



**Kenya Red Cross Society v Omar (Civil Appeal 41 of 2019)
[2022] KECA 532 (KLR) (6 May 2022) (Judgment)**

Neutral citation: [2022] KECA 532 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 41 OF 2019
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
MAY 6, 2022**

BETWEEN

KENYA RED CROSS SOCIETY APPELLANT

AND

ABDULRAHMAN OMAR RESPONDENT

(An appeal from the judgment of the Employment and Labour Relations Court at Mombasa (Rika, J.) delivered on 20th March 2018 in ELRC Cause 30 of 2016)

JUDGMENT

1. The appellant, Kenya Red Cross Society, has challenged the judgment delivered on 20th March 2018 in which the Employment and Labour Relations Court (ELRC) (Rika, J.) found that the appellant unfairly terminated the respondent's contract of employment and awarded him Kshs. 480,000.00 being the equivalent of 12 months' salary in compensation.
2. The material facts, based on the record are as follows: The respondent, Abdulrahman Omar Mbarak, was employed by the appellant as a driver on short term renewable contracts, that were extended from time to time. The first of such contracts was dated 7th February 2008 in which the appellant offered the respondent employment for the position of driver of medium vehicles based at Kisumu "on a short-term renewable contract with effect from 8th February to 30th April 2008" for a gross salary of Kshs. 23,500.00.
3. Between January 2009 and 31st December 2009, the respondent was under short term contract as a heavy commercial vehicle driver in Eldoret on a monthly salary of Kshs. 34,000.00 and on 14th January 2010 the respondent was offered "a short-term contract w.e.f 1st January 2010 to 30th April 2010" for the position of driver based at Makueni for the salary of Kshs. 23,500.00 per month.



4. On 23rd January 2012 the appellant offered the respondent employment “on short-term contract with effect from 23rd January 2012 to 30th June 2012” in the position of driver based at Dadaab for a monthly salary of Kshs. 40,000.00. By a letter dated 22nd June 2012 addressed to the respondent, that contract was “extended up to 31st October 2012.”
5. During the currency of the last-mentioned contract, while stationed in Dadaab, the respondent was on 3rd April 2012 assigned to take the appellant’s vehicle for service in Nairobi. In Nairobi, he was asked by his supervisor to change the tyre of another vehicle that was parked at the office parking. In the process of doing so, the respondent sprained his back. That, according to the respondent, marked the beginning of his declining health and numerous hospital visits and consultations with doctors for purposes of medical treatment.
6. On 10th May 2013, the appellant wrote a letter to the respondent informing him that his contract “has been renewed for a period of 8 months with effect from 1st May 2013 to 31st December 2013” and, that “on expiry of contract, renewal will be subject to availability of funding” and existence the position in the appellant’s organogram. On 27th November 2013, just over a month before expiry of the said contract, the appellant wrote a letter to the respondent under the subject “Contract Expiry” as follows:

“Reference is made to your employment contract as Driver. As you are aware, your contract expired(sic) on 31st December 2013. I wish to inform you that your contract at Dadaab will Not be renewed. You will be entitled to the following: Salary for December 2013. Please note that your dues will be released to you after you have completed the enclosed clearance certificate and returned all company property in your possession.

I take this opportunity to thank you for your services to this organization and wish you the very best in your future endeavors.

Yours faithfully,

Abbas Gullet, MBS,

Secretary General.”

7. Thereafter, the respondent’s pension dues were processed and paid to him on 28th February 2014. A Certificate of Service indicating his date of engagement as 2nd August 2008 and date of leaving as 31st December 2013 was issued to him on 29th October 2014.
8. Slightly over two years after leaving employment, on 27th January 2016, the respondent filed suit before the ELC seeking judgment against the appellant for 12 months’ salary compensation for unfair termination; severance pay for 7 years worked, costs and interest. He pleaded in his memorandum of claim that he was employed as a truck driver in 2007 at a salary of Kshs. 40,000.00 per month; that he performed his duties diligently until 3rd April 2012 when he sustained severe back injuries while on duty; that despite advice from his doctor that he should only undertake light duties, his supervisor insisted on heavy duties further causing him injuries; that due to his condition, the appellant declined to allow him sufficient time to undergo treatment and for him to undertake light duties and in November 2013, the appellant gave him one month notice that his contract would be terminated in December 2013. He averred that the appellant’s actions were malicious, biased, inhuman and unfair.
9. In its memorandum of response, the appellant set out the contract history as indicated above and that the respondent was at all times advised on his position and accepted the terms of the contracts; that he was properly notified in good time by letter dated 27th November 2013 of the expiry of the contract; and



that the respondent was always aware that the activities of the appellant were sponsored by donors who prescribed the terms of service of all those who worked under any program or project. The appellant asserted that the respondent's services "were never terminated wrongfully and/or unlawfully" and that its actions were neither malicious, biased or inhuman and neither "were his services terminated on medical grounds." The appellant averred that the respondent was guilty of non-disclosure of material facts of his actual relationship with the appellant.

10. In his testimony during the trial, the respondent restated that he was employed by the appellant as a driver in 2007; that there was a break in 2010 for almost one year; that he was injured in April 2012 while changing a tyre and thereafter recommended for light duty; that he had requested for transfer/light duties but the appellant neglected his medical condition and that he was issued with a letter stating that his contract ended in December 2013.
11. Under cross examination he stated that his employment contracts were not dependent on availability of donor funds; that on 26th April 2010 he wrote a complaint stating that he was stressed and required rest; that he was notified that his contract would not be renewed; that he did not apply for renewal; that he complained to all his supervisors; and that he filed a claim for work injury, HCCC No. 61 of 2016 Mombasa.
12. The appellant's witness, Abdulhakim Otula, a logistics Officer with the appellant in the North Easter Region stated that the appellant advertises positions and engages contracts depending on donor funds and specific projects and that if donor stops funding, the terms of service ends; that the appellant has short and long term contracts, the long term ones being for more than one year; that the respondent worked for the appellant on short term contracts from 2008 and that at the time the respondent was notified that his contract would not be renewed, he was working in Dadaab; that he received verbal complaints from the respondent requesting change from truck driver to medium vehicle driver and that the respondent was assigned "tracing driver" which has shorter working hours from 7.30 a.m. to 11.00 a.m. which was the lightest duty; that at the time the respondent was not using crutches as he was doing during the trial; that the appellant consulted the respondent about transfer which would have meant a lower salary for him as drivers in other places earned Kshs. 23,500.00 and transferring respondent from Dadaab would have seen him earn the lower salary.
13. Under cross examination, the appellant's witness stated that the appellant carried out employee assessments for purposes of salary review but not for renewing contracts; that the notice of expiry of the contract given to the respondent did not mention his assessment; that transfer of the respondent from Dadaab was not a good option him; and that light duties for the respondent also entailed driving.
14. After considering the evidence and submissions made before him, the learned trial Judge in his impugned judgment found that the respondent worked for the appellant from 2008 to December 2013 and that in all those years, he worked on various fixed contracts and that "each contract was renewed after the other" and that the only reason the court "could think of" why the appellant did not renew the last of the fixed term contracts was improperly motivated by the fact that the respondent was injured and his productivity diminished. The Judge concluded:

"The court is content that in the claim filed herein, the respondent's decision not to renew claimant's contract of employment, was informed by an improper motive. Non-renewal was separation initiated by the respondent. The decision was informed by the claimant's injury, and diminished productivity. It was unfair termination of employment relationship."
15. With that, the Judge pronounced that the respondent's prayer for compensation for unfair termination, equivalent of 12 months' salary, at Kshs. 480,000.00 is allowed.



16. The appellant complains that in reaching that decision, and in finding that the respondent was unfairly terminated, the Judge failed to appreciate the evidence. Learned counsel Mr. Mbeche appearing for the appellant relied on written submissions which he highlighted. Counsel submitted that the Judge ignored the evidence of fixed term contracts presented before him which defined the relationship between the parties; neither did the Judge consider the submissions presented by the appellant to the effect that the appellant had no obligation to give reasons. That the conclusion that the appellant did not renew the contract was on account of the respondent's injury was unfounded as subsequent to the injury the contract of employment had in fact been extended twice.
17. Opposing the appeal, learned counsel Mr. Shimaka for the respondent relied on his written submissions. Counsel submitted that the Judge was right in concluding that there was no other reason, but the respondent's injury, that informed the decision not to renew his employment contract. It was submitted that the Judge duly considered the submissions tendered before him and arrived at the correct decision. It was submitted that the respondent had a reasonable expectation of continued employment and renewal of the contract and the judgment of the trial court should therefore be upheld.
18. We have considered the appeal and submissions. We have reviewed the evidence with a view to reaching our own conclusion bearing in mind that the trial Judge had the advantage of hearing and observing the witnesses which we, as an appellate court, do not have. We are cognizant of the established principle that an appellate court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did. [See, for instance, *Makube vs Nyamuro* [1983] eKLR]. With that in mind, the issue arising in this appeal is whether the finding by the learned Judge that the appellant unfairly terminated the respondent's employment is well founded.
19. In the impugned judgment, the learned Judge expressed that in all the years that the respondent worked for the appellant, each contract was renewed after the other without fail and that no evidence was presented to show that renewal was dependent on donor funding. In that regard, the Judge stated:

“In all these years, he worked on various fixed term contract. Each contract was renewed after the other. There is no evidence placed before the court to show that renewal depended on donor funding, and was pegged to any specific project. In particular, it was not shown by the respondent, that failure to renew claimant's contract after 31st December 2013, was occasioned by withdrawal of any donor funding, or the winding up of a specific project. The UNHCR did not cease operations at Dadaab. It was not shown that donor funding was a consideration in not renewing Claimant's contract, which had been renewed without fail, from the year 2008.”
20. The Judge went on to state that the court could think of no other reason for the appellant declining to continue employing the respondent than the fact that he was injured and unable to discharge driving duties in full; and that it was unsuitable to keep the respondent on the payroll as his productivity was diminished and he would be an expensive employee to retain.
21. The evidence presented before the trial court, as already demonstrated was that the first of such contracts was dated 7th February 2008 in which the appellant offered the respondent employment for the position of driver medium vehicles based at Kisumu “on a short-term renewable contract with effect from 8th February to 30th April 2008” for a gross salary of Kshs. 23,500.00. The next fixed short-term contract, the respondent was employed as a heavy commercial vehicle driver based in Eldoret at a monthly salary of Kshs. 34,000.00. That was between January 2009 and 31st December 2009. Next



came the short-term contract for the period between “1st January 2010 to 30th April 2010” under which the respondent was employed in the position of driver based at Makueni for the reduced salary of Kshs. 23,500.00 per month. On 23rd January 2012 the appellant offered the respondent employment “on short-term contract with effect from 23rd January 2012 to 30th June 2012” in the position of driver based at Dadaab for a higher monthly salary of Kshs. 40,000.00. By a letter dated 22nd June 2012 addressed to the respondent, last mentioned contract was “extended up to 31st October 2012.”

22. It is clear from the foregoing, that the respondent was employed on different contracts in different places and that there were periods in between the contracts that the respondent was not in employment. For instance, under cross examination, the respondent readily accepted that “there was a break in 2010-almost 1 year.”
23. The evidence also shows that the respondent sustained injury on rd April 2012 while changing a tyre. That occurred during the currency of the short-term contract that was running between January 2012 to 30th June 2012. Subsequent to the injury, that contract was renewed on 22nd June 2012 when it was extended to 31st October 2012. There was also the letter of 10th May 2013, by which the appellant notified the respondent that his contract “has been renewed for a period of 8 months with effect from 1st May 2013 to 31st December 2013” and, that “on expiry of contract, renewal will be subject to availability of funding” and existence the position in the appellant’s organogram.
24. There were, therefore, two extensions of the respondent’s contracts after he had sustained the injury on 3rd April 2012. The conclusion by the learned Judge that “what informed the [appellant’s] decision not to continue employing the [respondent], was that he had become impaired through work injury, and it was unsuitable to keep him on the payroll” due to “his diminished productivity” is not supported by the evidence. Had that been the case, one would not have expected the appellant to extend the contracts post injury. Accordingly, in reaching his decision, the learned Judge failed to consider that there were extensions of the contract beyond the injury on 3rd April 2012 and thereby arrived at a wrong decision.
25. As already indicated, by a letter dated 27th November 2013, the appellant informed the respondent that upon expiry of the employment contract on 31st December 2013 it would not be renewed. The authorities to which the learned Judge referred, namely, *Bernard Wanjohi Muriuki vs Kirinyaga Water & Sanitation Company & another* [2012] eKLR and *Margaret A. Ochieng vs National Water & Pipeline Corporation* [2014] eKLR support the propositions that an employer has no obligation to renew an employment contract upon expiry and that fixed term contracts carry no rights and obligations beyond the expiry date and the employer has the discretion to either renew or not to renew. Recently, in *Keen Kleeners Limited vs. Kenya Plantation and Agricultural Workers Union* (Civil Appeal No. 101 of 2019) [2021] KECA 352, this Court stated:

“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 (See *Trocaire v Catherine Wambui Karuno* [2018] eKLR)”.

26. In The *Registered Trustees De La Salle Christian Brothers t/a St. Mary’s Boys Secondary School vs. Julius D. M. Baini* [2017] eKLR the Court, in addressing a similar issue, expressed:

“It is our finding that the respondent’s contract ended on 31st December, 2014. There was no obligation on the appellant to give notice of expiry or information that it would not be renewed. We find no firm evidence that there was either an extension of the expired contract



or a commencement of a new one. Nor is there firm evidence that the respondent worked for one week in January 2015. There was therefore no question of unfair termination of employment. The claim had no basis and ought to have been rejected.”

27. In the same vein, in *Emmanuel Mutembi Nthambi vs. Tarmal Wire Products Ltd* [2019] eKLR, the Court had this to say:

“The contract was for a fixed term and upon expiry, the respondent exercised its discretion not to renew it. We have earlier in this judgment identified the two contracts signed by the appellant. Their validity was not questioned before the trial court. Having re-examined them, we have no doubt they were valid and enforceable. The appellant worked on contract for the time stipulated therein; the contracts lapsed by effluxion of time and the respondent exercised its rights under the contract not to renew and paid the appellant what it thought were his dues. In the circumstances, we agree with the learned Judge that termination of the appellant, unfair or otherwise was not an issue.”

28. The circumstances in the present case are not different. With respect to the learned Judge, there was no basis for the trial court, to depart from those principles. By hinging his decision on what the “court could think of” as the reason the last contract was not extended, the learned Judge in effect unnecessarily speculated that the appellant did not extend the contract because it was unsuitable to keep the respondent on the payroll as his productivity was diminished and that he would be an expensive employee to retain. There was no evidence in that regard.

29. As this Court stated in *Trocaire v Catherine Wambui Karuno* [2018] eKLR, the function of a court is to enforce a contract as agreed by the parties. It is not for the court not make additions to such a contract by implying a term merely because it deems it would be reasonable to do so. In the latter case, the Court pronounced 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. In *Keen Kleeners Limited vs. Kenya Plantation and Agricultural Workers Union* (above) this Court recognized that there may be instances where the unique circumstances of the employment relationship may create a legitimate expectation that a fixed term contract would be renewed. On the facts of that case, the Court stated that:

“The long standing, uninterrupted and consistent practice of renewing or extending the grievants’ contracts would have surely led the grievants to believe that their last contracts would be renewed, more so in the absence of any reasonable notice to the contrary given to them by the appellant.” [Emphasis]

31. In the present case however, quite apart from the interruption between the contracts, notice was duly given to the respondent that the contract would not be renewed and there is no sound basis for reaching the conclusion that a legitimate expectation for renewal was created.

32. In result, we hold that the learned Judge erred in concluding that the appellant was unfairly terminated. The appeal succeeds and is hereby allowed. The judgment of the ELC is set aside and substituted with an order dismissing the respondent’s claim. Each party will bear the costs of the proceedings before the ELC and of this appeal.

Orders accordingly.



DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF MAY 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

