



REPUBLIC OF KENYA



Kathoka v Ellams Products Limited (Employment and Labour Relations Cause 1488 of 2017) [2025] KEELRC 620 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 620 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1488 OF 2017**

JW KELI, J

FEBRUARY 28, 2025

BETWEEN

ERICK KITHUKA KATHOKA CLAIMANT

AND

ELLAMS PRODUCTS LIMITED RESPONDENT

JUDGMENT

1. The claimant aggrieved with the decision of termination of his employment by the respondent filed a memorandum of claim dated 28th July 2017 and received in Court on the 31st July 2017 seeking the following reliefs:-
 - a. A declaration that his termination was unfair and unlawful;
 - b. A declaration that the claimant was underpaid;
 - c. A declaration that the claimant is entitled to a certificate of service having diligently served the respondent for eight years
 - d. A declaration that the differential treatment by the respondent in the payment of the lumpsum, bus fare allowance, leave travelling allowance and bonus was discriminatory.
 - e. Compensation to the claimant as follows:-
 - i. Kshs 52, 132 being payment for Rest days from May 2007 to April 2011
 - ii. Kshs 184, 416 being the difference in underpayment in the basic salary
 - iii. Kshs 71, 250 being the equivalent of the underpayment in house allowance
 - iv. Kshs 324, 000 being the Lumpsum allowance for nine years
 - v. Kshs 162, 000 being the equivalent of bus fare allowance for nine years



- vi. Kshs 37, 323 being the equivalent of bonus from 2011 to 2015
 - vii. Kshs 15, 600 being the equivalent of Leave Travelling Allowance for nine years
 - viii. Kshs 19,500 being the equivalent of one month salary in lieu of notice
 - ix. Damages for unfair termination
2. Together with the claim, the claimant filed on even date verifying affidavit, a list of documents and the bundle of documents, and his witness statement dated 28th July 2017. On the 25th February 2019 the claimant filed reply to response. Further the claimant filed supplementary list of documents and bundle dated 22nd November 2024(the court did not find the Wage Order)

Response

3. The claim was opposed by the respondent who entered appearance through the law firm of Oraro & Company advocates and filed a memorandum of reply dated 4th February 2019 and received in court on even date. The respondent on even date filed Respondent's witness statement by Guyvira Nduma dated 4th February 2019, list of documents and the bundle of documents all received in court on the 4th February 2019. On the 13th September 2019 the respondent filed its supplementary list and bundle of documents.

Hearing And Evidence

4. The claimant's case was heard on the 13th of November 2024, where he testified on oath and adopted his witness statement dated 28th July 2017 and produced documents as his evidence in chief. The witness was cross-examined by advocates for the respondent, Sandra Kavagi.
5. The defence case was heard on even date where witness, Guyvira Nduma was RW1, he testified on oath, adopted his witness statement dated 4th February 2019 as defence evidence in chief, produced the respondent's documents under the two lists(dated 4th February 2019 and 13th September 2019 respectively) and was cross-examined by counsel for the claimant, Mr. Juma.
6. The parties took instructions on filing of written submissions. Both parties filed.

The claimant's case

7. The claimant had a claim for underpayment for the period from May 2007 to April 2011 when the claimant was employed as general labour and said to have been paid cash of Kshs. 249 per day. The claimant pleaded the minimum wage for general labour was Kshs.470 per day. Further the claimant stated he joined the union in 2010 and his terms ought to have been in accordance with the CBA of Kshs. 19500 but the respondent in disregard to the CBA paid him Kshs. 12,820 and underpaid his house allowance under CBA. The house allowance was paid at 15% of salary. The claimant stated that in April 2011 he signed an employment contract converting his employment to fixed term contract for one year with monthly salary of Kshs. 7643. That he was denied other allowances paid to the employees under CBA namely Kshs. 3000 lumpsum per month for all employees working overtime. Kshs. 50 per day for transport, bonus pay the equivalent of one month salary paid at the end of each completed year, leave travelling allowance payable end of the year, hence differential treatment which he stated amounted to discrimination.
8. The claimant stated that at termination in May 2016, he was earning Kshs. 15,368 per month. The claimant stated that his contract was terminated without a reason or hearing and sought for



compensation and notice pay. The claimant stated his contract was to expire on the 31st August 2016 as stated in the contract but on 31st May 2016 he reported on duty to be told his employment was terminated and he sought compensation for lack of reasons and hearing.

9. The claimant as adopted his evidence the witness statement dated 28th July 2018 reflecting the foregoing, produced a copy of the contract of employment dated 30th May 2015 and effective 1st June 2015 for 1 year, (the contract indicated expiry date of 31st August 2016 which had been amended and countersigned to read 31st May 2016, a copy union membership card, certificate of service, job card and demand letter at pages 16-23 of the claimant's bundle).

Response case

10. The claim was denied in totality on the basis that the contract ended vide effluxion of time on date of termination of 31st May 2016. RW1 stated that in clause 4 of the contract was an error on date of expiry which was amended by hand to read 31st May 2016 instead of 31st August 2016. The claimant was issued with the amended contract as the mistake was realized late when some of the contract had been issued.
11. On claim of underpayment, the respondent's position was that the claimant was paid beyond the minimum wages. That the CBA was not applicable to the claimant as he was not a member of the union, there were no deductions done nor did the union communicate the membership. That claim for overtime of Ksh. 3000, one month salary the end of the completed year and bus fare per day of Kshs. 50 were untrue. That these claims of continuing injury were statute barred. The respondent relied on the witness statement of Guyvura Nduma dated 4th February 2019 and a bundle of documents produced in court paginated 1-44 filed with the response and a supplementary list of documents dated 11th September 2019.

Determination

12. The parties filed written submissions after the hearing.

Issues for determination

13. The claimant raised the following issues for determination in the dispute: -
 - i. Whether the claimant was underpaid while working a general labourer in comparison to the applicable wage order
 - ii. Whether the claimant was underpaid while working under the fixed term contracts in comparison to the various CBAs
 - iii. Whether the claimant legitimately expected renewal of his contract
 - iv. Whether the claimant was unfairly terminated from employment
 - v. Appropriate remedies to award
14. The Respondent raised the following issues for determination in the dispute:-
 - a. Was the claimant underpaid during his employment with the respondent?
 - b. Is the claimant entitled to any of the reliefs sought in his claims



15. The court taking into account the foregoing issues identified by the parties and their parallel cases as summarized above was of the considered opinion that the issues placed before the court for determination were :-

1. Whether the termination of the employment of the claimant was unfair
2. Whether the claimant was entitled to reliefs sought

Whether the termination of the employment of the claimant was unfair

16. The claimant stated that his employment was terminated 31st May 2016 without reason or hearing hence unlawful and unfair.

17. The threshold to measure fairness of termination of employment is according to the provisions of section 45(2) of the [Employment Act](#) which provides as follows:-

“

- (1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.”

18. The method of prove of employment claims is as stated in section 47(5) of the [Employment Act](#) to wit :-
“47(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

19. The burden of proof of fairness of the reasons for termination is on the employer as stated under section 43 of the Act to wit:- “43. Proof of reason for termination

- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”



20. Procedural fairness to terminate employment on fault of employee is according to section 41 of the Employment Act to wit:-

“

41

- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

21. The respondent pleaded termination vide effluxion of time and relied on the contract dated 31st May 2015 for one year pages 16-18 which it stated expired on 31st May 2016 and was not extended. The claimant in submissions asserted that clause 4 of the contract stated that it was to expire on the 31st August 2018 yet he was stopped from working on 31st May 2016 which was 3 months before expiry of the contract. Further, the Claimant had legitimate expectation having worked for close to ten years with annual contracts renewed, that his last contract, unless there was a justified reason, would be renewed and relied on the passage in *De Smith, Woolf & Jowell* in judicial review of administrative cited in *Republic v Kenya Revenue Authority Ex parte M- Kopa Kenya Limited* thus, “A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government’s dealings with the public.”

22. The claimant stated that under clause 4 of the contract, the respondent promised him renewal in the following terms: “..the contract expires on 31st August 2016 and a fresh contract will be negotiated based on mutual agreement.” The claimant submitted the parties disagreed on the meaning of the clause 4 and according to him it meant that a new contract would be issued and the only issue due was the terms of the new contract and relied on the decision in *Attorney General of Belize vs Belize Telecom Limited* [2009] 2 All ER 1127, where the Privy Council was confronted with a similar scenario which required interpretation of certain clauses in the Memorandum and Articles of Association of the Respondent. Lord Hoffmann expressed the position as follows;

“The court has no power to impose upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to



the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to who the instrument is addressed: see Investors' Compensation Scheme Ltd –vs- West Bromwich Building Society [1998] 1 All ER 98 at 114- 115, [1998] 1 WLR 896 at 912 -913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.”

23. The position of the respondent was that the claimant's contract of service was not terminated as alleged in the claim. That instead his contract of employment came to an end by effluxion of time and as such, the claimant's terminal dues were calculated, paid to him, and even a certificate of service was issued.

Decision on fairness of the termination

24. The claimant stated that his employment was terminated in May 2016 when he reported to work without notice or hearing hence unfair. The claimant also contended that under clause 4 the contract, the employment was set to terminate on the 31st August 2016 and not 31st May 2016. In written submissions, the claimant stated he had legitimate expectation of renewal having served close to 10 years with annual renewals and also sought reliance on clause 4 that which stated ‘ the contract automatically expires on 31st August 2017 (amended in handwritten note and counter signed as 31st may).. and a fresh contract will be negotiated on the basis of mutual agreement (company and yourself)”
25. During the hearing the claimant produced the said amended contract as his evidence. He stated the amendment was not clear. He admitted that he received certificate of service indicating he left work on the 31st May 2016 and used it to get another job. RW1 on cross-examination stated the date of 31st August was an error and was corrected immediately by the human resources who had prepared the contract. He stated that the correction could not be done on computer as the mistake was realized late when some staff had received the contracts and there was no date of the countersigning.
26. The claimant produced the countersigned contract correcting date to 31st May and that is the contract he signed with the employer. I found no difficulty in concluding there was meeting of the minds of the parties that the contract started on 31st May 2015 and was for one year and ended on 31st May 2016.
27. On the expectation of renewal of contract, the court of appeal has already settled the interpretation of fixed term contracts in Transparency International - Kenya v Omondi [2023] KECA 174 (KLR) where the Court held as concerns a fixed term contract:- “The respondent was under a fixed-term contract with a definite commencement date and termination date. There was no ambiguity created to create an expectation of contract renewal by the appellant's issuance of a fixed-term contract. The contract terminated automatically when the termination date arrived. Whether a contract with a renewal clause will be extended or not, is an issue that is at the discretion of the employer and it cannot create a legal right under the doctrine of legitimate expectation.” The court further stated:-

”It is trite law that a fixed-term contract of employment is a lawful mode of employment with a start and end date.”

In the instant claim in paragraph 1 of the contract of 30th may 2025 , the term of the contract was stated as 1(one) year with effect from 1st June 2015. The court found no ambiguity to discern the end date of the contract to be 31st May 2016.



28. Was there a legitimate expectation under clause 4 of the contract for automatic renewal? The claimant stated he had a legitimate expectation of renewal following service of close to 10 years with annual contracts being renewed. The court noted the 1st contract was of 2011. The claimant was on daily wages from 2007. The claimant to buttress the claim for legitimate expectation relied on the passage in *De Smith, Woolf & Jowell* in judicial review of administrative action cited in *Republic v Kenya Revenue Authority Ex parte M- Kopa Kenya Limited* thus, “A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government’s dealings with the public.” The Court of Appeal in the *Transparency International - Kenya v Omondi* [2023] KECA 174 (KLR) on legitimate expectation of renewal with respect to fixed term contracts held:-

“In the instant appeal, a cursory look at clause 13 of the contract of employment, allows either the appellant or the respondent, to terminate the agreement, by giving three (3) months’ notice in writing or by paying three (3) months’ pay in lieu of such notice. The appellant simply exercised its right as captured in the letter and as such, could not be deemed to have unfairly terminated the contract. It is old hat, that parties are bound by the terms of the contracts they enter into.

30. Concomitantly, the scenario would have been different if there was an indication, by act or omission from the appellant, to indicate renewal was forthcoming to whet the respondent’s appetite, that her contract would be renewed and hence rely on the doctrine of legitimate expectation. In the instant case, there was no promise of any sort that was given to the respondent to justify a claim based on legitimate expectation.”

29. The claimant pegged his contract renewal expectation on clause 4 of the contract which stated: “the contract automatically expires on 31st May 2016 (the correction having been upheld –supra) .. and a fresh contract will be negotiated on the basis of mutual agreement (company and yourself) .” The claimant relied on the holding in *Attorney General of Belize vs Belize Telecom Limited* [2009] 2 All ER 1127, where the Privy Council was confronted with a similar scenario which required interpretation of certain clauses in the Memorandum and Articles of Association of the Respondent. Lord Hoffmann expressed the position as follows:-

“The court has no power to impose upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see *Investors’ Compensation Scheme Ltd –vs- West Bromwich Building Society* [1998] 1 All ER 98 at 114- 115, [1998] 1 WLR 896 at 912 -913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.” The claimant submitted that the interpretation of clause 4 of the contract would be issuance of automatic new contract with the only issue being its terms.



30. The court finds that in interpretation of the contract, the entire contract had to be read in whole. The contract expired on 31st May 2016. That was the end of employment obligations. The next step was the issue of renewal. The same was subject to mutual agreement between the parties. The court took the position that mutual agreement meant for the parties to agree on renewal. That would have meant a new offer. The respondent exercised its right not to make a new offer of contract. That was within the terms of clause 4.
31. In the upshot, the court held that the employment of the claimant terminated through effluxion of time and the claimant was not entitled to automatic renewal as held in *Transparency International - Kenya v Omondi* [2023] KECA 174 (KLR). The issue of unfair termination did not arise.

Whether the claimant was entitled to reliefs sought

Underpayment of salary claim

32. Underpayment of salary is a continuing injury. The Court of Appeal has since settled the definition and application of continuing injury in claims under the decision in *The German School Society & another v Ohany & another* (Civil Appeal 325 & 342 of 2018 (Consolidated)) [2023] KECA 894 (KLR) (24 July 2023) (Judgment) Neutral citation: [2023] KECA 894 (KLR) to wit:-

‘40. Normally, a belated service related claim will be rejected on the ground of delay and laches or limitation. One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. Borrowing from the excerpts reproduced above and considering that the respondent continued to work under the same circumstances, we find and hold that the breach complained of was of a continuing nature, capable of giving rise to a legal injury which assumes the nature of a continuing wrong. It follows that the appellant’s argument that the claims were time barred fails. On the contrary, the said claims fall within the ambit of a continuing wrongs contemplated under section 90.’

The court in setting aside the award for back pay observed in part:- ‘69. Next, we will address the claim for back pay in respect of which the learned judge awarded Kshs. 4,975,360/= in her ruling following an application for review filed by the respondent. Back pay can be defined as the difference between the amounts of pay a worker is owed versus what they actually received. Essentially, back pay is the term for wages that are owed to an employee for work done in the past, yet, for whatever reason, the employer withheld these wages from the employee’s paycheck. Payment of back pay depends upon the facts and circumstances of each case. It would, however, not be correct to contend that it is automatic. It should not be granted mechanically. The workman is required to plead and prima facie prove the claim.’

33. Section 90 (now reads section 89 following the 2024 amendments of the [Employment Act](#)) reads:-

‘

89. Limitations

Notwithstanding the provisions of section 4(1) of the [Limitation of Actions Act](#) (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained of or in the case of continuing injury or damage within twelve months next after the



cessation thereof.” The claim for underpayment of wages and salary falls under continuing injury claim hence ought to be filed within 12 months next after cessation. In the instant case the date of cessation was 31st May 2016 when the employment of the claimant terminated with the respondent.

34. The first issue for the court to address was whether the claims for underpayment of salary since 2007 to 2011 with respect to daily wages being less than minimum wages and underpayment claims for the period from 2011 to 2016 pegged on the collective bargaining agreements between the Union and the Respondent were within the statute timeline of continuing injury of within 12 months of stoppage of continuing injury being the termination of contract dated of 31st May 2016. The court found it was not in dispute the contract ended on 31st May 2016. The instant claim dated 28th July 2017 was filed in court on the 31st July 2017. 12 months post the termination was by or before 31st May 2017. There is no doubt the claim for underpayment of salaries/back pay was filed post expiry of 12 months after cessation of the underpayment thus statute barred under section 89 of the [Employment Act](#) (supra) (The German School Society & another v Ohany & another (Civil Appeal 325 & 342 of 2018 (2023)e KLR, Okere v County Government of Kakamega and another (2023)e KLR, and Cotec Security Group Ltd (Formerly known as Bedrock Holdings Ltd)v Kenya National Private Security Workers Union (2024)e KLR on filing of continuing injury claims being limited to 12 months post cessation) .
35. In the upshot, the claims for underpayment of wages/salary by the claimant are held as statute barred under section 89 of the [Employment Act](#)(supra).

Conclusion

36. The Court held the termination of employment of the claimant was on effluxion following expiry of contract and the salary underpayment claims were statute-barred vide section 89 of the [Employment Act](#). The claim was without merit. It was dismissed with costs.
37. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2025.

J.W. KELI,

JUDGE.

In the Presence of:

Court Assistant: Otieno

Claimant :- absent

Respondent: Sandra Kavagi

