



**Riley Falcon Security v Lumbete (Appeal E006 of 2023)  
[2024] KEELRC 1793 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1793 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E006 OF 2023  
CN BAARI, J  
JULY 11, 2024**

**BETWEEN**

**RILEY FALCON SECURITY ..... APPELLANT**

**AND**

**DENNIS LUMBETE ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. T. Odera (CM)  
delivered on 18th January, 2023 in Kisumu CMELRC NO. 164 OF 2020)*

**JUDGMENT**

1. This appeal arises from a Judgment rendered on January 18, 2023, where the Trial Court found in favour of the Respondent, and awarded him one month salary in lieu of notice, 6 months' salary as damages for unfair termination and costs of the suit.
2. The Appellant being aggrieved by the decision of the Trial Court, lodged this appeal on February 9, 2023.
3. The appeal is premised on the grounds that:
  - i. The Learned Magistrate erred in law and fact in finding that the Claimant had been unlawfully dismissed from employment when there was no evidence to support the said termination. The mixed reference to 'dismissal' and termination meant that the learned. magistrate did not appreciate the issues that were before her for determination.
  - ii. The Learned Magistrate erred in law and fact in failing to find that the Claimant's contract had lapsed by effluxion of time, and hence it would have been impossible for the Appellant to terminate the Claimant from employment.



- iii. The Learned Magistrate erred in law and fact by wholly ignoring the uncontroverted evidence that the Claimant's employment was governed by a contract between parties, as such, parties were bound by the terms of the said employment contract.
  - iv. The Learned Magistrate erred in law and fact in finding that sleeping at work did not warrant summarily dismissal but a warning considering the nature of work that the Claimant was employed.
  - v. The Learned Magistrate failed to consider the Appellant's submissions and exhibits presented in court.
4. Submissions on the appeal were filed for both parties.

### **The Appellant's Submissions**

5. It is the Appellant's submission that the Respondent was engaged on a fixed term contract which had a definite start date and an end date. It submits further that there was no provision in the Respondent's contract that the said contract would be renewed, hence the issue of termination and/or unlawful termination could not arise when the separation of the Respondent from the Appellant was by way of lapse of contract.
6. The Appellant submits that the Respondent was not terminated from work, and that the issue of him being subjected to a disciplinary hearing did not even matter because the outcome of the said disciplinary hearing was that the Respondent was issued with a warning letter which fact the Respondent confirmed during his testimony in court.
7. The Appellant submits that the only reason why they proceeded with the Respondent's disciplinary hearing on January 23, 2020, was because the disciplinary process had started earlier before the Respondents contract came to an end. It submits that the Respondent had earlier been served with a notice to show cause dated January 14, 2020.
8. The Appellant submits that the trial Court was misdirected on reaching its finding the way it did, since unfair termination could not arise where the Respondents contract had come to an end. That the contract automatically came to an end on January 20, 2020, and there was no requirement for the Appellant to inform the Respondent that his contract was about to end or that his contract had ended. It had reliance in *Bernard Wanjohi Muriuki Versus Kirinyaga Water and Sanitation Company Limited & Another* (2012) to support this position.
9. It is the Appellant's submission that the trial court erred in awarding the Respondent one month pay in lieu of notice and damages for wrongful termination on the basis that he was notified that his employment contract had come to an end and informed that his last day of employment would be on January 27, 2020.
10. It submits further that the Respondent was not unfairly terminated, his contract simply came to an end, and thus a claim for unlawful termination could not be maintained. It sought to rely in Nairobi Civil Appeal No. 81 of 2018-*Transparency International Kenya Versus Teresa Carlo Omondi* to buttress this position.
11. The Appellant urges that this appeal be allowed and the decision of Honourable T. Odera delivered on January 18, 2023 be set aside and the suit in the lower court be dismissed with cost to the Appellant.



## **The Respondent's Submissions**

12. The Respondent submits that an employee is entitled to notice even when the contract had come to an end. He sought to rely in the case of of *Oshwal Academy (Nrb) & Another v Indu Vishwanath Civil Appeal No. 125 of 2011* to support this position.
13. It is the Respondent's submission that the practice of the Appellant was such that it offered fixed term contracts to employees who then proceeded to "end of contract leave" and upon return to work, new contracts would be issued. He submits that this position was confirmed by the Appellant's witness before the trial Court.
14. The Respondent further submits that whenever his contract came to an end, he would proceed on end of contract leave, after which he would apply for renewal of contract and the same would be renewed. He states that this had been the norm for over seven years that he worked for the Appellant.
15. It is his submission that this practice created a legitimate expectation for renewal of the contract after returning from the end of contract leave. He submits further that he had even written a letter for renewal of contract dated 28.01.2020 which he expected as usual would be renewed by the Appellant. The Respondent sought to rely in the case of *Teresa Carlo Omondi v Transparency International-Kenya* [2017] eKLR to support this assertion.
16. It is his submission that given the years that he had worked for the Appellant, and the practice of renewal of his contracts, the Appellant had created a legitimate expectation, and as such, the Respondent was entitled to notice before termination of service.
17. The Respondent submits that sleeping at work was not sufficient reason to warrant the draconian action of termination, and instead a warning would have been proportionate in this circumstance.
18. It is his prayer that this appeal be dismissed with costs and the decision of the trial court be upheld.

## **Analysis and Determination**

19. I have considered the Appellant's Record of Appeal and the submissions by both parties. The grounds of appeal are summarized into the following two issues: -
  - i. Whether the Respondent was Unfairly Terminated or Whether His Contract Lapsed by Effluxion of Time.
  - ii. Whether the Respondent is Entitled to the Awards by the Trial Court.

### **Whether the Respondent was Unfairly Terminated or Whether His Contract Lapsed by Effluxion of Time.**

20. Although the Appellant submitted that it terminated the Respondent for sleeping at work, and that this was a valid reason to terminate, it later abandoned this line of argument and relied on the position that the Respondent's contract had terminated by effluxion of time. It therefore does not matter at this juncture whether sleeping at work was a valid reason to terminate the Respondent and I let it rest.
21. The Appellant's position is that the Respondent was engaged on a fixed term contract which had a definite start date and an end date, and that the contract had no provision for renewal, hence the issue of termination and/or unlawful termination could not arise when the separation of the Respondent from the Appellant was by lapse of contract.



22. It is therefore its position that the Respondent was not terminated from service, and that the issue of him being subjected to a disciplinary hearing did not matter on the basis that the outcome of the said disciplinary hearing was that the Respondent was issued with a warning letter.
23. The Respondent on his part, admitted that his contract lapsed on January 20, 2019 and that as had been the practice, he took an end of contract leave and resumed duty thereafter on January 27, 2020, hoping that his contract would be renewed as it previously had.
24. It is his assertion that given the years that he had worked for the Appellant, and the practice of renewal of his contracts, the Appellant had created a legitimate expectation, and as such, he was entitled to a notice before termination from service.
25. It is not disputed that the Respondent appeared before the disciplinary committee of the Appellant on January 23, 2020, which then begs the question of what the basis for the disciplinary action was if indeed the Respondent was no longer an employee of the Appellant. Why was the Appellant disciplining a non-employee?
26. That a side, it is also true that as correctly submitted by the Respondent, his contract with the Appellant had been repeatedly renewed for the seven (7) years he was in the service of the Appellant.
27. The general rule is that a fixed term contract carries no expectation for renewal. It is however settled that a fixed term may create expectancy of renewal on the part of the employee based on previous contract renewals. Where an employer creates a legitimate expectation and fails to renew the contract, the law deems the employee to have been Unfairly terminated. (See *Samuel Chacha Mwita v. Kenya Medical Research Institute* (2014) eKLR).
28. In the case of *Teresa Carlo Omondi v Transparency International- Kenya* [2017] eKLR, the Court opined thus on legitimate expectation: -

“The burden of proof, in legitimate expectation claims, is always on the Employee. It must be shown that the Employer, through regular practice, or through an express promise, leads the Employee to legitimately expect there would be renewal. The expectation becomes legally protected, and ought not to be ignored by the Employer, when managerial prerogative on the subject is exercised. Legitimate expectation is not the same thing as anticipation, desire or hope. It is a principle based on a right, grounded on the larger principles of reasonableness and fair dealing between Employers and Employees. The Employee must demonstrate some rational and objective reason, for her expectation. The representation underlying the expectation must be clear and unambiguous. The expectation must be induced by the decision maker. The decision maker must have the authority to renew. Repeated renewals, extended service beyond the period provided for in the fixed term contract, and promise of renewal, are some of the elements that would amount to objective reasons underlying expectation of renewal.”
29. In my opinion, the Appellant having renewed the Respondent’s contract for over a period of seven (7) years, is confirmation that it created legitimate expectation on the part of the Respondent that his contract will continue being renewed in the absence of notice of non-renewal.
30. It then follows that to casually assume that the Respondent’s contract had terminated by effluxion of time after variously renewing it, and without issuing notice of non-renewal, amounts to an unfair termination.



31. I thus find and hold that the Respondent was unfairly terminated and the finding of the Trial Court is upheld.
32. The Trial Court awarded the Respondent one-month salary in lieu of notice and 6 months' salary as damages for unfair termination. Having reached the finding that the Respondent was unfairly terminated, and the awards made being discretionary, I find no reason to interfere with the awards, save for the fact that the Respondent earned a monthly salary of Kshs. 15,000 and not Kshs. 16,000, which is the amount used by the Trial Court in making the awards.
33. In the premise, I uphold the Trial Court's award of one-month salary in lieu of notice at Kshs. 15000- and 6-months' salary in damages for the unfair termination at Kshs.90,000.
34. The Appellant will bear the costs of the appeal and the costs of the suit before the lower court.
35. It is ordered.

**DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 11<sup>TH</sup> DAY OF JULY, 2024.**

**C. N. BAARI**

**JUDGE**

Appearance:

Ms. Oduor present for the Appellant

Ms. Owiti present for the Respondent

MS. Debra - Court Assistant.

