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Wambugi v Board of Management Afya Yetu Initiative (Civil Appeal 180 of 2019) [2024] KECA 1557 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KECA 1557 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 180 OF 2019

W KARANJA, J MOHAMMED & AO MUCHELULE, JJA

OCTOBER 25, 2024

BETWEEN

CATHERINE WANJIRU WAMBUGI .... APPELLANT

AND

BOARD OF MANAGEMENT AFYA YETU INITIATIVE .... RESPONDENT

(Being an appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nyeri (Nzioka Wa Makau, J.) delivered on 17th January 2019 in ELRC Case No. 482 of 2017)

JUDGMENT

1. The dispute arose from an employee/employer relationship. The respondent employed the appellant on 1st January, 2013 as an accountant on contractual basis. The relevant term of employment provided as follows:

> " Upon review of your credentials and performance in the interview, I am pleased to inform you that you have been appointed as the Afya Yetu Initiative (AYI) accountant with effect from 1st January 2013 up to 31st December 2014.Your salary will be a basic salary of Kshs.71,130 per month and a house allowance of Kshs.21,339, NSSF-Kshs.200 and NHIF-Kshs.320 will be paid for you by AYI."

2. Upon expiry of the term, the respondent declined to extend the contract of employment and this dispute is primarily on the interpretation of the said clause.

3. Upon non-renewal of her contract of employment, the appellant sued the respondent in ELRC Case No 482 of 2017 seeking the following prayers;

> "a) Compensation for wrongful dismissal to a maximum of 12-month wages and general damages emoluments/contingencies at a rate of 15% of the total amounting to Kshs.1,387,035.00
>
> b. Damages for lost earnings from 7th January, 2015 up to today being monthly earnings at a rate of Ksh.92,469 and annual increment of 5% of the salary p.a;
>
> c. The claimant be reinstated to his job as the General Secretary of the respondent and Programme Coordinator of CBHIS.
>
> d. Costs of the suit; and
>
> e. Interest on a, b and d above till payment in full."

4. In the trial court, the appellant's case can be summarized as follows: that she was employed by the respondent as an accountant on 1st January 2013; that she performed her duties diligently, and that the management was impressed leading to her appointment on 15th March 2012 as a Secretary General; that on 7th January 2015 she was dismissed through a short message (SMS) and that as at that date she was the Secretary General and the Programme Coordinator of the CBHIS Programme of the respondent; that the respondent unexpectedly, and without assigning any reason, wrongfully, unfairly, and maliciously terminated her employment without offering her an opportunity for notification and hearing and/or proof for termination within the meaning of section 41 and 43 of the *Employment Act* and that she did not voluntarily leave employment.

5. From the record before us, the respondent's position in the trial court was that the appellant's appointment to serve as acting team leader was part and parcel of her fixed term employment as programme coordinator with the respondent which terminated by effluxion of time on 31st December, 2014; that she was not a fully fledged Secretary General or that she worked until 7th January, 2015; that the respondent did not terminate her contract, or dismiss her as alleged, but that the contract expired, and a decision was made not to renew, which was lawful and justified; that she was notified that her contract would not be renewed, and that the claim lacked legal basis.

6. After considering the evidence tendered, the learned Judge (Nzioka Wa Makau, J) held as follows:

> "There was a contract exhibited by the respondent which was from 1st January 2013 till 31st December 2014. It was a 2-year contract issued to the claimant. It was not signed by the claimant but had been signed by the respondent's representative on 1st January 2013. It was not averred or even shown that this contract was renewed. The claimant was therefore not dismissed as she alleged since by January 2015 there was no contract. Constructive dismissal occurs when there is a change of the employee's conditions of work to force their resignation. There was no constructive dismissal in this case as the email she relies on speaks of the non-renewal of her contract. The foregoing is clear indication that the case is only fit for dismissal and the suit herein is dismissed with no order as to cost."

7. Aggrieved by the judgment, the appellant filed a notice of appeal on 23rd January 2019 and a memorandum of appeal dated 19th July 2019. The appellant has listed 5 grounds in her memorandum of appeal, which can be summarized as follows: the learned trial Judge erred in law and in fact; by failing to find that the contract relied upon by the respondent in terminating the appellant's employment was

never signed by the appellant; in failing to find that the appellant was aware of her terms of employment whereas she was never given a copy of her contract of service upon her promotion; in failing to find that the appellant's employment with the respondent was terminated illegally without compliance with the contract of service relied upon by the respondents and contrary to the *Employment Act*, 2007; by finding that there was no constructive dismissal contrary to the evidence on record; dismissing the appellant's claim on flimsy grounds hence miscarriage of justice; and in failing to find that the appellant was entitled to damages and all consequential costs for unlawful dismissal from employment.

8. The appellant through her advocates filed submissions dated 15th May 2023. The submissions addressed three broad issues: whether the termination of the contract of employment of the appellant was procedural and in accordance with the contract of employment or the *Employment Act*, 2007; whether the termination of the appellant's contract was constructive dismissal or not and whether the appellant was entitled to compensation/damages for wrongful dismissal.

9. On unprocedural and/or wrongful termination the contention was that pursuant to the contract of employment, the contract could be terminated by the employee giving a three months' notice in writing to the programme coordinator or payment of 3 months' salary in lieu of notice. And that alternatively, it could be terminated without notice if the employee committed a serious breach of her obligations under the contract. Further, it was submitted that none of the foregoing obtained so that her termination of employment could have been said to have taken effect and the termination was thus unlawful or wrongful.

10. Counsel went on to state, that under sections 35 and 36 of the *Employment Act* a contract of service may be terminated with notice, or without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by her as the case may be in respect of notice required to be given. It was on that basis that the appellant was claiming compensation of three (3) months salary in lieu of notice.

11. On the issue of constructive dismissal, it was submitted that the respondent's refusal to renew the appellant's contract on grounds of underperformance and absenteeism, whereas she was not called upon to demonstrate why or to defend herself against those allegations, amounted to constructive dismissal by the respondent. According to the appellant, the learned Judge erred in law in not finding that there was constructive dismissal.

12. On the issue of compensation/damages for wrongful dismissal it was submitted that section 49(1) of the *Employment Act* 2007 caps the maximum compensation for wrongful dismissal or unfair termination and that the appellant also had set out the prayer for damages for lost earnings and for reinstatement. She was thus entitled to the same and the trial court erred on that score as well.

13. We were urged to allow the appeal.

14. In response the respondent filed submissions dated 29th May 2023. It was submitted that this was not a dismissal case, but rather that the appellant's employment contract terminated upon the expiry of the contractual period; that the consideration of performance and the contractual requirements of the job was to be by the respondent and that they were under no obligation to inform the appellant of its findings upon consideration of the same. The respondent reiterated that the appellant had not proved that her contract was to be renewed.

15. When the appeal came up for plenary hearing on 2nd October, 2023 learned counsel Mr. Makura appeared for the appellant while Mr. Waweru appeared for the respondent. They adopted their written submission which they briefly highlighted. We have considered the entire record of appeal, the rival submissions by both counsel and the applicable law, including the caselaw cited to us.

16. This being a first appeal, we are required to analyze the evidence afresh and reach our own conclusions without losing sight to the fact that we did not have the advantage of seeing the witnesses as they testified. This duty has statutory underpinning under rule 31(1)(a) of the Court of Appeal Rules and has been amplified in many decisions of this Court for instance in Selle -vs- Associated Motor Boat Co. [1968] EA 123, the predecessor of this Court expressed itself as follows:

> " An appeal to this court from a trial by the High Court is by way of 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 demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif -vs- Ali Mohamed Sholan (1955), 22 EACA 270".

17. There is no dispute that the appellant was employed by the appellant on a two-year fixed term contract from 1st January 2013 to 31st December 2014. It is trite law that a fixed-term contract of employment is a lawful mode of employment with a start and end date. The appellant claims that she did not sign her part of the contract. That notwithstanding, however, she continued carrying out her duties pursuant to that contract and never raised that issue until she raised the issue before the ELRC in her further statement of claim. She never repudiated the contract until it expired and she received her gratuity, certificate of service and even got a letter of recommendation from her employer. We find that the contract was valid for all intents and purposes.

18. The pertinent question in this appeal is whether the appellant's contract was terminated by effluxion of time, or she was dismissed from service without notice as she claims. The contract was a two-year fixed term contract from 1st January 2013 to 31st December 2014. The same ran with no problems to the end. The message informing, or rather reminding the appellant that the contract term had come to an end was sent to her on 7th January 2015, after the contract term. The contract was not extended, and if it was to be extended or renewed, it would have been done before its expiry.

19. The position in law in regard to termination of contracts by effluxion of time was clearly elucidated by this Court in Registered Trustees De La Salle Christian BrothersT/A St. Mary's Boys' Secondary School -vs- Julius D M Baini [2017] eKLR as follows:

> " In the view of the Court, there is no obligation on the part of an employer to give reasons to an employee why a fixed-term contract of employment should not be renewed. To require an employer to give reasons why the contract should not be renewed, is the same thing as demanding from an employer to give reasons why, a potential employee should not be employed. The only reason that should be given is that the term has come to an end, and no more.... Reasons, beyond effluxion of time, are not necessary in termination of fixed- term contracts, unless there is a clause in the contract, calling for additional justification for the termination..."

20. In this case, we note that the contract remained in force and the appellant served until the last day. When informed that the contract had expired and after the intention not to renew the same was communicated, the appellant handed over the respondent's properties and signed the handing over report. She also received her gratuity and certificate of service. She was even given a letter of

recommendation to assist her in her future job search. From the circumstances of the case, it is clear to us that the appellant was not dismissed from employment, constructively or otherwise. The issue of notice does not, therefore, arise and nor was the respondent bound to give any explanation or justification for not renewing the appellant's contract.

21. We are of the view that any relief sought by the appellant on the basis of her assertion that her employment was unfairly terminated was automatically not available to her. This Court while dealing with a similar situation in Registered Trustees of the Presbyterian Church of East Africa & another -vs- Ruth Gathoni Ngotho [2017]eKLR expressed itself as follows:

> "Bearing the foregoing in mind, we note that a 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."
>
> See also Francis Chire Chachi -vs- Amatsi Water Services Company Limited [2012] eKLR.

22. The appellant was under a fixed-term contract with a definite commencement date and termination date. The contract terminated automatically when the termination date arrived.

23. We think we have said enough to demonstrate that the learned Judge did not err on issues of fact and/or law and that the judgment in favour of the respondent should stand. Accordingly, we hold that this appeal has no merit and it is dismissed with costs to the respondent.

DATED AND DELIVERED AT NYERI THIS 25TH DAY OF OCTOBER 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

Deputy Registrar