



REPUBLIC OF KENYA



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**Halar Industries Limited v Muia (Appeal E170 of 2022)
[2024] KEELRC 2479 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2479 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E170 OF 2022
NJ ABUODHA, J
OCTOBER 11, 2024**

BETWEEN

HALAR INDUSTRIES LIMITED APPELLANT

AND

DAVID KYALO MUIA RESPONDENT

(Being an appeal from the Judgment of the Honourable P. K. Rotich delivered on 14th September 2022 in Nairobi MCELRC No. E557 of 2021 between David Kyalo Muia Vs Halar Industries Limited)

JUDGMENT

1. Through the Memorandum of Appeal dated 5th October, 2022, the Appellant appeals against the Judgement of Honourable P. K. Rotich against the whole of the said Judgement.
2. The Appeal was based on the grounds that:
 - i. The Learned Magistrate erred in law and fact in holding that the Appellant did not follow due procedure as per the Employment Act 2007 in terminating the employment of the Respondent herein.
 - ii. The learned magistrate erred in law and in fact in finding that the Respondent was employed by the Appellant on a continuous basis.
 - iii. The learned magistrate erred in law and in fact in holding that the Respondent was a permanent and pensionable employee of the Appellant.
 - iv. The learned magistrate erred in law and in fact in not appreciating the fact that the Respondent was and had always been engaged on a fixed term contract basis.



- v. The learned magistrate erred in law and in fact in holding that the Respondent's employment was unfairly, wrongfully and illegally terminated.
 - vi. The learned magistrate erred in law and in fact in awarding the Respondent twelve (12) month's compensation when the Respondent was employed for a fixed term of three (3) months only.
 - vii. The learned magistrate erred in law and in fact in awarding the Respondent costs for the suit.
3. The Appeal was disposed of by written submissions.

Appellant's Submissions

4. The Appellant through its Advocates Timothy Got Ondego Advocates filed written submissions dated 18th March, 2024. On the issue of whether the Respondent was employed on fixed term basis, counsel submitted that the Honourable P. K. Rotich, in his judgment erred in fact and law in holding that the Respondent was a permanent and pensionable employee of the Appellant Company.
5. Counsel relied on among others the case of Transparency International Kenya vs Teresa Carlo Omondi while submitting that the Appellant Company did engage the Respondent on fixed term basis and the contract period was clearly captured in the Respondent's respective fixed term contracts.
6. Counsel submitted that the Respondent had been voluntarily signing and entering into his various fixed term contracts and at no point in time intimated to the Appellant Company that he did not understand the terms of his fixed term contract. The Respondent confirmed the validity of each fixed term contract he was engaged under by claiming the salary and other benefits for the period of each fixed term contract up to the last fixed term contract which expired on the 30th June 2019.
7. Counsel relied on among others the case of Francis Tonui vs Heifer International Kenya (2017) eKLR while submitting that the rationale is that a fixed term contract expires with effluxion of time and unless either party invites the other to renew it, then it automatically ends as contemplated.
8. On the issue of whether the Respondent was a casual employee, Counsel submitted that that the Respondent, at time of his employment or engagement with the Appellant Company was not deemed as and is not a casual employee as per section 2 of the *Employment Act* and the Black's Law Dictionary 9th Edition because he was engaged for a period which was longer than 24 hours at a time. That he was engaged on fixed term contracts which were before the court and he would receive remuneration at the end of each month as per the contracts.
9. Counsel relied on among others the case of Krystalline Salt Limited v Kwekwe Mwakele & 67 others (2017) eKLR and submitted that casual employment entailed engagement for a period not longer than 24 hours at a time and payment made at the end of the day.
10. On the issue of whether there was conversion of Respondent's employment status, Counsel submitted that the Respondent was not and cannot be categorized as a casual employee and the provisions of section 37 of the *Employment Act* do not apply to him or to this case. That his employment status could not convert to term contract because he was engaged on fixed term contracts not a casual employee since the first time he was engaged by the Appellant Company. Counsel appreciated Lady Justice Wasilwa judgment in Esther Njeri Maina v Kenyatta University (2020) eKLR that a casual worker cannot be held as a casual worker for over 3 months. Counsel differentiated the above case with the above case where the employee was engaged as a casual worker the first time while in this case the Respondent was engaged on fixed term contract the first time.



11. Counsel submitted that the trial court appreciated that the Respondent was engaged on fixed term contract but went to assume that he gained permanency under section 37 of the Act which was an error on the trial court. Counsel relied on the case of *Rashid Mazuri Ramadhani & 10 Others v Doshi & Company (Hardware) Limited & Another (2018) eKLR* that the employee must first establish that he was engaged as a casual employee to be converted to permanent employee under the Act. That the Respondent's employment was not continuous as held by the trial court and that each fixed term contract had its unique terms which could not be used for another.
12. On the issue of whether the Respondent was wrongfully terminated from employment counsel submitted that the issue of termination of the Respondent's employment does not arise in this instance given the fact that his contract was not terminated, but the same expired at the end of its respective term due to effluxion of time, and in the process releasing the Appellant Company from any and/or all of its obligations in the fixed term employment contract.
13. Counsel submitted that the Appellant Company had no legal obligation to issue the Respondent with notice of termination of a fixed term contract where there was an ascertained date of expiry and all parties involved were well aware of said date of expiry of the fixed term contract. Counsel relied on among others the case of *Transparency International Kenya vs Teresa Carlo Omondi Civil Appeal 81 of 2018* that legitimate expectation does not arise in renewal of fixed term contract and that its non-renewal does not constitute unfair termination or dismissal. The same terminates on effluxion of time given in the fixed term contracts.
14. Counsel relied further on the case of *Willy Changwony v Laikipia University (2021) eKLR* and submitted that the Appellant Company had never and did not terminate the Respondent's employment wrongfully, that it had no obligation to justify the termination after lapse of time. That the trial court erred by failing to hold that the Respondent was in a fixed term engagement hence the aspects of section 41 of the *Employment Act* regarding termination of employment did not apply in his case because employment came to a logical conclusion at the expiry of the fixed term contract.
15. On the issue of whether the Respondent is entitled to compensation, counsel submitted that the Honourable P. K. Rotich erred in fact and law in holding that the Respondent was entitled to notice pay and payment of 12 months gross salary as damages for wrongful termination. That the Respondent was employed on a fixed term basis that had a definite start and end date and that each contract was independent of the other hence not entitled to any compensation.
16. Counsel submitted that the trial Magistrate did not give any reasons as to why the Respondent was awarded 12 months damages yet he was on a fixed term contract of 3 months and relied on among others the case of *Kiambaa Dairy Farmers Cooperative Society Ltd vs Rhoda Njeri & 3 others (2018) eKLR* while submitting on discretion of appeal court interfering with trial court discretion of damages and that in awarding the 12 months compensation the court must take in to considerations outlined under section 49 of the *Employment Act*.
17. In conclusion counsel submitted that this court should find in its favor by overturning the trial court's judgment and finding that the Respondent was not wrongfully terminated but that his fixed term contract came to its logical conclusion by effluxion of time.

RESPONDENT'S SUBMISSIONS

18. The Respondent's Advocates Situma Nyongesa & Co. Advocates filed the Respondent's submissions dated 3rd June, 2024 and on the issue of whether there were valid contracts between the parties counsel relied on provisions of section 9 of the *Employment Act* and submitted that the Contracts were null



and void for failing to comply with mandatory provisions of sections 9(3) and (4) of the Employment Act on requirement to sign them in presence of some other person other than the employer and the same be explained to the employee in language they understand.

19. Counsel submitted that the contracts were in English yet no one explained to the Respondent since he did not understand English. That the Appellant's officer would open specific pages and require the Respondent to sign, Respondent was not allowed to retain copies, there were no witnesses, period of employment in some contract unknown and the date for confirmation although signed the same time as notice was postdated to 2 to 3 months ahead. That this amounted to unfair labour practices on the part of the Appellant.
20. On the issue of whether the Respondent's employment assumed permanency Counsel relied on section 37 of the Employment Act on conversion of casual employee to permanent employee claiming that the Respondent worked with the Appellant from 2016 and he did the same job continuously every month until his employment was terminated on 28th June, 2019. That a perusal of NSSF member statement showed that the Appellant remitted the Respondent's deductions for every month continuously from April 2016 to June, 2019.
21. Counsel submitted that the Appellant's allegations that the Respondent signed contracts every year was incorrect as the Respondent was already a permanent employee by the end of 2016 in light of section 37 of the Act. Counsel echoed the holding of Lady Justice Wasilwa in *Esther Njeri Maina v Kenyatta University* (2020) eKLR where the Court held that one cannot be held as a casual employee for more than 3 months especially where the employee is doing the same job continuously. Counsel relied on the case of *Nanyuki Water & Sewerage company Limited v Benson Mwititi Ntiritu & 4 Others* (2018) eKLR where the Court held that contracts of service assumed permanency and were deemed to be so where wages were paid monthly and section 35(1)(c) should apply to that contract of service in terms of section 37. That the trial court was therefore correct in holding that the Respondent's employment assumed permanency under section 37.
22. On the issue of whether the Respondent's termination was proper, fair and lawful counsel submitted that having found that the Respondent was a permanent employee the trial Magistrate was right when he held that the Appellant was bound to issue a notice to the Respondent thus rendering his termination unlawful for contravening sections 35(1), 43 and 45 of the Employment Act. That the Appeal should be dismissed as it lacked merit.

DETERMINATION

23. The principles which guide this court in an appeal from a trial court are now well settled. In *Selle And Another v Associated Motor Boat Company Ltd & Others*, [1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows: -

“An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”



24. In this case, the Judgment of the trial court was that judgment was entered in favour of the Claimant against the Respondent as follows: -
- a. A declaration that the Respondent's action to dismiss the Claimant from employment amounted to wrongful termination of employment.
 - b. declaration that the Claimant is entitled to his terminal dues and to compensatory damages for wrongful termination of employment.
 - c. Payment of one Month salary in lieu of notice of Kshs 17,960.88
 - d. Payment of 12 Months gross salary as damages for wrongful termination Kshs 215,530.36
 - e. Costs
25. The court finds that the issues placed by the parties for determination in the appeal are:
- a. Whether the trial Magistrate erred in finding that the Respondent's employment assumed permanency under section 37 of the *Employment Act*
 - b. Whether the trial learned Magistrate erred in finding that the Respondent was unfairly terminated.
 - c. Whether the trial learned Magistrate erred in awarding the Respondent maximum compensation of 12 months' salary and notice pay

Whether the trial Magistrate erred in finding that the Respondent's employment assumed permanency under section 37 of the *Employment Act*

26. The court notes that the Respondent was employed by the Appellant from 2010 to 2019 when his services were terminated. Whereas the Appellant alleged that the Respondent's services were not continuous as he was engaged in various fixed term contracts the respondent alleged that he was continuously engaged by the Appellant for the 9 years. The court agrees with the lower court that from the payslips and he NSSF deductions the Appellant remitted the Respondent's dues every other month from May, 2016 to June 2019 without fail. This meant that his employment was continuous.
27. The Respondent has faulted the legality of the said contracts stating that the same offended provisions of Section 9(3) and (4) in that there was no witness, he was never explained the contracts in language he understood, he was never given a copy and some did not have specific employment timelines.
28. The court is guided by Section 2 of the *Employment Act* which defines contract of service as follows:

‘means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies;

The Court in the case of *Krystalline Salt Limited vs Kwekwe Mwakele & 67 Others* [2017] eKLR defined the different engagements as follows:-

"The *Employment Act* recognizes four main types of contracts of service: contract for an unspecified period of time, for a specified period of time, for a specific task (piece work) and for casual employment.....The decision to elect which form of employment to go for, either as an employee or employer will depend on a number of factors, but the



dominant consideration is, for the employee, the earnings and other physical conditions of employment, and on the other hand, savings for the employer."

This means that the Act appreciates fixed term contracts. The court therefor asks itself whether the said fixed term contracts could assume permanency under section 37 of the *Employment Act* as held by the trial court.

29. Section 37(1) of the *Employment Act* provides as follows:-

- (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 , the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service.

30. The Appellant has maintained that the proper reading of the above section meant that the Respondent must have first been employed by the Appellant as a casual worker for him to be converted to permanent worker as per section 37 of the Act. That the Respondent was all along in fixed term contracts which were independent with start and end dates. That the same could not be converted to permanent contracts under section 37.

31. The Act envisages a casual employee to be converted to term contract. The court has amplified this position as was held in the case of *Silas Mutwiri vs Haggai Multi-Cargo Handling Services Limited* [2013] eKLR that:

“The *Employment Act*, 2007 has now created a fundamental shift from the previous *Employment Act*, Cap 226 with regard to who a casual employee is. This followed many decades of abuse, violation and disregard of the rights of workers who were classified as casual workers or casual labourers. This shift has extensive ramifications as any employer who employs an employee for more than three (3) consecutive months and or is on a job that is not expected to end or be finished within this time, the law creates a mandatory provision and coverts such casual employment into term contract status.”

32. In this case was the Respondent a casual employee to be converted to term contract? The Black’s law dictionary 9th Edition defines a casual employment as ‘work that is occasional, irregular and for a short period.’ In addition, section 2 of the *Employment Act* defines a casual employee as “ a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time’

33. The court notes that the Respondent was not a casual employee for the reasons that his payslips and NSSF statement showed that he was paid every month. A proper scrutiny of his contracts shows that he was given three months contract with the first one as a general worker and the rest as machine attendant. The Respondent used to sign one contract every year since 2010 except in 2019 when he signed one contract in January and another one in April ending in June 2019. This therefore meant that the Respondent was in fixed term contracts.

34. The court does not agree with the Respondent on the validity of his contracts since he signed all those contracts all the years and he has never raised any issue with the nature of the engagement with the



Appellant. The court therefore holds that the Respondent was in a fixed term contracts and section 37 cannot convert a fixed term contract which the Act appreciates into a permanent contract.

Whether the trial learned Magistrate erred in finding that the Respondent was unprocedurally terminated.

35. The court having found that the Respondent was on fixed term contracts which he accepted all along without any complaint notes that the Respondent knew that the contract would end by effluxion of time. The court has repeatedly held that fixed term contracts end at their time and the employer has no obligation to explain why they will not be renewing the contract so long as time has lapsed. The lapse of the time does not amount to unfair termination or dismissal.

36. In the case of *Esther Muthoni Wachira v Vice Chancellor University of Nairobi & University of Nairobi* [2022] eKLR while relying on court of Appeal decision, the Court had this to say;

In *Registered Trustees Of The Presbyterian Church Of East Africa & Another Versus Ruth Gathoni Ngotho Kariuki* 2017 ECLR ‘Bearing the foregoing in mind, we note that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry. Accordingly, any claim based after the expiry of the respondent’s contract ought not to have been maintained. This is in relation to the salary for the months of April up to 5th May, 2010. Similarly, since the respondent’s contract came to an end by effluxion of time any claim for wrongful termination could not be maintained’

37. In the case of *East Africa Sea Food Limited v Mwazito (Appeal E013 of 2020)* [2023] KEELRC 1257 (KLR) (20 April 2023) (Judgment) the court had this to say:-

Whether to issue a fixed term contract or not is regulated under the provisions of Section 10(3) (c) of the Act. An employer is allowed the prerogative to employ an employee under a fixed term contract with a start and end date. the self-executing contract is lawful and valid in employment and labour relations. The Court of Appeal in Civil Appeal No. 18 of 2018 *Transparency International Kenya v Teresa Carlo Omondi* [2023] eKLR held that a fixed-term employment contract does not create a legitimate expectation of renewal. Further, the non-renewal of fixed-term employment does not amount to unfair termination of employment warranting compensation. Section 10(3) (c) of the Act then lifts the obligation on an employer to explain reasons for termination of employment in fixed-term contract as the same lapse by effluxion of time without creating a right of legitimate expectation of renewal.

38. In addition, in the case of *Margaret A Ochieng v National Water Conservation & Pipeline Corporation* [2014] eKLR the court while dealing with the question of whether there is automatic need for notice of renewal of a fixed-term contract held that;

Automatic renewal [of a fixed-term contract] would undermine the very purpose of the fixed-term contract, and then revert to indeterminate contracts of employment..... Courts have upheld the principle that fixed-term contracts carry no expectancy of renewal, in a catena of judicial authorities..... The Court is persuaded that the Claim has no merit. The fixed term contract had its own in-built termination notice, in that the date of termination was advised to the Claimant on execution of the three-year contract in December 2008. She knew termination would be upon the lapse of the three years in 2011 ...



39. The Respondent received his final dues and acknowledged that he had no further claims against the Appellant. The Respondent was therefore never unfairly terminated by the Appellant.

Whether the trial learned Magistrate erred in awarding the Respondent maximum compensation of 12 months' salary and notice pay.

40. The court having established that the Respondent was not unfairly terminated but his contract terminated by effluxion of time, it goes without saying that the Respondent was not entitled to damages for unfair termination or notice pay. The court notes that the Respondent was paid his dues and signed that he did not have any further claim against the Appellant. In any case an award of maximum compensation has to be explained as was held in the Court of Appeal in Kenya Broadcasting Corporation v Geoffrey Wakio(2019) eKLR that;

(22) This Court has established the rule that an award of the maximum 12 months' pay must be based on sound judicial principles. In Ol Pejeta Ranching Limited vs. David Wanjau Muhoro [2017] eKLR this Court categorically stated that the trial Judge must justify or explain why a claimant is entitled to the maximum award; that the exercise of discretion must not be capricious or whimsical.

41. In the upshot the Appeal is found merited and hereby succeeds and the order of the lower Court entering judgment in favour of the respondent is hereby substituted with an order dismissing the suit in the lower Court.

42. The appellant shall have costs of the Appeal and costs in the lower court.

43. It is so ordered.

DATED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024

DELIVERED VIRTUALLY THIS 11TH DAY OF OCTOBER, 2024

Abuodha Nelson Jorum

Presiding Judge-Appeals Division.

