REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEALNO. E135 OF 2023

(Before D. K. N. Marete)

GODFREY BUNDI…….…….1ST APPELLANT

SIMON MAERA JAMES……..……...…2ND APPELLANT

JOSEPH NYAKUNDI OMWENGA…….....3RD APPELLANT

JAMES OMBUI NYAMWEYA…….....4TH APPELLANT

JARED BABU…….....5TH APPELLANT

JUSTUS OKINDO NYAMACHERE……..……...…...6TH APPELLANT

DANIEL OMOTE ONGERI…….…….7TH APPELLANT

VINCENT ONSERIO BARONGO……...……...……..8TH APPELLANT

ZAPHANIAH ANUNDA NYANGAU…….…..9TH APPELLANT

AND

HALAR INDUSTRIES LIMITED….……..…...RESPONDENT

JUDGMENT

1. This matter was originated by way of Memorandum of Appeal dated 18th July, 2023. It comes out as follows;

    1. *The learned magistrate erred in law and fact by failing to award the Appellants one month's salary in lieu of notice.*

2. *The learned magistrate erred in law and fact by failing to award the Appellants their claim for overtime despite there being no evidence of such payments and also placing the burden of proving the same on the Appellants whereas Section 10 and 74 of the Employment Act, 2007 places the burden on the employer who is enjoined to keep records of employment.*
3. *The learned magistrate erred in law and fact by failing to award the Appellants house allowance as required by the mandatory provisions of Section 31 of the Employment Act, 2007.*
4. *The learned magistrate erred in law and fact by failing to award the Appellants their claim for leave days for the years worked.*
5. *The learned magistrate erred in law and fact by failing to award the Appellants unpaid public holidays that they worked.*
6. *The learned magistrate erred in law and fact by failing to award the Appellants their claim for underpayments despite the fact that the Appellants were underpaid during the course of their employment.*
7. *The learned trial magistrate erred in law and fact in failing to make a finding that the termination of the Appellants was unlawful and unfair.*
8. *The learned Magistrate erred in law and fact by not considering the facts, evidence and submissions made by the Appellants.*
9. *The learned Magistrate erred in law and fact by failing to consider the trial dues and benefits accruing to the Appellants before the signing of the three months fixed term contracts.*
10. *The learned Magistrate erred in law and fact in dismissing the Appellants' claim with costs to the Respondent.*

2. The Appellant prays for orders:

    1. *The appeal herein be and is hereby allowed.*
    2. *The judgment and decree of the trial court delivered on 19 June, 2023 in C.M.E.L NO. 205 OF 2020 be set aside.*
    3. *The Honourable Court be pleased to award the Appellants the terminal dues and compensation as prayed in the Appellants' statement of claim filed in the lower court amounting to Kshs. 8,546,505.89/= or such amount as the Honourable Court may deem fit and just.*
    4. *The costs of the appeal and the lower court be awarded to the Appellants.*
    5. *The Honourable Court do issue such orders and relief as it may deem fit and just to grant.*

It is the Appellants' case and submissions that they instituted proceedings before the trial court seeking payment of terminal dues following what they contended was an unfair and unlawful termination of their employment by the Respondent. In its judgment dated 19th June 2023 the trial court dismissed the suit on the basis that the Appellants had executed three-months fixed term contracts. These were allowed to lapse and consequently the court held that the Respondent's conduct did not amount to unfair termination notwithstanding the absence of any notice.

Being dissatisfied with that determination, the Appellants preferred the present appeal, challenging the entirety of the judgment and urged this court to determine whether the termination was unfair and unlawful, whether they were entitled to terminal dues and compensation besides the issue as to who should bear the costs of the appeal and the proceedings below.

As to the issue whether the termination was unfair and unlawful, the Appellants' submission that the law is settled that a termination of employment is unfair unless the employer proves the existence of a valid reason, demonstrates that the reason is fair, and shows that the termination was carried out in accordance with a fair procedure.

The Appellants submit that they were served the Respondent diligently and faithfully on diverse dates between 2009 and 2013 all the way to June 2019 when their services were abruptly terminated without notice and without any justifiable reason. They further submit that their termination from employment offended the rules of natural justice and was in clear violation of Part VI of the Employment Act, 2007. In this regard, reliance is placed on section 45 of the Act, which expressly prohibits unfair termination and section 35, which mandates issuance of notice or payment in lieu thereof.

It was further the Appellants' submission that the trial magistrate erred in law and in fact by holding that no notice was required, despite expressly acknowledging that none had been issued. It is their case that the finding by the trial court that *"the Respondent's actions did not amount at all to unfair termination as no notice was required"* was a misdirection. This is because section 35 of the Employment Act, 2007 imposes a statutory obligation on an employer to issue notice, save in circumstances not applicable to the present case.

Moreover, the Appellants submits that although they were issued with three-month contracts in 2019, those contracts were illegal and could not lawfully alter the true nature of the employment relationship. They averred that their NSSF statements demonstrated continuous service over many

years and that the sudden introduction of short fixed-term contracts was a calculated and premeditated attempt by the Respondent to defeat accrued employment rights and to unlawfully terminate their long-standing service. The Appellants in buttressing this position sought to rely on the authority of ***Esther Njeri Maina v Kenyatta University [2020] eKLR***, where the court held that prolonged and continuous service attracts the protection of Section 37 of the Employment Act, 2007 and that an employee cannot lawfully be retained on casual or temporary terms indefinitely. Moreover, unilateral conversion of long service into temporary contracts instead of confirmation to permanent status, constitutes a breach of the law. The case affirms that section 37 of the Employment Act (supra) operates to convert casual or irregular employment into a contract of service once the statutory threshold is met, thereby entitling employees to the full protections of the Act, including notice under section 35.

In applying these principles to the present appeal, it is submitted that the Respondent acted unlawfully in disregarding years of continuous service and in relying on the expiry of three-month contracts to justify termination without notice or reason. The Appellants urged the Court to find that the termination was unjustified, unprocedural, unfair and unlawful.

On the issue of terminal dues and compensation, it was the Appellants' submission that the trial court's refusal to award any dues flowed directly from its erroneous finding that the termination was lawful. They submitted that once this court finds that the termination offended sections 35 and 45 of the Employment Act, 2007, they are entitled to the remedies pleaded in their statement of claim dated 19th February 2020. These include one month's salary in lieu of notice, overtime pay for hours worked in excess of the statutory threshold, annual leave in accordance with section 28 of the Act, and

house allowance pursuant to section 31 on the basis that they were neither housed nor paid housing allowance throughout their employment. The Appellants again submitted that they worked on public holidays without compensation, contrary to the law, therefore, they are entitled to payment for such days as pleaded.

The Appellants also sought compensation for unfair termination under section 49 of the Employment Act, 2007 submitting that the court ought to exercise its discretion and award the maximum twelve months' gross salary, given the length of service, the manner of termination and the Respondent's conduct. Additionally, it was submitted that the Respondent failed to issue certificates of service, and the Appellants prayed for an order compelling compliance with section 51 of the Act. It is the Appellants' submission that the trial court failed to properly appreciate the facts, the evidence and the applicable law, and thereby arrived at an erroneous decision.

The Respondent's submission is that the appeal is misconceived, lacks merit and amounts to an impermissible attempt by the Appellants to invite this court to re-litigate issues that were conclusively determined by the learned trial court after a full hearing. Again, the trial court properly directed itself on both fact and law and that the findings reached were fully supported by the evidence placed before it.

During the hearing at the lower court, it produced written fixed-term contracts duly executed by each Appellants for the years 2016, 2017, 2018 and 2019. These contracts were admitted in evidence without objection and clearly indicated the commencement dates, duration, and expiry of each engagement. Therefore, the Respondents contends that the trial court correctly found, as a matter of

fact that the Appellants were not casual employees but were engaged on successive fixed-term contracts whose terms were clear and unequivocal.

It is the Respondent's other submission that the Appellants, while testifying before the trial court, conceded that they signed the contracts and worked under them for the full contractual periods. No evidence was tendered to demonstrate coercion, fraud, or misrepresentation in the execution of the contracts. Consequently, the Respondent submitted that the trial magistrate correctly held that the Appellants were bound by the terms of the contracts they voluntarily entered into.

On the issue as to whether the Appellants were casual employees, it is the Respondent's submission before the trial court that the statutory definition of a casual employee under section 2 of the Employment Act was not met. Evidence before the trial court showed that the Appellants were paid monthly, not daily, and worked continuously over defined contractual periods. The Respondent submitted that the learned trial magistrate expressly addressed this issue and correctly found that section 37 of the Employment Act, 2007 was inapplicable, there being no casual employment capable of conversion.

The Respondent again submits that the Appellants were, at all material times, employees engaged on fixed term contracts with clearly defined commencement and expiry dates. It was submitted that the Employment Act, 2007 a forecited recognizes fixed term employment as a lawful and legitimate mode of engagement and that such contracts naturally terminate upon expiry without the necessity of notice. It posited that the trial court properly relied on the principles articulated in **Krystalline Salt Limited v Kwekwe Mwakele & 67 others [2017] KECA 717 (KLR)** that;

"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."

It is the Respondent's submission that Section 37 of the Employment Act, 2007 provides for conversion of casual employment into term contracts was wholly inapplicable to the Appellants' circumstances. Conversion under Section 37 presupposes the existence of casual employment in the first instance, which the Appellants had failed to establish. In this regard, reliance was placed on the Court of Appeal decision in ***Rashid Mazuri Ramadhani & 10 others v Doshi & Company (Hardware) Limited & another [2018] eKLR,*** which clarified that conversion cannot occur unless casual engagement is first proved. The Respondent distinguished the case of **Esther Njeri Maina v Kenyatta University [2020] eKLR** relied upon by the Appellants on the basis that the claimant therein had initially been engaged as a casual employee unlike the Appellants who were engaged on fixed term contracts from inception.

On termination, it was the Respondent's submission that the learned trial court correctly framed the issue as one of expiry of contract by effluxion of tim and not termination. The Respondent submitted that the evidence before the trial court showed that the Appellants' contracts expired automatically by effluxion of time, a process recognized in law. This does not amount to dismissal or termination by the employer. On this subject, reliance was placed on the Court of Appeal decision in **Transparency International - Kenya v Omondi [2023] KECA 174 (KLR)**, where the court observed that non-renewal of a fixed term contract does not constitute unfair termination and that the doctrine of legitimate expectation does not ordinarily arise in such circumstances.. It was submitted that the trial

court correctly held that expiry of a fixed-term contract does not amount to termination and does not trigger the procedural safeguards under sections 41, 43 and 45 of the Employment Act, 2007.

Again, it was further submitted that where a contractor has a definite end date known to both parties, no notice of termination is required as the contract itself contains an in-built notice of expiry. The Respondent relied on the authority of **Samuel Chacha Mwita v Kenya Medical Research Institute [2014] eKLR**, **Trocaire v Catherine Wambui Karuno [2018] eKLR**, and **Amatsi Water Services Company Limited v Francis Shire Chachi [2018] KECA 255 (KLR)** all of which affirm the principle that courts cannot rewrite fixed term contracts freely entered into by parties.

On legitimate expectation, the Respondent submitted that this issue was fully addressed by the trial court which correctly found that mere renewal of fixed-term contracts in the past does not create a legitimate expectation of such renewal. The Respondent contends that no promise, representation, or policy guaranteeing renewal was proved at the trial, thus, the court correctly declined to impose obligations not contained in the contract.

The Respondent's other submits that the trial court properly evaluated the evidence and found that claims for notice pay, compensation for unfair termination, overtime, leave, house allowance and public holidays were either unsupported or legally untenable. The Respondent averred that pay slips and employment records were produced before the trial court showing compliance with statutory obligations, and that the Appellants failed to discharge the burden of proof placed upon them under sections 107 and 108 of the Evidence Act, Chapter 80, Laws of Kenya.

On compensation, the Respondent submitted that the Appellants were not entitled to any award under section 49 of the Employment Act, 2007 there having been no unfair termination. The Respondent averred that compensation is discretionary, not automatic, and is only available in deserving cases. They sought to rely on the authority of **Kiambaa Dairy Farmers Co-Operative Society Limited v Rhoda Njeri & 3 others [2018] eKLR** where the Court of Appeal faced with the same situation and circumstances observed as follows

> *"I agree with that reasoning and state categorically that the compensatory damages for unfair dismissal must always be seen as first of all not mandatory or automatic meaning that they should be awarded only in deserving cases; and, even where appropriate, there must be an assessment with the range of zero to twelve months in mind. To my mind, this means, as it must, that the less the violation of an employee's rights that accompany his dismissal, the fewer the monthly wages will be awarded. Twelve months, the statutory maximum ought in all logic to be reserved for the most egregious cases of abuse where there is blatant and contumelious disregard for the rights and disregard for the rights and dignity of an employee who is being dismissed. Awards of the full twelve months ought therefore to be the exception, all fully explained and justified, as opposed to a default or knee jerk award for every and any case of unfair dismissal."*

It was submitted that even assuming liability, which was denied, an award of twelve months' compensation would be wholly unjustifiable given that the Appellants were on three-months fixed term contracts.

The Respondent submitted that notice pay was not due as the contracts expired by effluxion of time. Additionally, the claims for overtime, annual leave, house allowance and public holidays were

unsupported by evidence and were in any event rebutted by pay slips and duly executed clearance forms showing that all dues had been settled. It was further submitted that certificates of service had been prepared and were available for collection and that the Respondent had complied with its statutory obligation under Section 51 of the Employment Act, 2007.

On costs, it is the Respondent's submission is that the trial court properly exercised its discretion in awarding costs to the Respondent as the successful party. Reliance is had on Section 12(4) of the Employment and Labour Relations Court Act and Rule 28 of the Employment and Labour Relations Court Rules, 2024 It further relied on the authority of **Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR** and **Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd[2]**where this court observed thus;

> "*The basic rule on attribution of costs is that costs follow the event.….. It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case."*

After a considered look and scrutiny of the Memorandum of Appeal, the Record of Appeal and the submissions of the parties the issues for determination therefore become;

1. Whether the Appellants' termination from employment was unfair and unlawful
2. Whether the Appellants are entitled to the terminal dues and compensation as sought in the statement of claim
3. Costs

On the 1st issue for determination, that is whether the Appellants' termination from employment was unfair and unlawful, the Appellant's submission is that they offered their services continuously over a prolonged period of time and faulted the Respondent for attempting to introduce three months contract. However, from the evidence on record, the Respondent produced duly signed employment contract fixed for a period of three months between the year 2016 and 2019 and clearance notice showing they were paid their dues upon expiry of these contracts.

The Appellants failed to produce in court any evidence to corroborate that they were engaged by the Respondents beyond the period provided in the contracts which were produced in the trial court.

This court aligns itself with the trial court's holding that the Appellants had knowledge that they had signed fixed term contracts which were to end at the period of three months subject to renewal and the renewal was not automatic. This is affirmed in the authority of **Samuel Chacha Mwita vs Kenya Medical Research Institute 2014 eKLR; which provided thus**

> *" a fixed term employment contract naturally terminate at the expiry date. There is a definite start and a definite end."*

On the issue as to whether the Appellants are entitled to the terminal dues and other relief sought in the Statement of Claim this court seeks reliance on the authority of **Transparency International - Kenya v Omondi [2023] KECA 174 (KLR)** wherein the court provided thus;

> *"Having noted that the respondent was in employment under a fixed-term contract and that the contract came to an end at the appointed time, we are of the view that any relief sought by the respondent on basis of her assertion that her employment was unfairly terminated was automatically not available to her. The Court of Appeal decision in Registered Trustees of the Presbyterian Church of East Africa & another v Ruth Gathoni Ngotho [2017] eKLR lends*

credence to our holding, where the court pronounced itself, thus:" Bearing the foregoing in mind, we note that fixed term contract carries 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 of the months 5th of April up to 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."

Therefore, the Appellants' claim for one month's notice cannot stand. Additionally, the claim for underpayment is cannot be sustained as the Appellants entered into the employment contracts voluntarily and there is no evidence on the record that they objected to the pay issued to themselves.

As for housing allowance and annual leave, CW1 confirmed in his testimony that they were paid housing allowance and leave as per the contract. This was as much for public holidays where the Respondent testified that the company usually closes during public holidays which was uncontroverted by the Appellants.

I am therefore inclined to dismiss the Appeal with orders that each party bears their costs of the same.

Delivered, dated and signed this **25th** day of **February** 2026.

D. K. Njagi Marete

JUDGE

Appearances:

1. Miss. Kimani instructed by Nyabena and Co. Advocates for the Appellant
2. Mr. Ondego instructed by Timothy Got Ondego for the Respondent