



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gobe & 37 others v Jiangxi Zhongmei Engineering Construction Company Limited  
(Civil Appeal 254 of 2019) [2024] KECA 1353 (KLR) (4 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1353 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 254 OF 2019  
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA  
OCTOBER 4, 2024**

**BETWEEN**

**GIDEON BORU GOBE & 37 OTHERS ..... APPELLANT**

**AND**

**JIANGXI ZHONGMEI ENGINEERING CONSTRUCTION COMPANY  
LIMITED ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the (Nzioki Wa Makau, J.) in the  
Employment & Labour Relations Court at Nyeri dated and delivered on 3rd day of June  
2019) in ELRC Cause No. 130 of 2017 consolidated with Cause Nos. 131 through 169 of 2017)*

**JUDGMENT**

**Background**

1. In this appeal, Gideon Boru Gobe & 37 others (the appellants), are dissatisfied with the decision of the Employment and Labour Relations Court (ELRC) (Nzioki wa Makau, J.) dated and delivered on 3<sup>rd</sup> June 2019 in Cause No 130 of 2017 consolidated with Cause Nos. 131 through 169 of 2017.
2. A brief background into the facts giving rise to this appeal is that all the 38 appellants individually filed their respective Statements of Claim alleging that Jianxi Zhongmei Engineering Construction Company Limited (the respondent) wrongfully and unprocedurally dismissed them from employment and failed to pay them their terminal benefits.
3. As can be gleaned from the Statement of Claims, the appellants were employed by the respondent in diverse capacities to perform different duties during the construction of the Marsabit – Turbi Road. The common ground is that all the appellants’ terms of engagement were discontinued by the respondent on different dates between the years 2014 and 2015. The appellants alleged that their dismissal/termination from employment by the respondent amounted to violation of Section 41 of the Employment Act. The appellants prayed for one month’s pay in lieu of notice, gratuity/service benefits,



compensation for unfair termination, underpayment, annual leave dues, unpaid house allowance, Sunday's overtime, costs of the suit and interest.

4. In its replying memorandum dated 11<sup>th</sup> July, 2017, the respondent averred that it entered into a contract with The Kenya National Highways Authority (KENHA) for upgrading to bitumen of the Kenya/Ethiopia Corridor Development Project Phase 11 Marsabit - Turbi (A2) Road for a period of 3 years commencing 5<sup>th</sup> April, 2011 to 5<sup>th</sup> April, 2014. The respondent admitted that it employed the appellants to offer services in various capacities within the contractual period. The respondent contended that as of April 2014, most of the appellants left its employment for reasons that the works had been finalized and no extension had been granted to the respondent by KENHA for the remainder of the works.
5. The respondent further stated that in August 2014, its contract with KENHA was extended by a further 1-year period until 20<sup>th</sup> April, 2015. The respondent stated that it retained some of the appellants until April 2015 when they were released upon completion of the project. It was further stated that the respondent continued maintaining the road with minimal staff between 20<sup>th</sup> April, 2015 and 19<sup>th</sup> April, 2017 which was the defects liability period.
6. The respondent further contended that none of the appellants had a legitimate expectation that they would continue working for it as their contracts automatically lapsed with the completion of the project. According to the respondent, its separation with each of the appellants was discussed and it issued each of the appellants with recommendation letters and paid them their accrued terminal dues including payment in lieu of leave days not taken. The respondent denied that it is liable to pay all the other dues as pleaded by the appellants and urged that their claims be dismissed with costs.
7. After considering the pleadings, the facts in dispute, the oral and written arguments by all the parties, the ELRC found that the appellants' claims were misplaced. Under the various heads which the appellants claimed compensation, as regard to underpayment, it was held that none of the appellants produced payslips to prove that there was underpayment.
8. On the claim for overtime, it was held that the nature of work which the appellants were engaged in, could not have been performed beyond daylight hours. On the issue of house allowance, it was held that none of the appellants produced rent receipts and the fact that the road was being constructed in a remote area, the appellants did not lead evidence to demonstrate that the respondent allowed them to travel hundreds of kilometres to and from work. The ELRC opined that if the appellants travelled every day to and from work, then a significant amount of time would have been spent on the road with less than 8 hours spent on work.
9. In dismissing the appellants' claim, the ELRC observed that the appellants' terms of contract were for a fixed period of time ending upon completion of the project. The ELRC held that the respondent established that the reason for termination was valid as per Section 43 of the *Employment Act*.
10. Aggrieved by the said decision, the appellants are now before this Court seeking to set aside the judgment and decree of the ELRC; and award the appellants' the sums of money claimed in the statements of claim; and costs of the suit both in the trial court and of this appeal. The grounds of appeal as contained in the Memorandum of Appeal dated 12<sup>th</sup> September 2019 are 4 which we hereby reproduce verbatim as follows:-
  1. The trial court erred in law and in fact in holding that the appellants' claims were devoid of merit and against the weight of evidence;



2. The trial court erred both in law and in fact in entering judgment in favour of the respondent whereas the respondent did not produce any evidence to proof its allegations and/or controvert the evidence tendered by the appellants;
3. The trial court erred in both law and fact in dismissing the appellants' cases whereas the appellants proved their cases on a balance of probabilities as required by law;
4. The trial court erred in both law and fact in finding that the road construction project had been completed when the appellants' employment terminated whereas there is sufficient and uncontroverted evidence to the contrary.

### **Submissions by Counsel**

11. At the hearing of the appeal, learned Counsel Mr. Orayo appeared for the appellant while Mr. Karuti appeared for the respondent. Both Counsel proceeded by relying on their written submissions.
12. In support of their appeal, counsel for the appellants submitted that the respondent failed to discharge the burden of proof that there was procedural fairness during the termination of the appellants' service as per Section 43 (1) of the *Employment Act*. That Section 45 of the *Employment Act* provides that the reasons for termination must be valid and on fair.
13. Counsel further contended that under Section 74 of the *Employment Act*, the employer has a mandatory obligation to keep a written record of all employees which the respondent did not adhere to. The consequence thereof, as submitted by counsel for the appellants, is that the respondent failed to prove its allegation that it paid all the terminal dues to the appellants, provided housing and payment for the Sunday overtime.
14. According to counsel for the appellants, his clients were not given payslips to prove the underpayment and the responsibility lay with the respondent to produce the payslips but it chose not to. From the foregoing, counsel further submitted, that the appellants' termination or dismissal was unfair, unjust and unprocedural and therefore, the appellants are entitled to payment of twelve months' pay as compensation for unfair termination as provided for under Section 49 (c) of the *Employment Act*.
15. Counsel urged us to compute each of the appellants' claims using the *Labour Institutions (Building and Construction Industry) (Wages) Order, 2012* and consider the capacity in which the appellants were employed, the wage/salary, date of employment, date of termination which are all different. Counsel further urged that costs of this appeal and in the trial court be awarded to them.
16. In rebuttal, counsel for the respondent submitted that the appellants' witness (the 1<sup>st</sup> appellant herein) confirmed in the trial court that there was an agreement dated 19<sup>th</sup> May, 2011 to pay his dues per hour. The agreement was not a formal letter and therefore, no evidence was tabled in support of the assertion that he had been formally employed by the respondent. Further, it was submitted that the appellants' witness testified that he paid for his accommodation but he did not tender a receipt as evidence of payment for rent.
17. Counsel asserted that the findings by the trial court in declining to award the underpayment and house allowance was merited since the appellants failed to demonstrate that they were entitled to the reliefs sought. Counsel further asserted that the appellants failed to prove that their termination was unfair as they failed to demonstrate that they were employed on terms other than fixed terms and therefore entitled to the reliefs sought.



18. Counsel submitted that the respondent's evidence that the appellants' employment came to an end by effluxion of time was not controverted. Counsel emphasized that the respondent employed the appellants to specifically serve for the period under its contract with KENHA and the contracts were terminated on account of completion of the project works.
19. Reliance was placed on the decisions of this Court in *Registered Trustees of the Presbyterian Church of East Africa & another v Ruth Gathoni Ngotho – Kariuki* [2017] eKLR and *Transparency International – Kenya v Omondi* (Civil Appeal No 81 of 2018)[2023] KECA 174 (KLR) (17 February 2023) where this Court addressed itself on the nature of fixed employment contracts.
20. Counsel emphasized that the appellants equally failed to produce payslips to prove the underpayments and therefore they cannot claim the alleged underpayments. Further reliance was placed on the ELRC's decision of *Chege Jeremiah & 9 others v Jiangxi Zhongmei Engineering Construction Company Limited* [2019] eKLR. The respondent submitted that the appellants' witness testified that he was paid Kshs 60/= per hour which in fact was in excess of what he had claimed. In counsel's opinion, the trial court correctly found that the appellants were not underpaid and were paid in excess of what they claimed.
21. On the payment in lieu of notice, it was submitted that the appellants were employed on a fixed contract and therefore there would be no justification for the appellants to seek notice pay as held by the ELRC in *Anne Theuri v Kadet Limited* [2013] eKLR. On the payment of house allowance, counsel submitted that from the evidence on record, the respondent demonstrated that it provided all employees with accommodation within the project site.
22. On the allegation that the appellants' employment was terminated before completion of the road construction, it was submitted that the uncontroverted evidence was that the three (3) years' contract with KENHA lapsed on 5<sup>th</sup> April, 2014. Counsel submitted that after the works were completed between April and September 2014, the respondent relieved the appellants depending on the months which they finalized their respective specific assignments. Counsel asserted that in as much as the project was extended for a further period of one year from April 2014 with the completion date being 20<sup>th</sup> April 2015, a number of the appellants' services were superfluous given that their services for their earlier project had already been dispensed with. Counsel urged us to uphold the decision of the ELRC and dismiss the instant appeal with costs to the respondent.

### **Determination**

23. This being a first appeal, our duty as the appellate court is to re - evaluate and reconsider the evidence adduced before the trial court so as to draw our own independent conclusions, as it was held in the case of *Selle v Associated Motor Boat Company* [1968] E.A. We must also examine and satisfy ourselves on whether the conclusions reached by the trial court were based on no evidence, or a misapprehension of the evidence or on application of the wrong principles, as was held in the case of *Sanitam Service (EA) Ltd v Rentokil* [2006] eKLR.
24. We have carefully considered the record of appeal, the written submissions by both counsel, the cited authorities and the law. We discern the following 2 issues for determination: -
  - i. Whether the appellants' termination was unfair and unlawful; and
  - ii. Whether the appellants are entitled to the reliefs sought.
25. The uncontroverted evidence is that there was an employer - employee relationship between the appellants and the respondent. It is also common ground that the basis of the employment relationship was premised on the then upgrading to bitumen standards of the Kenya/Ethiopia



Corridor Development Project Phase 11 Marsabit – Turbi (A2) Road for a period of 3 years commencing from 5<sup>th</sup> April 2011 to 5<sup>th</sup> April 2014. It is also not contested that the construction period was further extended by one year to April 2015 and a further extension of two years till 19<sup>th</sup> April 2017 to cover the defects liability period.

26. It is the appellants’ contention that they were terminated during the subsistence of the construction project and therefore, they were terminated unlawfully and unfairly.
27. At paragraph 10 of the affidavit evidence dated and sworn on 20<sup>th</sup> February 2018 by Zhang Jiaying, the respondent’s Project administrator, there is a list of all the appellants and the period of service with the respondent. According to the tabulation, the appellants were employed and terminated at diverse periods between the years 2011 and 2015. It is common ground that the appellants served in different capacities ranging from general workers, watchmen, mason, leveller, rake man, tanker man and tire man. Accordingly, we are constrained to observe that each of the appellants had a specific role to play and duties to undertake during the construction period.
28. Section 2 of the *Employment Act* defines a contract of service to mean an agreement whether oral, written, express, implied, to employ or to serve as an employee for a period of time. The law recognised that there are certain contracts which are time bound. In this instance, the construction period having lapsed, it was unreasonable for the appellants to expect that their contracts would have been extended. Furthermore, the appellants cannot be heard to allege that they were terminated unlawfully when they had not demonstrated that their skills were necessary for the extended period of the contract or, in the alternative, that the respondent terminated their contracts but proceeded to employ other persons to work in the same capacity that they held. Accordingly, it cannot be concluded that the appellants’ termination was unlawful and unfair within the meaning of Section 45 of the *Employment Act*.
29. The contract period having lapsed by effluxion of time, there was no obligation on the part of the respondent to give notice of the expiry for a contract which it would not have been renewed. This Court in *Registered Trustees of the Presbyterian Church of East Africa & another (supra)* held that: -

“The general position on the consequences of expiry of a fixed term contract, as can be gleaned from various decisions of this Court and that of the Employment and Labour Relations Court, is that once a fixed term contract is at an end, the employer has no obligation to justify termination on other grounds beyond the lapse of the fixed period.”
30. It is our finding that the appellants’ terms of service with the respondent lapsed upon the completion of the construction period. There was no legitimate expectation either implied or explicit by the appellants that they would have been retained by the respondent upon completion of the construction period.
31. Having found that the termination of the appellants’ employment was proper, we need not delve into the second issue for determination.
32. Accordingly, we find and hold that this appeal is devoid of merit. It is accordingly dismissed. The order that commends itself to us is that each party will bear their own costs of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF OCTOBER, 2024.**

**JAMILA MOHAMMED**

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**JUDGE OF APPEAL**



**L. KIMARU**

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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**

