



Okello v Usomi Limited (Employment and Labour Relations Cause E30 of 2024) [2025] KEELRC 2696 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KEELRC 2696 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E30 OF 2024
NJ ABUODHA, J
OCTOBER 3, 2025**

BETWEEN

ANNE FRANCISCAR OKELLO APPELLANT

AND

USOMI LIMITED RESPONDENT

(Being an appeal from the Judgment delivered by Hon. B.M. Cheloti, PM, on 4th October, 2024)

JUDGMENT

1. Through the Memorandum of Appeal dated 22nd October 2024, the Appellant appeals against the whole of the Judgment of Honourable B.M. Cheloti (PM).
2. The Appeal was based on the grounds that:
 - i. The learned trial Magistrate erred in fact and law by failing to give concise statement of the case, points of determination, decision thereon and reason for her judgment.
 - ii. The learned trial Magistrate erred in law and in fact in failing to put into consideration the proceedings and evidence on record in advancement of the appellant case and thereby ignoring relevant guiding facts to enable her reach a fair and reasoned determination in her judgment hence prejudicing the appellant.
 - iii. The learned trial Magistrate erred in fact and in law by failing to appreciate the fact that the Respondent did not remit salary to the Appellant for a period of 6 months and a half salary as from the month of April 2019 to January 2020 amounting to Kenya shillings 398,448.00 and the Respondent did not remit the Claimant payee causing the claimant to be indebted to the KRA for Kshs.114,032.65.



- iv. The learned trial Magistrate erred in law and in facts by deliberately failing to consider evidence on record to confirm that the Respondent did not remit payee to KRA and the acknowledgement of the amount Respondent agreed to be indebted to the Appellant.
 - v. The learned trial Magistrate erred in law and fact by failing to appreciate the spirit behind the provision of article 159 of *the constitution* and ignoring important facts by dismissing the Appellant arguments summarily without consideration of distinctive nature of the case before her for consideration.
 - vi. The learned trial Magistrate erred in law and in fact by failing to appreciate and/ or capture and/or record the evidence tendered before the court by the appellant during the hearing and thereby missing out on relevant evidence thus delivering judgment which did not factor the evidence tendered in court.
3. The Appellant prayed that the judgment and all consequential order be set aside and the Appeal be allowed with costs.
 4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant's Advocates Okello Okoth Advocates LLP filed written submissions dated 22nd October 2024.
6. Counsel relied on the case of the case of *Gitobu Imanyara & 2 others vs Attorney General* (2016) eKLR on the role of the first appellate court.
7. On the grounds 1& 2 counsel submitted that it is trite law that all judgments must start by giving concise statement of the case followed by points of determination, decision, thereon and the reasons for the judgment. That the judgment of the trial magistrate B.M Cheloti delivered on 4th October 2024 missed out on the above stated basics making it fatal.
8. Counsel submitted that the Appellant was employed by the Respondent for a period of one year and continued to work for another year and resigned due to lack of payment by the Respondent. That the judgment had determination but it was very brief and shallow and failed to include the details as per the chronology of events as laid down during the hearing, instead, the trial magistrate only made a scanty analysis of the evidence.
9. Counsel further submitted that the judgment had no point of determination, decision thereon and rationale for her judgment and thus the reason the trial magistrate misdirected her mind and proceeded to dismiss the appellant's case while the Appellant had proved her case on balance of probabilities as required under law considering the evidence tendered by the Appellant regarding lack of payment of salary and the arrears to KRA that the Respondent failed to submit.
10. Counsel submitted that the trial magistrate failed to consider that the Respondent confirmed that the Appellant was not paid salary and provided evidence where Respondent acknowledged debt owed to the Appellant and the mutual agreement to the termination of the contract. That the learned trial magistrate relied heavily on the submission of the Respondent hence did not consider the Appellant's submission in her judgment and thereby ignored very relevant guiding facts to reach a fair and reasonable determination.
11. On the grounds 3 and 4 counsel submitted that the Appellant was employed as a marketing specialist by the Respondent with a salary of Kshs 85,589.00 in which the Respondent due to failure to remit the



- Claimant salary led to her resignation on 1st February 2020. That the Respondent further frustrated the Appellant when they wanted to review the Appellant's contract to the effect that her remuneration would be varied from fixed to commission based of 2 % with a retainer of Kshs. 10,000/- providing no clarification on how the organization would guarantee continued business support to enable the Appellant to meet sufficient sales that would earn her commission at least commensurate to her existing salary which amount to unfair practice.
12. Counsel submitted that the contract for employment was from 2nd April 2018 to 2nd April 2019, but the Appellant continued to work and was to be paid only if there was availability of funds as they had agreed on, however, the Respondent did not produce any evidence to the effect. That the Respondent stated the reason for the Appellant's resignation was that the Appellant did not want to be paid on commission basis.
 13. Counsel submitted that the Respondent agreed and confirmed the letter dated 27th February 2020 in which parties mutually agreed that the Respondent is indebted to the Appellant to the amount of Kshs. 232,428.00/= being outstanding arrears and to be paid in four months instalment as from 31st March 2020. That the Respondent confirmed that he is yet to pay the Appellant the amount and that the Respondent did not remit the payee as there was no money in the company but stated that they only remitted the payee after deduction of the salaries which were not paid.
 14. Counsel submitted that the Respondent stated that it did not remit the salaries of the Appellant as the Appellant was not bringing work to the company, but the Respondent did not provide proof of the Appellant's redundancy.
 15. Counsel submitted that the Respondent's actions amounted to constructive dismissal which goes against rules of justice and the Employment Act in particular section 18(2)(c) and 18(5) (a) which ought to be followed during the Appellant's employment. Counsel relied on the cases of Western Excavating (ECC) Ltd vs Sharp (1978) 2 WLR344 and Coca Cola East and Central Africa v Maria Kagai Ligaga on legal principles of constructive dismissal.
 16. Counsel submitted that as per the Coca Cola case the burden of proving a repudiatory breach or constructive dismissal was borne by the employee and in this case, the Appellant did furnish sufficient evidence to establish a constructive dismissal.
 17. On grounds 5 and 6 counsel submitted that either by design or by default the trial court erred in law and facts contrary to the spirit of Article 159 of the Constitution of Kenya leading to miscarriage of justice.
 18. Counsel submitted that despite the parties having filed detailed statements which were adopted at the hearing, it is surprising to see the scanty recordings of evidence by the trial magistrate on issues which were raised at cross examination by the rival parties. That the proceedings and judgment had' some contradicting statements.
 19. Counsel submitted that the Respondent stated that it had outstanding salary debt to pay the Appellant which in the judgment the trial magistrate confirmed that the Appellant was entitled to Kshs 234,428/= as per the mutual agreement signed by parties on 27th February,2020 and the same amount has never been paid. That the Respondent also confirmed not having remitted the Appellant's dues to KRA to date.

Respondent's Submissions

20. The Respondent did not participate in this appeal despite proof of service.



Determination

21. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its own findings and conclusions as held in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR where it was stated thus:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

22. The Judgment of the trial court was that the Claimant’s suit was dismissed for lack of merit. The Claimant was estopped from claiming more money than what was indicated in the mutual termination of contract hence constructive dismissal was not applicable. The Appellant was aggrieved by the said judgment and fronted six grounds in her Memorandum of Appeal dated 22nd October, 2024 which this court will condense in to one issue for determination as follows which is whether the trial magistrate erred in dismissing the Appellant’s suit and not awarding the reliefs sought.

23. It was not in dispute that the Appellant was engaged by the Respondent on one-year fixed term contract from 2nd April, 2018 as a marketing specialist but the Appellant continued working past the one year up to February, 2020 when she resigned citing change of her contract terms and failure by the Respondent to pay her salaries when due. This therefore meant that her contract was constructively renewed upon expiry since she continued working until she resigned in 2020. The Respondent however alleged that the Appellant’s contract had since lapsed and she was thereafter engaged on casual basis. The contract provided that it could be renewed subject to availability of funds.

24. The court noted that the Appellant was offered a new contract where she would be paid Kshs 10,000/= as a retainer then 2% commission on work done which she did not agree to and resigned citing the change on her engagement terms and failure by the Respondent to pay her dues.

25. The court appreciates that fixed term contracts are not renewable automatically as was held in the case of *Rajab Barasa & 4 Others v. Kenya Meat Commission* 2016] eKLR, where it was stated that a fixed term contract will not be renewed automatically even when there exists a clause allowing for such renewal. The court further appreciates that fixed term contracts carry no legitimate expectation of renewal. In the case of *Osoti v Trees for the Future* Inc (Cause E002 of 2023) [2024] KEELRC 962 (KLR) (2 May 2024) (Judgment) the court observed as follows: -

The general rule is that a fixed term contract carries no expectation for renewal. It is however settled that a fixed term contract with a renewal clause may create expectancy of renewal on the part of the employee based on previous contract renewals.

26. This court takes the view that the Appellant was initially engaged by the Respondent from April, 2018 she continued working past the expiry of the contract without any communication from the Respondent that her contract was not renewed hence she had legitimate expectation for renewal of her contract. Regarding the considerations to be made when considering whether a legitimate expectation



for renewal of a fixed term contract was created, the sentiments of Rika J. in *Teresa Carlo Omondi v Transparency International- Kenya* [2017] eKLR guide as follows-

“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. The presence of these elements however, is not to be taken as conclusive proof of legitimate expectation.”

27. In the case of *Otiende v Ligawa & another* (Petition E052 of 2022) [2023] KEELRC 3363 (KLR) (13 December 2023) (Judgment) the court observed as follows: -

In the Court’s view, the conduct of the Respondents not only created a legitimate expectation on the Petitioner but also led to an inference that he was still an employee until released formally in terms of clause 1(iv) of the contract.

28. The conduct of the Respondent in this case where it continued paying the Appellant her salary, never notified her of its intention of not renewing the contract before it expired and it never objected to the Appellant’s continuation of work amounted to the Appellant’s legitimate expectation. The Appellant was presumed to be bound by the terms of the existing contract.

29. Section 10(5) and section 13 of the *Employment Act* prohibits an employer from revising the terms of employment unilaterally. The court in addition, notes that the employer cannot just wait for the contract to expire, continue utilizing the services of the employee then later claim that the contract had expired. The intention of the Respondent of not renewing the contract ought to have been communicated before the said contract expired and not after engaging the Appellant after the contract expired. The Appellant had legitimate expectation that her contract had since then been constructively renewed.

30. The Supreme Court in the case of *Gatuma v Kenya Breweries Ltd & 3 others* (Petition E023 of 2023) [2024] KESC 52 (KLR) (Civ) (30 August 2024) (Judgment) held that: -

From the provisions of sections 10(5) and 13 of the *Employment Act*, any unilateral variation of the terms of an employment contract may be deemed as a repudiation of the contract and in case the same would lead to termination of employment the same may be deemed as constructive dismissal. The provisions of section 13 equally applied to remuneration. Any unilateral changes in remuneration and terms of employment without informing the employee would be tantamount to unfair labour practices.

31. From the above cited authorities, it is evidently clear that in any change of terms of employment, the employee ought to be consulted. In this case there was no proof that the Appellant was consulted.



32. The court therefore overturns the finding of the trial court that the Appellant was not constructively dismissed.

33. The Court of Appeal explained the doctrine of constructive dismissal in the case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR where it observed that:

“The key element in the definition of constructive dismissal is that the employee must have been entitled or have the right to leave without notice because of the employer’s conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer’s behavior towards him was so unreasonable that he could not be expected to stay - this is the unreasonable test. The second interpretation is that the employer’s conduct is so grave that it constituted a repudiatory breach of the contract of employment - this is the contractual test. The contractual test is narrower than the reasonable test”.

34. The court notes from the above decision that the Respondent’s actions of changing the terms of employment of the appellant such as remuneration term and failure to pay her salary as per existing contract amounted to constructive dismissal as it caused her resign unwillingly.

35. The trial court dismissed the Appellant claim stating that she was not entitled to any further amount other than what was stated in the mutual termination of contract agreement. Whereas the court agrees with the trial court that the said agreement was binding between the parties since no coercion, fraud or any of vitiating factors of a contract were noted, the trial court did not ascertain whether the Respondent honoured the said agreement.

The Appellant never disputed the amount stated in the mutual agreement hence the court will award as per what parties agreed was owing which was Kshs 234,428/=

36. The trial court did not address itself to the amount the Appellant owed to KRA as deductions from her salary. The Appellant produced evidence to that effect and the Respondent never produced any evidence of remitting the same to KRA. The Appellant produced a tabulation of what was not paid Kshs 114,032.65 as money owed to KRA which the Respondent never objected to.

37. This court having found that the Appellant was unfairly terminated she was entitled to damages for unfair termination under section 49 of the *Employment Act*. The court notes that the Appellant had worked for one year and 9 months and that the respondent never paid her salary regularly and the fact that the respondent despite being served never bothered to defend the finding of the trial court in this appeal, an award of 4 months’ salary would be reasonable in the circumstances.

38. In the upshot the Appeal succeeds as follows: -

- a. 4 months’ salary as compensation for unfair termination Kshs 342,356/=
- b. Accrued salary arrears... Kshs 234,428 /=
total KSHS 576,784/=

39. It is so ordered.

DATED AT NAIROBI THIS 3RD DAY OF OCTOBER, 2025

DELIVERED VIRTUALLY THIS 3RD DAY OF OCTOBER, 2025

ABUODHA NELSON JORUM



PRESIDING JUDGE-APPEALS DIVISION

