



Oyoo v Registered Trustees of the Sisters of Mercy (Kenya) t/a The Mater Misericordiae Hospital (Employment and Labour Relations Cause 717 of 2019) [2025] KEELRC 647 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 647 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 717 OF 2019
JW KELL, J
FEBRUARY 28, 2025

BETWEEN

WILLIS ODHIAMBO OYOO CLAIMANT

AND

REGISTERED TRUSTEES OF THE SISTERS OF MERCY (KENYA) T/A THE MATER MISERICORDIAE HOSPITAL RESPONDENT

JUDGMENT

1. The claimant alleging unfair termination of employment by the respondent filed a statement of claim dated 25th October 2019 against the respondent seeking the following reliefs:-
 - i) An Order directing The Registered Trustees of The Sisters Of Mercy Kenya T/A The Mater Misericordiae Hospital to pay Willis Odhiambo Oyoo:-
 - (a) 12 month Compensation for unfair termination of the Claimant's permanent and pensionable employment on 6th December, 2017 amounting to Kes 8,383,896 or such amount as the Court deems appropriate;
 - (b) One month salary in lieu of termination of the Claimant's permanent and pensionable employment on 6th December, 2017 amounting to Kes 698,658;
 - (c) General damages for the 23 month remainder of the Claimant's term employment contract of service dated 6th December, 2017 amounting to Kes 16,069,134 or such amount as the Court deems appropriate; and
 - (d) Pension contribution for the 23 month remainder of the Claimant's term contract dated 6th December, 2017 amounting to Kes 1,205,186 or such amount as the Court deems appropriate.



- ii) Interest on the foregoing prayer (i)above at Court rates from the date of filing herein till settlement in full;
 - iii) Costs
 - iv) Certificate of Service
 - v) Such other and further orders that this Honourable Court deems just and expedient to grant.
2. The claim was filed together with a verifying affidavit and witness statement of the claimant, a list of documents all of even date, and the bundle of documents. The claimant further filed a reply dated 29th June 2020 to the respondent's statement of response dated 8th January 2020 and a supplementary list of documents of even date.
 3. The respondent entered appearance and filed the respondent's statement of response dated 8th January 2020, the statement of Jane Wanjiku Kimani dated 18th June 2021, the respondent's supplementary list of documents dated 22nd June 2021, and a further witness statement by Everlyn Njeri Maina dated 24th March 2023.

Hearing and evidence

4. The claimant's case was heard on the 6th November 2024 when the claimant testified on oath, adopted his witness statement dated 25th October 2019 as his evidence in chief and produced his documents under list of even date. He was cross-examined by advocate for the respondent, Mr. Mbugua.
5. The Respondent's case was heard on even date. The respondent called its witness one Everlyn Njeri Maina, who testified on oath as RW1 and adopted her witness statement dated 24th March 2024 with an amendment at paragraph 6 to add acting finance controller and paragraph 7 to read 2015 in place of 2011. She produced documents under list dated 8th January 2020 being the contract of service dated 2nd November 2011, copy of the claimant's pay slip, copy of contract of 6th November 2017, a copy of the termination letter dated 26th March 2018, claimant's appreciation letter dated 5th April 2018 and a copy of employee handbook. RW1 also produced documents under the supplementary list of documents dated 22nd June 2021. RW1 relied on her witness statement and the said documents as the respondent's evidence in chief and was cross-examined by advocate for the claimant, Mr. Onyango.

Claimant's case

6. The Claimant testified on oath and adopted his claim, written witness statement dated 25th October, 2019 together with a Reply to Respondent's Statement of Response dated 29th June 2020 as his evidence in chief. He further produced his list of documents dated 25th October 2019 and annexures in his supplementary list of documents dated 29th June 2020 as his further evidence in chief. In brief, the claimant stated that vide a letter dated 2nd November, 2011, he was confirmed to the entry position of Senior Financial Accountant as a permanent and pensionable employee of the respondent effective 5th December, 2011. His starting salary was Kshs.150,000 but due to his diligent service it was increased severally up to Kshs.698,658. This positing was never terminated at any time during his employment.
7. Further, after several management changes and the termination of employment of about (11) eleven top management personnel in the Respondent Hospital and in addition to the Claimant's exemplary performance and track record, the Respondent, appointed him to the position of acting financial controller on acting capacity vide a letter dated 5th February, 2015 while still on the same terms he previously served as the Senior Financial Accountant, with a salary increment. The Claimant thereafter continued to diligently and honestly served the Respondent in the position of Senior Financial



Accountant and Acting Financial controller. Through the Claimants diligence and commitment to the Respondent, he unearthed massive incidences of short-banking in the period between January 2009 to July, 2014 in the sum of Ksh. 16,000,000/= and reported to the Respondent his findings, which report formed the basis of a criminal case of theft by servant against some staff of the Respondent who were alleged to have been involved in the Criminal case at the request of the Respondent, where the Claimant herein was a witness. The Claimant stepped up as the Respondent's witness and strenuously defended the Respondent in civil claim that the Respondent's former chief cashier filed against the Respondent. The Respondent relied on the Claimants report to lodge a criminal complaint against the said payroll accountant which formed the basis of an ongoing criminal case of theft by servant against the Payroll Accountant and at the request of the Respondent, the Claimant testified as State witness in the payroll fraud case.

8. The Claimant confirmed in both examinations in chief and cross that both his contract were running simultaneously. That is his initial contract and the one of acting financial controller dated 2nd November 2011 (Pg. 21) and 5th February 2015 (Pg. 26) respectively. He also confirmed having signed the contract dated 6th December 2017 (Pg. 41), the one Respondent claims to have used to terminate him due to duress, given the atmosphere surrounding the Respondent hospital at the time having been present and seen more than 10 of his senior colleagues get fired in front of him over the last three years. He also during this duration worked under over 5 different Chief Executive Officers, which is quite a unique if not bizarre occurrence. He was therefore signing the same to secure his position at the Respondent Hospital. The Respondent's witness - Evelyn Maina on the other hand joined the Respondents Employment in January of 2018 and was however able to confirm that the aforementioned letter/contract dated 6th December 2017 (Pg. 41) was never subjected to appraisals as captured in it's paragraph 3. She also confirmed in cross-examination that there was no meeting between her and the Claimant or any Human Resource Manager therefore evidencing non-procedure of termination of employment. The Respondents previous witnesses chose not to testify and their only witness only wrote her statement after part taking in a court annexed mediation process that run for almost 9 months. Her evidence therefore being an after fact. That despite the Claimant's exemplary services and commitment rendered to the Respondent organization, the latter vide a letter dated 6th December, 2017, in utter ingratitude, unilaterally, without notice, hearing or prior input from the Claimant, terminated his permanent and pensionable employment and purported to review his contract which was done through duress as can be seen from evidence adduced. Worse still the afore mentioned letter purported to backdate the effective date of commencement to 1st July 2017 (5 months prior) thus illustrating that the Respondents actions were an afterthought with the ill intent of getting rid of the claimant. The said letter as already mentioned under paragraph 3 stated verbatim "The term of office is renewable for another two year(s) upon successful appraisal before the expiry period of the contract." As the Respondent's witness confirmed in cross-examination, no such appraisal was ever carried out. Barely (4) four months after the aforementioned letter the Claimant was coerced to sign and without any appraisal being carried out, the Claimant received a purported termination letter 3 dated 26th March, 2018 (Pg.45).
9. Whereas the Respondent's letter dated 26th March 2018 claimed that the Claimant's purported term contract lapsed on 28th March 2018, the first paragraph of the said Respondent's letter of 6th December 2017 stated that the effective date of the Claimants appointment as Credit Control Manager was 1st July 2017. 21. A year contract term from 1st July, 2017 signed on 6th December, 2017 could not, by whatever stretch of imagination lapse on 28th February, 2018. 22. The Claimant worked for close to a month after 28th February, 2018 till 26th March, 2018 and legally it was therefore implied that his contract was renewed for a further term of two years when the Respondent continued to



engage him and assigned him tasks as its employee after 28th February, 2018 and even paid him salary for March, 2018.

Respondent's case

10. Further to the witness statement of RW1 and documents produced at trial as the defence case at examination in chief, the respondent's position was that the Claimant's contract of service lapsed by effluxion of time. He, however, purported that he was unfairly terminated. He pleaded two (2) Claims, both arising from the Respondent's letter dated 6.12.2017. Unfair termination of his permanent and pensionable contract and compensation for unexpired contract. He urged the Court to find that his termination was unfair and prayed for compensation for unfair termination. The Respondent by a Response dated 8.1.2020, denied unfair termination and urged the Court to find that the Claimant's contract lapsed as per the terms of the contract. It is trite law that parties to a contract are bound to their terms, save where there is misrepresentation and or fraud. Under the common law, for an offer to be binding or valid, three essentials should be construed, and these are an intention to create a legal relationship; an offer and an acceptance and agreement on the essentials of the contract (including consensus on the rights and duties of the parties, remuneration, duration and start date). The Respondent relied on the case of Thomas Ogunde Mboya v Grand Royal Swiss Hotel [2022] KEELRC 314 (KLR).
11. The parties filed written submissions after the hearing.

Determination

Issues for determination

12. The claimant in written submissions identified the following issues for determination: -
 - a. Whether the reasons for the termination were valid and fair.
 - b. Whether the procedure followed was fair.
 - c. Whether the reliefs sought are merited.
13. The respondent's identified the following issues for determination:-
 1. Whether the letter/contract of service dated 6.12.2017 unfairly terminated the earlier contract.
 2. Whether the Claimant's contracts of service were unfairly terminated.
 3. Whether the Claimant is entitled to the reliefs sought.
14. The court, having heard the case, perused the documents and submissions of the parties was of the considered opinion that the issues placed before the court for determination in the suit were as follows:-
 - a. Whether the termination of employment of the claimant by the respondent was lawful and fair.
 - b. Whether the claimant was entitled to the relief sought.

Whether the termination of employment of the claimant by the respondent was lawful and fair

Claimant's submissions

15. It is trite law that all contracts of employment be terminated within the law. Therefore, it is mandatory that this termination is done pursuant to the provisions of section 41, 43, 45, 47, 49 and 51 of the



Employment Act, 2007. Until there is a determination of the same, to make the claimant lose a benefit that was available within his employment which has now been terminated and the same alleged to be unfair would be to deny him a fair hearing before this court. Such would remove the claimant from his employment with the respondent and deny him work benefits that were denied of him upon the termination of such employment.

16. Similarly, also the supreme law of the land being the Constitution of Kenya, 2010 provides for a fair Hearing and the presumption of innocence under Articles 50 (1) states; "Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. " In the case at hand there was no fair hearing before any independent or impartial tribunal or body.
17. From the documentary evidence and testimonies both in-chief and in cross-examination adduced by the Claimant and Respondent, it is paramount to note that it is not in dispute that the Claimants were employed by the Respondent for over 6 years. It is also not in dispute that the Respondent dramatically dismissed the Claimant from employment without any notice, hearing, show cause and without any reasons given for the termination. Section 43 (1) of the Employment Act, 2007 Provides that: - "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." In this case, the reasons for the termination were never captured in the termination letter instead, his contract was deemed to have automatically lapsed on 28th February 2018.
18. On procedural fairness, the claimant relied on the decision in Patrick Abuga v ICPAK per Radido J. where the court held that "section 41 of the employment Act 2007 has made procedural fairness part of employment contract in Kenya. The ingredients of procedural fairness as I understand is within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. Secondly, it would follow naturally if the employee has a right to be informed of the charges, he has a right to a proper opportunity to prepare and to be heard in person, writing or through a representation or shop floor union representative. Thirdly, it is an obligation on the employer to consider any representation by the employee before making the decision to dismiss or give other sanction."
19. The claimant contended that the procedure followed was not fair because he was not given chance to show cause before the disciplinary. The respondent maintained that show cause was not necessary herein because there was no need of investigations before disciplinary hearing. Section 41 of the Employment Act, 2007 provides that: - 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." 37. Section 45(5) (a) of the Employment Act further provides that in deciding whether it was just and equitable for the employer to terminate the employment of an employee, the court shall consider; "The procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee, and the hearing of any appeal against the decision."



Respondent's submissions

20. The Claimant contended that, “the Respondent purported to unilaterally vary the Claimant’s employment terms and placed him on a cumulative three year term 6 employment, with the first term of the employment being one year contract renewable for a further two years.” (See para. 22 of the Statement of Claim) 19. By a letter dated 6.12.2017, the claimant was appointed as the Credit Control Manager in place of the acting financial controller position. The Claimant was granted seven (7) days to read, understand and execute the contract. The Claimant appended his signature on 8.12.2017, indicating that he read and understood the contents of the contract. The Claimant alleged that he was coerced to execute the contract. The Claimant neither gave the particulars of duress nor adduced any evidence on the same. During examination in chief, the Claimant stated that he signed the contract for fear of being dismissed. Nothing would have stopped the Claimant from declining to execute the contract and sue for unfair termination as he did in the present suit. The Claimant conveniently postponed suing, and only sued after benefiting from the contract. The Claimant wrote a very hearty appreciation letter to the Respondent. During cross examination, he confirmed that the same was not written under duress but from free will. (See letter at page 46 of the Claimant’s documents.). The Respondent submitted that the Claimant had not done anything wrong nor was he terminated for misconduct. His fear that the public would know of his exit from the Respondent’s organization was with ulterior motive. The Respondent did not intend to publicize the Claimant’s exit. If it did, it would be to protect itself or goodwill from any contingent liability were the Claimant to deal with suppliers or creditors post exit. The Claimant instituted his suit after establishing his business and probably getting some client’s on board. The Respondent submits that the Claimant approached the Court with unclean hands and does not deserve the reliefs sought. The contract that the Claimant executed on 8.12.2017, expressly stated at clause two (2) that “your contract will be for one year.” It further stated, “Please note that unless advised to the contrary in writing, this contract shall automatically lapse on 28th February 2018.” (See page 41 of the Claimant’s documents.)
21. The Claimant executed the contract well aware of the terms therein. After 28th February 2018, the Claimant was requested to work for one more month to facilitate smooth transition. He accepted and was paid for days worked in March 2018. The Respondent’s evidence, by Evelyn Maina on the same was not controverted. The Respondent relies on the case of *Thomas Ogunde Mboya v Grand Royal Swiss Hotel* [2022] KEELRC 314 (KLR).
22. Did the termination of the contract that lapsed on 28th February 2018 amount to unfair termination of the same? The Respondent is convinced that the same was not. The Respondent urged the Honourable Court to find as such. The Respondent submitted that it never terminated any of the Claimant’s contracts unfairly. The first contract had a termination clause. The averment by the Claimant that the same was permanent and pensionable implies that the same was eternal. It is trite law that no employment contract is permanent. The Respondent calls to aid the case of *Elizabeth Wakanyi Kibe v. Telkom Kenya Ltd.* [2014] eKLR. The said contract was mutually varied by the parties. The Claimant assumed a more prestigious position compared to that of senior financial accountant. He should not be heard to complain of being short changed or unfair termination. The Credit Control Manager’s Contract lapsed on 28.2.1018, hence fairly ended. A term contract cannot be said to have been unfairly terminated when it lapses. The Claimant was fully aware of the term of the contract. The Respondent calls to aid the case of *Transparency International - Kenya v Omondi* (Civil Appeal 81 of 2018) [2023] KECA 174 (KLR)



Decision on fairness of the termination

23. 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.”

24. 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.”

25. The claimant alleged unfair termination while the respondent took the position that the employment contract ended pursuant to effluxion of time as the contract dated 6th December 2017 for one year stated it was to end automatically on the 28th February 2018. The respondent relied on the decision in Transparency International - Kenya v. Omondi (Civil Appeal 81 of 2018) [2023] KECA 174 (KLR). The claimant stated that he continued working past the date of 28th February 2018 effectively placing him on open contract.

26. The letter of termination was dated 26th March 2018 and was titled non-renewal of contract. In part the letter read:- “the registered Trustees of the sisters of mercy T/A the Mater Misericordiae Hospital hereby inform you that your contract terminated on 28th February 2018 and the same shall not be renewed.

“You are therefore required to immediately handover to the deputy director finance all hospital property for which you are responsible during your employment and get a clearance from HR to facilitate payment of your dues.

Your final dues will be paid as follows:-

Salary up till 31st march 2018



1 month in lieu of notice period

29 accrued leave days not taken...”

27. The court found that the claimant initially held an open contract on permanent and pensionable terms dated 2nd November 2011 as senior financial accountant (pages 21-22 of the claim). He was appointed acting finance controller vide letter dated 5th February 2015 and remunerated for the position (page 24 and 26 of the claim). The respondent issued the claimant a letter dated 6th December 2017 the subject matter being renewal of contract of service. The letter offered the claimant the substantive position of credit control manager in place of acting finance controller. The contract stated it was effective 1st July 2017. The period of the contract was one-year renewable for another term of two years upon successful appraisal before the expiry of the contract. The contract period (clause 2) was stated as 1st March 2017 to 28th February 2017 and stated the contract would lapse automatically on the 28th February 2018. Clause 3 on remuneration was that salary was payable in arrears effective 1st March 2017, being the commencement of the contract period. The claimant confirmed he had accepted the new contract terms, which had a higher salary than the previous position. Though he alleged to have signed the contract effectively terminating his permanent terms contract, he told the court he had no evidence of the duress.
28. The court returned that the contract of 6th December 2017 was a new position, which the claimant accepted and was paid a higher salary backdated to the commencement date of 1st March 2017. The contract was fully performed. Parties are bound by their contracts unless they can prove vitiating factors like duress, mistake, etc. The Court did not find any contract vitiating factor in the instant case.
29. The defence by the Respondent for the separation was effluxion of time. The claimant submitted the defence was defeated by the fact that he worked beyond the expiry date under contract of 28th February 2018. The court confirmed this was the position as the letter of termination (supra) dated 26th March 2018 was issued post 28th February 2018 and the claimant was paid Salary up to 31st March 2018 with an additional 1 month salary in lieu of notice period. Salary is compensation for labour. The letter was an admission that the termination happened post the expiry date of the 1 year contract of 6th December 2017. That means the contract was renewed automatically and was now open ended. The respondent sought refuge in the decision of *Transparency International - Kenya v. Omondi* (Civil Appeal 81 of 2018) [2023] KECA 174 (KLR) where the Court of Appeal held:-” 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 while upholding the decision, finds the facts of the instant case were different as the termination occurred while the claimant was on the 26th day of working after the expiry date of the contract. In *Omondi* case, the court further observed: - “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.” The court returns that by failure to terminate the services of the claimant on or before the 28th February 2018 as per the one-year contract, the Respondent indicated to the claimant of renewal of the contract. The Respondent even paid salary for the subsequent month of March and notice pay. The conduct of the respondent meant the contract had been renewed and terminated unfairly. The reason of effluxion of time was only valid up to 28th February 2018. Termination post that



date was subject of fairness threshold under section 45(2) of the employment act(supra). The court found no compliance with fairness on reasons and procedure in the termination. In the upshot the court held that the termination of the employment on the 26th March 2018 was unlawful and unfair.

Whether the claimant was entitled to the relief sought.

30. The remedies available on finding of unfair termination are according to section 49 of the Employment Act.

Claimant's submissions

31. The Claimant worked for the respondent from November 2011 to February 2018 about six years. He had a legitimate expectation to continue working but for the unfair termination. Being an employee in the accounting sector the court should take judicial notice that his chances of securing another job in the sector is minimized. In view of the foregoing consideration, an award of twelve (12) months gross salary is reasonable compensation for the injury suffered. Hence Kshs. 98,658 x 12 =Kshs. 8,383,896/= . The claimant relied on decision in Ezekiel Nyangoya Okemwa v Kenya Marine & Fisheries Research Institute [2016] eKLR where the court noted that where an employee has been unlawfully terminated after a long standing professional life and they thereafter because of the actions of their former employee find it difficult to get work again the same can be termed as loss of employability, it referred to this while making reference to the above mentioned case of Naqvi Syed Qmar v Paramount Bank Limited & another [2015] eKLR.

Respondent's submissions

32. The Respondent submitted that the Claimant does not merit the prayers sought for the following reasons:-
- a. The Prayer for 12 month compensation for unfair termination of the Claimant's permanent and pensionable employment on 6th December, 2017 amounting to Kes.8,383,896/= or such amount as the Court deems appropriate.
 - i. The amount of Kes.8,383,896/= being 12 month compensation for unfair termination is not merited. The Claimant's purported permanent and pensionable employment contract was not unfairly terminated. As evidenced the same was mutually varied by the parties. The Claimant assumed the position of acting Financial Controller and was duly remunerated for it.
 - ii. The Claimant did not find it prudent to task the Court to confirm whether his termination was unfair. He adjudged his termination as unfair, and is asking the Court to proceed to award him compensation. The Respondent urges the Court not to fall for the trap.
 - b. The Prayer for one month salary in lieu of termination of the Claimant's permanent and pensionable employment on 6th December, 2017, amounting to Kes.698,658.
 - i. The prayer is not due since the Claimant's permanent and pensionable employment was not unfairly terminated. The Respondent urges the Court to hold as such.
 - c. Prayer for general damages for the 23 months remainder of the Claimant's term employment contract of service dated 6th December 2017 amounting to Kes.16,069,134 or such amount as the Court deems appropriate.



- i. The Respondent submits that this prayer is misplaced and is not merited. The Claimant has alleged that he was coerced to execute the term contract dated 6th December 2017. He has equally questioned the validity of the said contract.
 - ii. In converse, he is now seeking compensation for the purported remainder of the said contract. The Respondent submits that the Claimant cannot approbate and reprobate on the same contract.
 - iii. It is clear that the contract lapsed. The expiry of the contract did not require the issuance of a notice to show cause or disciplinary hearing. The allegation that he was not heard, does not hold.
33. The respondent submitted that the Claimant’s contract was never renewed. The conditions for renewal of the same were not fulfilled. The Claimant offered his services for the month of March upon request by the Respondent to facilitate hand-over. (See clause 2 on pg 41 of the Claimant’s Documents) There was, therefore, no basis for demanding compensation for the balance of the contract. The Respondent relies on the case of Elizabeth Wakanyi Kibe v. Telkom Kenya Ltd. [2014] eKLR. The Prayer for pension contribution for the 23-month remainder of Claimant’s term contract dated 6th December 2017 amounting to Kes.1,205,186 or such amount as the Court deems appropriate. This prayer cannot be sustained and the award of Kes.1,205,186 sought did not crystalize, as the contract was not renewed. The Claimant was informed at paragraph 13sub-paragraph 4, that any benefits and/or privileges attached to his position would only apply as long as he offered services to the Respondent. (See paragraph 2on page 44. of the Claimant’s Documents). The Respondent does not manage pension contributions. The Claimant as the Financial controller is aware who does, and he can access the same.
34. On Prayer for interest at court rates from the date of filing suit and costs. The Respondent submitted that the Claimant does not deserve costs and interest as prayed. Costs follow the cause. The Claimant having failed to proof his claim does not merit the same.
35. On Prayer for Certificate of service. The Claimant declined to accept a certificate of service, for the reason that it indicated his last position with the Respondent as that of Credit Control Manager.

Decision on the relief sought

36. Section 49 of the Employment Act provides for various remedies for unfair termination:-
- “(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—
- (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;
 - (b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a)



which the employee would have been entitled to by virtue of the contract; or

(c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

(2) Any payments made by the employer under this section shall be subject to statutory deductions.

(3) Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to—

(a) reinstate the employee and treat the employee in all respects as if the employee's employment had not been terminated; or

(b) re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.”

37. The court, in determination of the applicable remedy, is obliged to apply factors under section 49(4) of the Employment Act to wit:-

“A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—

(a) the wishes of the employee;

(b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and

(c) the practicability of recommending reinstatement or re-engagement;

(d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;

(e) the employee's length of service with the employer;

(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;

(g) the opportunities available to the employee for securing comparable or suitable employment with another employer the value of any severance payable by law;

(i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;

(j) any expenses reasonable incurred by the employee as a consequence of the termination;

k) any conduct of the employee which to any extent caused or contributed to the termination;



- (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
- (m) any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee.”

38. Taking into account the foregoing, I turn to the remedies sought in the claim, namely:-

- i)
 - (a) 12-month Compensation for unfair termination of the Claimant's permanent and pensionable employment on 6th December 2017 amounting to Kes 8,383,896 or such amount as the Court deems appropriate;
 - (b) One month salary in lieu of termination of the Claimant's permanent and pensionable employment on 6th December, 2017 amounting to Kes 698,658;
 - (c) General damages for the 23 month remainder of the Claimant's term employment contract of service dated 6th December, 2017 amounting to Kes 16,069,134 or such amount as the Court deems appropriate; and
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- iv) Certificate of Service
- v) Such other and further orders that this Honourable Court deems just and expedient to grant.

39. The court found that the only remedies it could award in a claim of unfair termination, unless there are claims for violation of the Constitutionlike discrimination, are those under section 49 of the Employment Actand, in this case, compensation for the unfair termination and notice pay. The prayer for the remainder of the contract is not available under section 49 of the Act. The court noted that the claimant was paid notice pay under the letter of termination; hence, the only outstanding issue is compensation. Taking into account the factors in section 49(4) of the Act, the claimant was on a one-year contract as a Credit Control Manager. He had been in service under an earlier contract with the respondent of 2nd November 2011. He had earlier in 2015 been appointed as acting finance controller. He was a good employee with no record of disciplinary. He was paid notice pay. He wrote an appreciation letter to the employer 5th April 2018 where, among others, he disclosed he would look for a job or start a financial consultancy. During cross-examination, he confirmed that he had a consultancy company by the name Docfin Consultancy Limited. He and his wife were the directors. The court held that compensation of the equivalent of 3 months salary was adequate for the unfair termination. The salary under the employment letter of 6th December 2017 was Kshs. 698,658 thus total award of Kshs. 2,095,974/-

40. The certificate of service ought to issue under section 51 of the Employment Actto wit :- “(1) An employer shall issue to an employee a certificate of service upon termination of his employment, unless the employment has continued for a period of less than four consecutive weeks.



- (2) A certificate of service issued under subsection (1) shall contain—
- (a) the name of the employer and his postal address;
 - (b) the name of the employee;
 - (c) the date when employment of the employee commenced;
 - (d) the nature and usual place of employment of the employee;
 - (e) the date when the employment of the employee ceased; and
 - (f) such other particulars as may be prescribed.
- (3) Subject to subsection (1), no employer is bound to give to an employee a testimonial, reference or certificate relating to the character or performance of that employee. (The certificate should cover the entire period of service)

Conclusion

41. In conclusion, the termination of the employment of the claimant by the respondent is held to have been unlawful and unfair. Judgment is entered for the claimant against the respondent as follows:-
1. Compensation for unfair termination of Kshs. 2,095,974/- (payable subject to statutory deductions)
 2. Costs and interest at court rates from date of judgment.
 3. Certificate of service to issue under section 51 of the Employment Act.
42. Stay granted of 30 days.
43. 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 :- Jude Onyango

Respondent: Mbugua

