



**Kimalit v Laikipia University (Employment and Labour Relations Cause  
44 of 2019) [2024] KEELRC 1706 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1706 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 44 OF 2019  
HS WASILWA, J  
JULY 4, 2024  
(FORMERLY ELRC CAUSE NO. 107 OF 2018)**

**BETWEEN**

**ERIC KIBICHUM KIMALIT ..... CLAIMANT**

**AND**

**LAIKIPIA UNIVERSITY ..... RESPONDENT**

**JUDGMENT**

1. The claimant instituted this suit by a memorandum of claim dated 29<sup>th</sup> October, 2018, claiming to have been unfairly dismissed through a redundancy that was not done in accordance with section 40 of the [Employment Act](#). The claimant sought for the following reliefs; -
  - 1) That this Honourable Court do order the Respondent to pay the claimant 12 months compensation for unfair termination of Kshs. 750,288.
  - 2) The Honourable Court do order the Respondent to pay the claimant the accrued acting allowance of Kshs 473,501.
  - 3) This Honourable Court do order the Respondent to pay the claimant severance pay for 7 years worked of Kshs. 218,834.
  - 4) The Honourable Court do order the Respondent to pay the claimant subsistence allowance for 15 days from 2/7/2017 to 16/7/2017 of USD 1481.25.
  - 5) The Honourable Court do order the Respondent to pay the claimant general damages for discrimination at the work place.
  - 6) The Honourable Court do order the Respondent to bear the costs for this suit as provided under section 12(4) of the [Employment and Labour Relations Court Act](#).



2. The summary of the claimant's case is that, the claimant was employed by the Respondent in then its Laikipia university college on 7<sup>th</sup> June, 2010 as an assistant farm manager, for a three year contract commencing on 1<sup>st</sup> July, 2010.
3. That he served as the assistant manager until 1<sup>st</sup> April, 2012 when he was appointed as the acting farm manager, however that he was not paid his acting allowance as provided in the CBA 2010-2012 that provides for acting allowance at a rate of 15% of the employee's basic salary. Nonetheless, that he continued pursuing for these allowance while working for the Respondent in the acting capacity until his termination on 31<sup>st</sup> December, 2017, with no success.
4. He stated that on 8<sup>th</sup> May, 2013 prior to the termination of his first contract, he applied for consideration into the substantive position of a farm manager, however the same was not considered but that his position as acting farm manager was extended for a contract period of one year.
5. The claimant states that he wrote to the Registrar Administration protesting his contract renewal for one year when the CBA at clause 4.4 provided for minimum contract period for at least 2 years. This issue was never addressed, neither was his letter responded to.
6. On 12<sup>th</sup> February, 2015, he wrote another letter expressing his dissatisfaction with the way his issues were never addressed. He further wrote the letters of 19<sup>th</sup> February, 2014, 15<sup>th</sup> April, 2015, 22<sup>nd</sup> June, 2015 and 14<sup>th</sup> September, 2015, asking for his acting farm manager position to be moved from Grade 10 to Grade 13 in line with the proposed career progression guidelines for Farm staff, 2016, But none of this letters elicited any response.
7. The claimant states that he even wrote a letter of 17<sup>th</sup> April, 2015, asking the Respondent to convert his employment from contract basis to permanent and pensionable basis to no avail.
8. On 4<sup>th</sup> June, 2015, he applied for renewal of his contract for a third term, which the Respondent allowed for 2 years running from 1<sup>st</sup> July, 2015 to 30<sup>th</sup> June, 2017 and upon lapse of that contract, the contract was extended for a further term of 6 months till 31<sup>st</sup> December, 2017, when it was communicated that his contract will not be renewed due to reorganization of the farm activities. Therefore, that his employment came to an end as a result of redundancy, but due procedure was not followed.
9. The claimant avers that during his tenure, the chairperson, demo farm, and the vice chancellor wrote several letters complaining that the farm was making losses which was not true as the catering department was heavily depending on the farm activities and not paying for the said goods. In fact, that it is the catering department in the university that was making huge losses and was not closed.
10. He also states that during his tenure in the year 2017, he was send for a training of trainers' workshop in the Dairy Training Centre in Netherlands between 2/7/2017 and 16/7/2017 but only partially funded instead of being paid daily subsistence allowance at the rate of USD 395 as provided by the Salaries and Remuneration Commission.
11. It is stated that on 1<sup>st</sup> November, 2017, after he was informed that his employment would not be renewed due to restructuring, the Respondent advertised for position of farm coordinator and on 31<sup>st</sup> August, 2018 after his termination, the Respondent advertised for the position of farm manager.
12. The claimant took issue with the fact that he worked for the respondent for 7 years without review of his grade or payment of his acting salary. Further that the Respondent failed to follow the procedure under section 40 of the *Employment Act* in terminating his services. Also that he was discrimination in the way in which he was terminated when the university sought to fill his position and generally



failing to improve the terms of employment in a discriminatory manner because all the other staff of the university had their cadres move after three years, while the claimant served in the same position for 7 years contrary to section 5(3) of the *Employment Act*.

13. The Respondent entered appearance and filed a defence to Claim on 1<sup>st</sup> March, 2019 denying the entire claiming and stating that the claimant was engaged on various contracts from May, 2012 to 2017 on mutual agreement with express date of termination of these contract, hence he was not declared redundant as alleged.
14. The Respondent reiterated that since the engagement was on contract basis, the renewal was not automatic but on the discretion of the Respondent.
15. It is averred that contrary to the claimant's averments, the claimant was not careful on his work since during his employment as the acting farm manager, because the farm registered huge losses as some livestock were lost and some died in unclear circumstances.
16. On the payment of Daily Subsistence Allowance, the Respondent stated that the training in Netherlands was sponsored by the Netherlands Government through INNOCAP project and all traveling expenses and allowance were fully paid to the trainees by the Netherlands Government.
17. The Respondent stated that in advertising for the position of farm coordinator and farm manager, it was exercising its powers to ensure smooth running of its operation and this powers cannot be usurped. In any event that the claimant did not apply for these jobs.
18. The Respondent maintained that the claimant served it on various contracts that were renewed from time to time and at no point did the claimant inform it that it was not willing to serve any of the contractual period, as such the alleged protests are an afterthought.
19. In conclusion, the Respondent stated that the claimant entered into a contract with expiry date indicated on the employment contract and a notice of expiry given as such the claim of unfair termination cannot arise and the claim for severance pay under alleged redundancy is not tenable.
20. The Respondent reiterated that the claimant contract expired and was paid all his dues as such the claim in this cause is without any merit and urged this Court to dismiss the same with costs to the Respondent.

## **Evidence**

21. The claimant testified as CW-1 and adopted his witness statement of 29.10.2018 and a further statement dated 1.10.2023. He then produced the list of documents dated 29.10.2018 and a further list of 9.8.2023 as his exhibits.
22. Upon cross examination, he testified that he was employed on a three year contract dated 7<sup>th</sup> June, 2010, renewable on mutual agreement. He stated that initially he was employed by the University college but on 1<sup>st</sup> July, 2010, the university was awarded a charter as such, the employment was now between him and Laikipia University. He testified that on expiry of the initially contract, he signed two other contracts for one year each and the last one for 2 years, which he did voluntarily. He testified that prior to expiry of his last contract, he received a notice from the University telling him that his contract will not be renewed. He also told this Court that at expiry of each of this contract, he was paid his Gratuity. He However stated that he is owed dues he earned as the acting farm manger that was never paid throughout his contracts. He then stated that he used to receive Kshs8,000 and Kshs 12,000 being entertainment and responsibility allowance respectively in 2017 however in earlier years he was not



- paid these allowances. He added that the former farm manager was in cadre 13 and thus, he ought to have been elevated to the said cadre.
23. On training in Netherlands, he states that he was sponsored by the Dairy training centre Netherlands, however that he ought to have been paid  $\frac{1}{4}$  per diem as he usually received whenever, he went out of the country for trainings. He concluded by stating that, he holds a bachelor's degree but that he has not attached the same.
  24. On re-examination, he testified that the contract was terminated earlier than 31<sup>st</sup> December, 2017, when the Respondent had communicated the contract to run up to. He also stated that the gratuity was calculated at the rate of 25% instead of 31% provided for under the CBA. On the issue of per diem, he testified that the letter of 24/10/2013 is clear that the employer is required to pay  $\frac{1}{4}$  per diem in instances where an employee is fully sponsored. He also stated that the acting allowances were not paid as such, the same is due.
  25. The second claimant's witness was David Cheruiyot. He stated that he was the Respondent's former farm manager. He testified adopted his witness statement and produced documents number 1-8 in the claimant supplementary list of documents as Claimant's exhibits.
  26. On cross examination, he testified that he was employed by Laikipia university in 1998 and deployed to work in Laikipia University college but that he left that employment before the College became a University of its own. He testified that he left the Respondent for other greener pastures, however at the time of leaving the Respondent he had a degree and in the process of doing his master. He also stated that as a farm manager, he was in job group 13. Further that as the head of the farm, he was paid duty and entertainment allowance only.
  27. The third claimant's witness was Simon Chege Muchendo, who testified as CW-3 and adopted his witness statement of 6.10.2023 and produced the list of documents in the claimant's supplementary list of documents from document 9-19.
  28. On cross examination he testified that he was employed as the procurement officer and promoted in 2013 as head of department and in 2016 he was promoted once again to the position of Senior Procurement officer II. He stated that the highest education was bachelor's degree at the time of employment, however on attaining his Master degree, he was promoted. He stated that in these promotions, he was paid responsibility allowance and entertainment allowance of Kshs 12,000 and Kshs.8000 only.
  29. The Respondent on the other hand summoned Dr, Mugo Mureithi, the Deputy Registrar in charge of Administration and Human Capital, as its RW-1. He adopted his witness statements of 25/2/2019 and the one of 17/10/2023. He also produced the respondent's list of documents dated 25/2/2029 as exhibit 1-19 respectively and the supplementary list of documents of 17/10/2023.
  30. He testified that the claimant was not terminated by the Respondent, rather that his contract of employment ended on 31/12/2017. He stated that the claimant was notified that his contract will not be renewed after 2017. He told this Court that the claimant as the acting farm manager was paid responsibility allowance and entertainment allowance at the rate of Kshs 12,000 and Kshs 8,000, similar to what all other heads of departments were paid. Hence he was never discriminated upon.
  31. The witness testified also that the claimant was paid gratuity at the end of each contract period and that the separation between the claimant and the Respondent occurred on lapse of his contract without renewal, thus, he is not entitled to severance pay as his contract ended and not declared redundant as alleged.



32. On payment of daily subsistence allowance, the witness stated that the claimant was fully sponsored and the University gave him permission for the training as such, the payment of Per Diem is not warranted in the circumstances.
33. The witness stated that the position of farm manager is at job group 10 and also that the career progression documents produced by the claimant does not have the position of farm manager.
34. On cross examination, he testified that the Respondent communicated that the claimant's contract would not be renewed due to re-organization of the farm activities. He admitted that the CBA provided for employment of at least 2 years' contract and in case of need for renewal then the employee to be absorbed on permanent basis, but that the same was not done in this case. He stated that gratuity is normally paid at the rate of 25% but that they paid the claimant at the rate of 31%. He testified that headship allowance was introduced by the University on 1<sup>st</sup> July, 2013. He told this court that the claimant was approved for training in Netherlands and in the same document he was to be paid ¼ per diem. He stated that the claimant's contract was not renewed due to restructuring. He admitted that they advertised for farm coordinator before the claimant left employment. Also that they advertised for the position of farm manager a year later.
35. On re-examination, the witness testified that when they advertised for the position of farm manager, the claimant did not apply. He stated that the claimant applied to be upgraded to job group 12 but that was not possible as the farm manager was employed at maximum job group 10. He also told this Court that the claimant was paid gratuity at the rate of 31% and not 25% as alleged. He testified that the claimant was paid responsibility and entertainment allowance as all other head of department as such, he was not discriminated against. on payment of Per diem, the witness clarified that the employee was only paid per diem if, they were not sponsored but since the claimant was on full sponsorship, he was not entitled to per diem.

#### **Claimant's Submissions.**

36. The claimant submitted on four issue; whether the claimant was in an acting capacity, whether the claimant's services were unfairly terminated, whether the claimant was discriminated against and subjected to unfair labour practices and whether the claimant is entitled to the reliefs sought.
37. On the first issue, it was submitted that the claimant was appointed in an acting capacity to the position of farm manager with effect from 1<sup>st</sup> April, 2012, a fact that was confirmed by the Respondent's witness. That the appointment varied his terms of engagement as he assumed the new position, therefore that the remuneration paid ought to reflect the new position. In support of this, he relied on the case of *Richard Abiero v Nyali Golf and Country Club Ltd* [2020] eKLR where the Court held that:-

“acting appointment is a form of variation of contract, it is not vitiated only by the fact that it is not given in writing, the law recognizes oral as well as written contracts of employment. There is no reason why an oral variation should not be upheld by a court of law.”
38. Accordingly, it was argued that having been appointed in the acting capacity, his responsibilities increased to cover that of a farm manager.
39. On whether the employment was unfairly terminated, it was submitted that the main beneficiary of the farm produced was the catering department of the University. However, that the said department had taken a lot of produce without paying for a long time, leading to huge losses made by the farm, a fact that the Respondent did not take up with the catering department but with him as the head of the farm. That despite explaining himself on these losses, including the state of farm structure and the



cow that had died, the Respondent did not listen to him and instead devised ways of terminating his serving by claiming that they are restructuring the farm.

40. The claimant submitted that terminating his contract on the basis of re-organization and restructuring, cannot be said to have occurred as a result of expiry of contract but as a result of restructuring that cause his position to be redundant. Thus, the termination ought to have been subjected to due procedure under section 40 of the *Employment Act* as reiterated by the Court in *Kenya Airways Limited v Aviation and Allied Worker Union of Kenya & 3 Others* [2014] eKLR.
41. It was argued that no notice was issued to the labour office in regard to the termination of the claimant's services as a result of restructuring of the farm activities. Further that while the claimant was serving his last month in employment, the position of farm coordinator was advertised and the position of farm manager was advertised a year later, an indication that no organization was being done but that the Respondent used the move to get rid of the claimant. In any case that no evidence was tabled before this court to confirm the said restructuring and also that no other employee was affected by the alleged restructuring.
42. The claimant submitted also that, his contract was to end in July, 2017, however the Respondent allowed him to work for three more months without any contract and receiving his normal pay, creating legitimate expectation that his contract would be renewed.
43. On whether the claimant was discriminated against, it was submitted that all the Respondent's employees such as CW-2 and CW-3's positions were reviewed after every 3 years to the exclusion of the claimant in violation of clause 4.4 of the CBA and section 41 of the of *the Constitution*. In support of this, the claimant relied on the case of *Silas Kaumbuthu Mbutura v Central Dairy Cooperative Union Limited* [2015] eKLR where the Court held that;-  
  
“the claimant was subjected to unfair labour practices by constantly being held on acting capacity in the post of production supervisor. the claimant's claim for substantive appointment is valid and for the unfair labour practice in contravention of Article 41 of *the Constitution*, the Court finds that a compensation of 300,000 under Article 21(3)(e) of *the constitution* will meet the ends of Justice. While making that finding, the court finds that for over 18 years of service, the claimant was required by the Respondent to serve in acting capacity for unexplained reasons of failure to appoint a substantive production supervisor... such conduct on the part of the Respondent, in the opinion of the Court, was a gross violation of the claimant's entitlement to fair labour practices as provided for under Article 41 of *the Constitution*”
44. Similarly, that appointment of the claimant on acting capacity for 7 years was unreasonable and amounted to discrimination and unfair labour practices on the part of the Respondent in violation of Section 5 of the *Employment Act* and Article 27 of *the Constitution*.
45. On the reliefs sought, it was submitted with regard to 12 months' compensation that the claimant was unfairly terminated as such, he is entitled to maximum compensation for the unfair termination.
46. On acting allowance claim, the Claimant submitted that, he worked for the Respondent on acting capacity for 7 years without being paid acting allowance at the rate of 15% of basic salary as provided for under the CBA or acting allowance as provided for under Memorandum of agreement between the Laikipia University College and Universities Non-Teaching staff Union of 2010-2012. In support



of this, the Claimant relied on the case of *Republic v Secretary, County Public Service Board Bungoma & Another, Ongoro (Ex parte Applicant)*, where the Court held that;-

“... The claimant performed the acting duties for 18 months and it was unfair labour practices to fail to compensate him for acting, which compensation is also provided for in PSC manual relied on...I award as unpaid acting allowance of Kshs 374,018 as calculated by the ex parte Applicant.”

47. On severance pay, it was submitted that the claimant was terminated on account of redundancy as such, he ought to be paid severance pay.
48. On per diem claim for travelling overseas, it was submitted that the Salaries and Remuneration Commission provide for Per Diem at the rate of USD 395 thus, he is entitled to the per diem as prayed in the claim.
49. On general damages sought for discrimination, the claimant submitted that he was treated differently from his colleagues in the way in which his employment was on contract and never converted to permanent and pensionable terms and also by failing to pay him acting allowance. On that basis, he urged this Court to exercise its discretion and award his general damages basing its decision on the case of *Ol Pajeta Ranching Limited v David Njau Muhoro* [2017] eKLR and he case of *V.M.K v C.U.E.A* [2013] eKLR, where the Court awarded the claimant Kshs 7,500,000 on appeal and Kshs 5,000,000 as general damages respectively for discrimination.
50. On costs, the claimant submitted that he instituted this claim as a result of unfairness of the Respondent’s actions of terminating his services. He urged this Court to award him costs of this suit.

### **Respondent’s Submissions**

51. The Respondent listed two issues for determination; whether the claimant was terminated from employment or his employment contract expired and whether the claimant is entitled to the reliefs sought in the memorandum of claim.
52. It was submitted that the claimant was not unfairly terminated, rather that he was engaged on a contract terms that were renewed from time to time with the last one lapsing on 31<sup>st</sup> December, 2017. Therefore, that the claimant’s employment came to an end on expiry of his contractual term and not as a result of unfair termination occasion by redundancy. Hence, the claim for compensation for unfair termination and severance pay is not warranted in the circumstances. In support of this, the Respondent relied on the case of *Susan Wairimu Karaya v Egerton University (Laikipia University)*, Nakuru ELRC Cause No. 324(B) of 2015 where the Court held that;-

“...a fixed term contract ends on its own terms. Fixed term contract in Employment and Labour Relations is recognized as a lawful and legitimate mode of employment and in accordance with section 10(3)(c) of the *Employment Act*.”

53. On accrued acting allowance, the Respondent submitted that the claimant based the acting allowance claim on CBA for the period between 2010-2012, when the years in issue is between 1<sup>st</sup> April, 2012 and 31<sup>st</sup> December, 2017. Further that as the acting farm manager and the person in charge of the department, the claimant was paid responsibility allowance and entertainment allowance, a sum that is only paid to heads of department and manager. Therefore, the claim under this head was paid though the responsibility and entertainment allowance and not warranted. In any case that the amount given to the claim was higher than what, he was to be paid on his job group.



54. On the claim for Daily Subsistence Allowance, it was submitted that the training in Netherlands was fully sponsored and the claimant fully funded. For that reason, the claim for Per diem is without any basis. Moreover, that such an allowance was not provided for under the Employment contract.
55. On general damages for discrimination, it was submitted; firstly, that the highest grade of farm department being the farm manager was grade 10 and the Respondent had not established any higher grade than that. Secondly that CW-3 had worked in the procurement department with different job group and career progression. Thirdly that David Cheruiyot, CW-2 was a farm manager at Egerton University and not Laikipia University, a different institution with different cadres of their employees. Fourthly, that CW-2 and CW-3, all hold Bachelor Degree and master degree, while the claimant was a Diploma holder, hence their qualification are totally different. In light of the foregoing, the Respondent submitted that there is nothing produced in evidence to show that the claimant was discriminated against as compared to his fellow colleagues.
56. The Respondent submitted further that the Claimant did not apply for any of the positions advertised by the claimant as such, he cannot be said to be discriminating against.
57. On costs, of suit, it was submitted that the Respondent was not served with any demand letter prior to the institution of this claim, neither does the Respondent owe the claimant any dues. As such, the claim has been instituted in *bas faith*. The Respondent urged this court, on that note, to dismiss the suit with costs.
58. I have examined all the evidence and submissions of the parties herein. From the facts herein, the issue for this court's determination are follows:-
- (1) Whether the Respondent terminated the Claimant's service unfairly.
  - (2) Whether the Claimant is entitled to the remedies sought.

### **1. Termination**

59. The Claimant has submitted that he was unfairly terminated by the Respondent having worked for them from 7<sup>th</sup> June 2010 to 31<sup>st</sup> December 2017.
60. The Claimant's case is that he served as Assistant Manager until 1<sup>st</sup> April 2012 when he was appointed as acting Farm Manager. He avers that he was not paid his acting allowance.
61. The Claimant testified before court and when cross-examined he indicated that he was on grade 10. He also admitted that he served various short term contracts which all ended on 2017 December. He agreed that in 2017 is when he received a letter from the University indicating that his contract will not be renewed again. He was paid his gratuity at end of each contract.
62. On issue of Acting Farm Manager he agreed he was always referred to as acting Farm Manager in official communication.
63. He also admitted he was always paid a responsibility allowance of 12,000/= and entertainment allowance of 8,000/=. This was in 2017. He however indicated that in payslip of April 2013 this was not paid. He indicated that he was owed dues of Acting Farm Manager from 1<sup>st</sup> April, 2012.
64. It is indeed true that whereas the Claimant was paid entertainment and responsibility allowance by the Respondent in certain months, in April 2013 he was not paid. He avers that he wrote a letter in February 2013 claiming the acting allowance and Respondents replied indicating that the special duty allowance was paid as entertainment allowance.



65. It is however true that the Claimant was not paid his Acting allowance payable as entertainment and responsibility allowance in all the period he worked.
66. He was however employed on contractual terms. The contract was to be renewed on mutual term. The Claimant having served on fixed term contract, renewable by mutual agreement, he could not insist on the contract being renewed when the Respondents didn't agree.
67. This is the position of law and as held in Susan Wairimu Karaya (supra) which held that a fixed term contract ends on its own terms. In this case, the contract of the Claimant ended by effluxion of time and he cannot contend that he was unfairly terminated.
68. That being the case, his claim for unfair termination cannot stand and the claim for compensation on this account is also not viable.

## **2. Remedies**

69. The Claimant indicated that he was entitled to other remedies as stated in his claim. He sought to be paid accrued acting allowance of 473,501/=. The Claimant was paid some entertainment and responsibility allowance in some cases which covered this aspect.
70. It is however also true that he was not paid the said allowance in all months as pointed out in month of April 2013 payslip. The Claimant indicated that he was not paid the said allowances and therefore the burden to prove the same was paid lies with the Respondent. The Respondent did not discharge this burden and I therefore find the Claimant is entitled to be paid accrued acting allowance to the tune of Kshs. 473,501/= as prayed.
71. On issue of his quarter per diem, he averred he was not paid when he travelled for a training in the Netherlands from 2<sup>nd</sup> July to 10<sup>th</sup> July 2017. Indeed as per SRC's Table 4, page 421 of the Memo of Claim, the Claimant was entitled to payment of his quarter per diem as pleaded and so I award him the same as pleaded at USD 1481.25 to be paid at the current rate on the dollar which is 128.75/= as at today, = 190,711/=

Total payable 663,212/=

Less statutory deductions

72. Payment for severance pay is not payable as there is no indication that the Claimant was declared redundant.
73. That being the case, the claim succeeds in part and I order the Respondent pays the Claimant as indicated in the judgment plus costs of this suit and interest at court rates with effect from the date of this judgment.

**JUDGMENT DELIVERED VIRTUALLY THIS 4<sup>TH</sup> DAY OF JULY, 2024.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of: -**

Aziz Anan for Claimant – Present

Ndichu for Respondent – Present

Court Assistant - Fred

