



Soni v Patel & 2 others (As Office Bearers of the Board of Management of the Pandya Ndmorial Society) (Cause E114 of 2023) [2024] KEELRC 1953 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1953 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E114 OF 2023**

**M MBARŪ, J
JULY 11, 2024**

BETWEEN

DR. DINESH JAMNADAS SONI CLAIMANT

AND

RAMAN PATEL 1ST RESPONDENT

SHOBHAG GUDKA 2ND RESPONDENT

DR. VINESH VAGHELA 3RD RESPONDENT

**AS OFFICE BEARERS OF THE BOARD OF MANAGEMENT OF THE PANDYA
NDMORIAL SOCIETY**

JUDGMENT

1. The claimant is a medical doctor by profession. The respondents are office bearers of the board of management of the Pandya Memorial Society that owns Pandya Memorial Hospital.
2. The respondents employed the claimant as a resident medical officer on 1st September 2017. He was on two years term contracts renewed and based on overall performance. His basic salary was Ksh.240, 000 and Ksh.25, 000 house allowance per month.
3. It was a contract term that either party could terminate the employment through 3 months' notice. The claimant also enjoyed the benefit of 30 days of annual leave.
4. The claim is that upon the expiry of his employment contract in the year 2019, the respondents extended the claimant's contract for a continuous period of 5 years until 27 February 2023 when they unfairly terminated his employment. The contract extensions were with the terms and conditions from the initial contract.

The last contract was due to lapse on 31 December 2023.



5. The claim is that the claimant worked diligently and continued to receive performance-based increments in salary. The renewal of the contract was based on performance assessment and the salary rose to Kshs. 307, 046.
6. On 27 February 2023, the respondents revoked the claimant's employment contract without any justified cause. The only reasons given were that the management had revised its policy on extension and a resolution to revoke the contract was issued. There was no notice, hearing or reason communicated to the claimant by the respondents. This resulted in unlawful and unfair termination of employment and the claimant is seeking the following;
 - a. a declaration that his employment was terminated unfairly;
 - b. 2 months' pay in lieu of notice Kshs. 664,152;
 - c. 9 months' pay on the outstanding contractual period Kshs. 2,988,684;
 - d. 12 months' compensation for unfair termination of employment Kshs. 3,984,912;
 - e. Leave earned and not taken for 5 years Kshs. 1,660,380;
 - f. Costs of the suit.
7. The claimant testified in support of his case that in the year 2017, he was employed by the respondents as the Resident Medical Officer on a two-year contract and based on overall performance it was reviewed over time. From the year 2019 to 2023 he did not sign any new contract and the respondent extended his contract and retained his terms and conditions save for salary reviews. His last salary was Kshs. 307,046 and inclusive of house allowance total paid per month was Kshs. 332,076 and a payment statement was issued in this regard.
8. The claimant testified that on 27 February 2023, he was issued with a notice terminating his employment because there was a change of policy and management met and agreed to terminate his employment. This was unfair and without notice, aged 45 years he has been unable to secure new employment due to the reputational damage caused by the revocation of his employment contract. This has affected his professional growth and the orders sought should be issued.
9. The claimant also testified that when he was employed by the respondents in the year 2017 he signed a contract with Rajesh Shukla the chief administrator on behalf of the respondents who continued to renew his contracts through letters. The claimant was retained on the same terms and conditions and his salaries would be increased over time.
10. The claim by the respondents that the chief administrator had no authority to issue contract extensions is in bad faith. This officer was engaged by the respondents and the claimant was employed and offered his services as an employee for many years.
11. The members and board of management changed in the year 2023 but Raman Patel remained the chairperson of the board. The chief administrator remained in office and under the authority of the respondents. After working for the respondents for many years, the claimant was aware that the chief administrator was in charge and issued similar employment letters to other medical doctors.
12. The claimant testified that on 1st December 2022, he applied for an extension of his contract and on 6 December 2022 the senior resident medical officer Dr. A. A. Naji who was his supervisor wrote a recommendation letter to the chief administrator indicating that the claimant was fit for the job. Dr. Naji attested to the fact that the claimant was of good work performance and had a good rapport



- with patients and the organization at large. He was then shocked to receive notice terminating his employment prematurely and without the due process or payment of his terminal dues.
13. The claimant testified that he is related to the chief administrator by marriage. He had previously worked for the respondent from the year 1982 to 1986. He returned on a contract in the year 2017. He has been able to secure employment in a pharmacy in the Nyali area but largely as a volunteer.
 14. Upon cross-examination, the claimant testified that his last contract renewal provided termination of employment for a justified cause. It allowed either party to terminate employment upon one month's notice of payment in lieu thereof. Upon the notice dated 27 February 2023, he worked and served under the same until March 2023 and was paid for such time worked.
 15. In the claim, the claimant is seeking payment instead of notice for 2 months on the basis that the notice period was to be 3 months while he only got a notice for one month. Under his contract he had 9 more months to work and was willing to serve were it not for the unfair termination of his employment by the respondents.
 16. The claimant admitted that since the year 2019, the respondents would extend his contract yearly. He did not take his annual leave.
 17. In response, the respondent's case is that the claimant was an employee from 15 August 2017 and his employment ended on 31st December 2022. He was not diligent in his duties as alleged and there was no renewal due to good performance. The purported extension of the contract on 15 December 2022 before its lapse on 31st December 2022 was illegal, null and void because, under article 6 of the Pandya Memorial Society, the affairs of the society are conducted by the board of management the only organ mandated to enter into contracts on behalf of the society. Acting or purporting to act as an officer of a registered society while not appointed is illegal and contrary to section 24 of the [Societies Act](#).
 18. The board of management did not resolve to extend the claimant's contract upon its lapse on 31 December 2022. The purported extension by the chief administrator is done without the knowledge or sanction of the board of management and hence ultra vires.
 19. The response is also that the respondents discovered in February 2023 that the chief administrator had issued a letter dated 15 December 2022 purporting to unilaterally extend the contract of the claimant for a period of one year without authority. The respondents took internal steps to investigate the matter and established that the claimant and chief administrator had family relations which was exploited to secure an extension of contract. The chief administrator was reprimanded and the respondents resolved in a meeting held on 22 November 2022 that renewal of expiring contracts would be upon appraisal.
 20. On 27 February 2023, the respondents issued the claimant with the decision to terminate his contract within the terms contained in the letter of extension which allowed either party to terminate the contract upon one month's notice. The respondents had the power to revoke the contract following the ultra vires conduct of its officer. Under Section 35(1) of the [Employment Act](#), 2007 (the Act) the respondents issued notice to the claimant which he served and was paid. The respondents were not required to hear the claimant before the termination of the contract under the provisions of Section 41 of [the Act](#) and the same did not relate to misconduct, poor performance or physical incapacity. His employment was not permanent and pensionable and could be terminated upon notice.
 21. The claimant is a medical practitioner capable of securing new employment and has set up a flourishing medical practice within Nyali in Mombasa.



22. Before filing this claim the claimant had filed Mombasa ELRC No. E045 of 2023 which he later withdrew. The court awarded the respondents' costs which had not been paid and the claim herein is sub judice.
23. On the claims made, the respondents responded that there was no unfair termination of employment as alleged since the notice was issued under Section 35 (1) of *the Act*. The extended contract provided for notice at one month and the claim for payment for 9 months cannot be issued. Compensation is not justified as employment is terminated lawfully. The leave days purportedly not taken have not been particularized and are not due under the provisions of Section 28(4) of *the Act* and should be dismissed with costs.
24. In evidence, the respondent called Dr. Abdulswamad Naji who was supervising the claimant and still in the employment of the respondent as the Chief Medical Officer. He testified that before the claimant's contract could be renewed, he issued a recommendation letter. The respondent has an evaluation system which is documented but this is not filed in court. Where he observed an issue about the claimant performing his duties, this was orally addressed and not documented. Any other records concerning the claimant's employment are not within his knowledge.
31. Dr. Naji testified that in his witness statement, he noted that the claimant was disorganized in his duties but this is not documented. He noted he would speak to the claimant as the supervisor but never documented any of these matters. In some instances, the claimant would report to work and work through the day and leave early at 4 pm. He would arrive at 8 a.m. but leave early. He was aware that the claimant had his contract extended and his role was only to issue a letter of recommendation which he did. He noted that the claimant was a diligent employee and had good rapport with patients and the organization.

At the close of the hearing, both parties filed written submissions.

32. The claimant submitted that his employment contract was extended by the respondents on 15 December 2022 to run until 31 December 2023. The extension was done by an employee of the respondents and the allegations that this was illegal, null and void are without evidence as the chief administrator acted in the course of his duty. The initial employment on 17 August 2017 was through a two-year contract signed by the chief administrator which is not challenged by the respondents.
33. The contracts of employment were extended by the respondents and signed by the same person, the Chief Administrator. The contract extension dated 15 December 2022 was no exception and the respondents have no justified reason to challenge it or terminate the same unlawfully and unfairly. The contract was extended upon the claimant's supervisor's recommendations, Dr. Naji. He testified in support of the respondent's case in court as the employee.
34. From the respondent's letter dated 27 February 2023, the only reason given for the revocation of his contract was that it was issued contrary to the policy. The issue of who signed it or the legality of it was not an issue. This resulted in unfair termination of employment. There was no notice or justified reasons and the claimant was not given a hearing as required under Section 41 of *the Act*. No work records were produced concerning the claimant's work performance or how the Board addressed the policy issues leading to the decision to revoke his contract. In the case of *Janet Nyandiko v Kenya Commercial Bank Limited* [2017] eKLR and the case of *Dennis Nyamweya Sibota v Deeway Security Limited* [2022] eKLR court has held that before termination of employment, the employer must secure the employee's rights to ensure that it is for a fair and valid reason under Section 45 and 43 of *the Act*.



35. In the case of *Naima Khamis v Oxford University Press (EA) Limited* [2017] eKLR the court held that the employer is required to justify the reason for termination of employment and where the employer fails to do so, the same is deemed to have been unfair.
36. The claimant is entitled to the remedies sought as held by the Supreme Court in the case of *Kenfriegt (EA) Limited v Benson K Nguti* [2019] eKLR that under the provisions of Section 49 of *the Act*, once the court has determined that there was unfair termination of employment, under the law, there are several remedies available the court should exercise discretion to determine whether to allow any or all of the remedies provided.
37. In this case, notice pay was due at 3 months and the respondents only paid for one month hence 2 months' notice pay is due. The claimant's contract had 9 more months before lapse which he expected to serve had it not been for the unfair termination by the respondents. Looking at the remedies available under Section 49, for unfair termination of employment, compensation is due at 12 months which should be awarded. In the case of *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* Civil Appeal 240 of 2018, the court held that the award of the maximum compensation is discretionary to the court looking at the facts of each case. The fact that the claimant is advanced in age and is not able to secure new employment should be awarded maximum compensation with costs.
38. The respondents submitted that the claimant's contract was dated 15 August 2017 and on 2 December 2020, it was revised and further on 12 January 2022 it was extended. The last extension was dated 15 December 2022. It was agreed that either party could terminate the contract with one month's notice. Through a letter dated 27 February 2023, the respondents invoked this term and issued the claimant with notice terminating his employment and he worked until March 2023 and was paid in full.
39. The respondents submitted that in the case of *Manuel Anindos v Kinangop Wind Park Limited in Receivership* [2019] eKLR the court held that under Section 35(1) of *the Act*, a party is allowed to terminate employment upon notice. In the case of *Kenfriegt (EA) Limited v Benson K Nguti* Petition No. 37 of 2018, the court held that *the Act* provides for various modes of terminating employment including through notice under Section 35 of *the Act*. The claimant was issued with notice and hence termination of his employment was lawful.
40. The claim for 2 months' notice pay is not justified since the last contract was extended upon the term that termination of employment would be upon one month's notice. The claim for the full-term contract payment is not justified by the contract having terminated lawfully and notice issued. In the case of *Munyao Musembi v China Road and Bridge Corporation (Kenya) Limited* [2022] eKLR and *D. K. Njagi Marete v Teachers Service Commission* [2013] eKLR the courts have held that an award of salary for a period which the employee did not work amounts to unjust enrichment. This claim and compensation are both not available to the claimant.
41. On the claim for leave not taken for 5 years, under the first contract the claimant had 30 days of leave. Under the second contract, the claimant had 30 days of annual leave similar to each contract but he did not apply for or take his annual leave. In the case of *Charles Nyaringo Rianga v Hatari Security Guards Ltd* [2019] eKLR the court held that under Section 28(4) of *the Act*, an employee cannot justify accumulation of leave days outside the law and beyond 18 months. In this case, the claim is not particularized and hence not justified and should be dismissed with costs.

Determination

42. The respondents in response raised the issue that the suit is sub judice since the claimant had filed Mombasa ELRC No. E045 of 2023 which was withdrawn and the respondents awarded costs. This



issue was not addressed during the hearing or written submissions. I take it the respondents abandoned the same. Save, a suit once withdrawn ceases to exist. Where the respondents were awarded costs, such should be pursued under such cause outside these proceedings.

43. The claimant's employment with the respondent was regulated under written contracts. Each was issued and signed by an officer of the respondent, the chief administrator. The response that this officer was not authorized to act for the respondent and hence the contracts issued are illegal is left bare. From the first contract dated 15 August 2017 to the last letter extending the contract dated 15 December 2022, all are signed and issued by the respondents under the hand of the chief administrator. The last contract cannot be singled out to justify the assertion that it was issued by an unauthorized person.
44. Where the chief administrator was acting in an unauthorized manner as alleged by the respondents, the unauthorized conduct if at all, should not have applied against the claimant. The respondents as the employer are liable for the actions of its employee. In the case of *Rashid Ali Faki v A.O. Said Transporters* [2016] eKLR the court held that where an employee is acting within the scope of his employment, and in so acting does something negligent or wrongful, the employer is liable even though the acts done, may be the very reverse of that which the employee was actually to do. The law casts upon the employer liability. It was no defence for the respondents to allege its policy did not require the claimant's employment to take effect after it had taken off.
45. In this case, there was no evidence led by the respondents that the chief administrator acted completely in his capacity rather than following the instructions of the employer. Indeed, before the claimant's last contract of 15 December 2022 was issued, his supervisor Dr Naji issued a recommendation letter that is not challenged. Dr Naji attended court and testified to this fact. It is therefore not correct that the chief administrator departed from the course of his employment and went on a frolic of his own simply because he was related to the claimant by marriage. He acted for and on behalf of the respondents and from the year 2017 to 2023 committed the respondents to an employment relationship with the claimant. The respondents are liable for the commitments undertaken by their employees in the course of employment.
46. On the claim that there was unfair termination of employment, the respondents assert that the employment contract with the claimant had provisions for termination of employment upon notice. They invoked such terms and issued the claimant with notice dated 27 February 2023 which he served for one month and was paid in full in March 2023.
47. Termination of employment is unfair and unlawful if it is not justified by a valid reason and if it is not done under a fair procedure. Section 45 (1 & 2) of the *Employment Act* which provides for requirements to be considered when determining whether termination was unfair;
 - 1) No employer shall terminate the employment of an employee unfairly.
 - (2) A termination of employment by an employer is unfair if the employer fails to prove:
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - i. related to the employee's conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.”



48. In the case of *Wanyera v Central Isiolo Investment Limited* (Appeal E002 of 2023) [2024] KEELRC 596 (KLR) (8 March 2024) (Judgment), the court held that;

A termination of employment takes two stages. First, there must be a valid and justifiable reason for termination and once this is established, the termination must be carried out in accordance with the procedure laid down in the employers' human resource manual or as set out in the *Employment Act* or both. The most important thing to be ensured is that there is a valid or justifiable reason for termination and that the termination must be conducted by following a fair procedure. This includes furnishing the employee with the charges he or she is facing and affording them an opportunity to defend themselves. It does not matter whether the employee's guilt is apparent on the face of the record. He or she must be heard no matter how weak or useless his or her defence might seem to be. However, the conduct of the disciplinary hearing does not have to take the rigour of a Court trial. It suffices that the employee was notified of the charges and afforded an opportunity to respond before the decision to dismiss is made.

49. Whether or not an employment contract allows termination of employment upon notice, it is settled law that under *the Act*, the employer is bound to give valid reasons before termination of employment. The right under Section 35(1) of *the Act* must be read in whole and not in part. Context must be given to the entire domain of rights under *the Act*. Otherwise, a termination of employment is deemed substantively unfair where the employer fails to give valid reasons to support the termination as required under the provisions of Section 43 and 45 of *the Act* as held in *Jane Wairimu Machira v Mugo Waweru & Associates* [2012] eKLR.
50. The respondents led evidence to the effect that the claimant was issued with a letter dated 15 December 2022 extending his contract to 31st December 2023 by an unauthorized person. In the letter dated 27 February 2023, the respondent stated that further to your application for extension of the contract and subsequent response dated 15/12/2022, and which extended your contract. The hospital board of management has revised its policy on extension and made a resolution to revoke the said letter.
51. The respondent acknowledged that the claimant had applied for an extension of his contract. Dr. Naji confirmed that he recommended the extension of the contract. But the respondents, in a board meeting held in November 2022 had passed a resolution not to extend the claimant's contract.
52. The board resolution arose before the claimant's application on 2 December 2022 and the subsequent extension of his contract through a letter dated 15 December 2022. The contract was for a term of one year.
53. To terminate the claimant's employment for no good cause relating to his performance, capabilities or conduct is defined under Sections 41, 43 and 45 of *the Act* as unlawful and unfair. The respondents cannot justify the unilateral termination of employment under the guise of issuing one month's notice. See *Wanyonyi v Principal Kamusinde Secondary School & another* (Employment and Labour Relations Appeal EOIO of 2023) [2024] KEELRC.
54. Therefore, under the provisions of Sections 43 and 45 of *the Act*, the employer assumes the burden of proof to justify the reason for the termination of employment and prove that a fair procedure was followed. The four elements and legal threshold to be established must relate to the employee's conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer.
55. The respondents fail to address these elements. The mandatory provisions of the law were not adhered to resulting in both procedural and substantive unfairness.



56. The claimant is seeking notice pay for two months because his original contract of 15 August 2017 provided for 3 months' notice and he only served one month's notice. Each employment term had its terms and conditions even though there were extensions. The contract running from 15 August 2017 lapsed on 14 August 2019. By operation of the law, such contract lapsed by effluxion of time and any claims thereof are regulated under the provisions of Section 90 of *the Act*.

57. The last contract that was extended through a letter dated 15 December 2022 provided for one month's notice which was issued and was served.

No notice pay is due.

58. On the finding that there was unfair termination of employment, as correctly cited by both parties in the case of *Kenfreight (EA) Limited v Benson K Nguti* Petition No.37 of 2018, the provisions of Section 49 of *the Act* allow the court the discretion to award the remedies thereof employer to pay to the employee any or all of the following. ...

What then should be the correct award on damages be based on? Having keenly perused the provisions of Section 49 of the *Employment Act*, we have no doubt that once a trial court finds that a termination of employment as wrongful or unfair, it is only left with one question to determine, namely, what is the appropriate remedy? *The Act* does provide for a number of remedies for unlawful or wrongful termination under Section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder. To us, it does not matter how the termination was done, provided the same was challenged in a Court of law, and where a Court found the same to be unfair or wrongful, Section 49 applies.

59. In this case, the claimant has claimed for the unexpired term of his contract and compensation for the unfair termination of his contract. At the end of the employment, the claimant was served with notice and allowed to serve the notice period and was paid up until March 2023. He testified that he has not been able to secure good and comparative employment since due to age and the circumstances leading to the loss of his employment.

60. Had the respondents allowed the claimant to serve under his contract, he would have offered his labour until the end of his contract from April to December 2023 a total of 9 months. An award of 9 months' gross salary well compensates the claimant in time and for the unfair termination of his employment. He has since moved to a new venture even though not as well remunerated as his employment. He is required to mitigate loss of employment and hence payment for 9 months is hereby found sufficient all at Kshs. 2,988,684.

61. On the claim for leave, indeed as the respondents submitted, under the provisions of Section 28(4) of *the Act*, annual leave cannot be accumulated beyond 18 months unless the employer has issued written approval to extend the same. In this regard, based on the last salary paid and without any work records by the respondents on allocating the claimant annual leave, for 18 months, the claimant is entitled to 33 leave days. The last salary earned was Kshs. 332,076 less house allowance, basic pay of Kshs. 307,046 and 33 days of annual leave is Kshs. 337,750.60 in annual leave pay.

62. On costs, had the respondent applied due process and substantive fairness in terminating the employment relationship, these proceedings would have been unnecessary. In this case, the claim for cost is found justified.

63. Accordingly, judgment is hereby entered for the claimant against the respondents in the following terms;



- a. A declaration that employment was terminated unfairly;
- b. Compensation awarded at Kshs. 2,988,684;
- c. Leave pay Kshs. 337,750.60;
- d. Costs of the suit.

DELIVERED IN OPEN COURT AT MOMBASA THIS 11TH DAY OF JULY 2024

M. MBARÜ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

