent contractor terminated prematurely was entitled to damages, and awarded a sum equivalent to 4 month's salary after taking into account the fact that the employer had proven that the reason for termination of the contractor was that it was unable to pay salaries and meet its statutory obligations. The appellant in this matter did not offer any explanation for terminating the contract. The appellant needed to demonstrate that the contract had been frustrated in order to escape liability. Their witness did not tender evidence of inability to pay. He only said that the contract had lapsed and that the respondent had been fully paid for the months worked, facts that was found not to be true. I therefore find that the magistrate's award of the expected earnings for the remainder period was not in error.
24. The upshot is that it is the finding of the court that the appeal lacks merit. The same is hereby dismissed with costs to the respondent.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 29<sup>TH</sup> DAY OF JULY, 2024.**

**A. C. BETT**

**JUDGE**

**In the presence of:**

Kafuna for appellant

Ms. Nasambu for respondent

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