



Seif v King Fahd Lamu County Referral Hospital & 2 others (Cause E001 of 2024) [2025] KEELRC 1767 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEELRC 1767 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
CAUSE E001 OF 2024
K OCHARO, J
APRIL 30, 2025**

BETWEEN

DR ABDULKARIM KASSIM SEIF CLAIMANT

AND

KING FAHD LAMU COUNTY REFFERAL HOSPITAL 1ST RESPONDENT

**COUNTY GOVERNMENT OF LAMU DEPARTMENT OF MEDICAL
SERVICE 2ND RESPONDENT**

OFFICE OF THE COUNTY SECRETARY LAMU COUNTY .. 3RD RESPONDENT

JUDGMENT

Background

1. Through a Memorandum of Claim dated the 14th March 2024, the claimant instituted this claim against the Respondent seeking the following reliefs;
 - a. A declaration that the decision by the Respondent to terminate his employment was procedurally unfair and substantively unjustified.
 - b. A declaration that the Respondents breached the Claimant's rights to a fair hearing and fair labour practices.
 - c. A declaration that the termination of the Claimant's employment was unfair and unlawful.
 - d. Damages for violation of the constitutional right to a fair hearing and fair labour practices.
 - e. An order directing the Respondent to reinstate the Claimant to his immediate former position with back-pay from September 2023;

In the alternative



- I. An order directing the Respondent to issue the Claimant a certificate of service.
 - II. An order of 12 months' salary to be paid to the Claimant for the wrongful and/or unfair termination in line with section 49 of the Employment Act at KShs. 243,216 per month, totalling KShs. 2,918,580.00.
 - III. One month's notice pay of KShs. 243,215.00.
 - IV. Pay in lieu of Leave earned but not taken [243, 215x2 years] at KShs. 486,430.00.
 - V. Public Holiday Pay [8,107.17 x 12 x 3 years] at KShs. 291,858.00
 - VI. Transfer Allowance at KShs. 55,510.00
 - VII. Baggage Allowance at KShs. 6,000.
 - VIII. Interest on [iii] to[viii] above at court's rates from the date of filing of the suit until payment in full;
 - IX. Costs of the suit and interest from the date of judgment.
2. The Memorandum of the Claim was filed contemporaneously with his witness statement and the documents he intended to rely on as documentary evidence to support his case.
 3. Upon being served with the summons to enter appearance, the Respondents entered appearance dated 2nd April 2024 and filed a Statement of Defence dated 17th April 2024. They denied the Claimant's cause of action and his entitlement to the reliefs sought.
 4. At the hearing of the parties' respective cases, the witness statements they had filed were adopted as part of their evidence in chief. The documents were admitted as documentary evidence.

The Claimant's case.

5. The Claimant states he was employed by the 2nd Respondent on or about 8th May 2020 as a Medical doctor on a one-year contract with a starting salary of KShs—47,780 exclusive of allowances.
6. On or about September 2023, while returning to work after a sick leave, the Medical Superintendent of the 1st Respondent abruptly and without prior notice informed him that his employment contract had been terminated. At the time of the termination, he earned a monthly salary of KShs. 243,215.00.
7. Upon inquiry, he was casually informed that his employment had been terminated as the 2nd Respondent had no intention of renewing his employment contract.
8. He stated that there was no renewal contract as of 1 September 2022. This resulted from the fact that the 2nd Respondent's office had shown dilatoriness in making renewal contracts available for its employees. For instance, the first employment contract was availed to him on 8 May 2020, and a subsequent one on 1 September 2022.
9. In the circumstances, the Respondents cannot purport to decline renewal of his contract, long after the renewal was due. As a result of the non-renewal at the time when it was supposed to, he remained in employment under a month-to-month open-ended contract for more than twelve months after the lapse of the agreement dated 1st September 2022.
10. The 2nd Respondent's office had devised a non-conductive working schedule that saw him work a 24-hour day shift for two weeks before proceeding for two weeks off. Thus, he was compelled to work up to 320 hours a month, contrary to the contractual working hours of 8 hours a day for five days a week.



11. He endured and dutifully discharged his duties for over two years without taking an annual leave. Whenever he applied for any, the 3rd Respondent's office didn't allow claiming that there was no Medical Officer whom he could hand over to.
12. The termination of his employment was made while he was on sick leave, a testament to the 2nd Respondent's ill faith.
13. His relationship with the 2nd Respondent started deteriorating when they transferred him from Witu Health Centre to Lamu County Referral Hospital, knowing very well that he was on his two weeks off during the time. The action was aimed at achieving one goal: pushing a narrative of desertion of duty.
14. Nonetheless, on or about the 11th of September 2023, he dutifully reported to the new station and received an arrival letter under protest. He was, however, unable to discharge his duties, for soon thereafter, he became unwell.
15. The 1st Respondent issued a notice to show cause letter dated 14th September 2023, charging him with absconding from duty. He responded to the letter, denying the accusation and explaining that he was indisposed and undergoing physiotherapy.
16. The Respondent's decision to terminate his employment was prompted by ill faith and was retaliatory in answer to his decision to contest the 2nd Respondent's decision to transfer him. The termination was without any valid reason. He was not served with a termination notice, nor were the reasons for the termination of his employment provided.
17. As his contract morphed into a month-to-month employment contract, the Respondents were obliged to adhere to the dictates of procedural fairness, yet they didn't.
18. The decision to terminate his employment contract violated his right to a fair hearing under Article 50 of *the Constitution* and to fair labour practices as guaranteed under Article 41.
19. Cross-examined by Counsel for the Respondents, he testified that he first came into employment with the second Respondent under a one-year fixed-term contract dated 8th May 2020.
20. The Contract dated 16 January 2021 was to run for one year, from 1 October 2021 to 30 September 2022. When the contract lapsed, there was no written extension.
21. All his payslips indicated the lapse date of his contract as 30 September 2023. However, the 2nd Respondent didn't inform him that the contract would lapse on this date at any time.
22. The Respondents paid him his salary for September 2023. The payslip shows that he was paid an emergency and extraneous allowance. Compensation for public holidays worked would not be part of the extraneous allowance.
23. Between December 2022 and February 2023, he was on leave for the days earned in the years 2021-2022. He didn't take leave for this period because the facility was understaffed. For 2021, he took his leave in May 2021.
24. He could work for 360 hours, not the 160 contractual hours.
25. He stated that he was transferred on 23rd August 2023. At the time of the transfer, he had his two weeks off, which were to commence on 28th August 2022. He was to report to the new station on the 11th September 2023. At the time, he reported his two weeks off were over.



26. After reporting, he was allowed until 18 September 2023 to prepare and move duly to the new station. His request for more time was declined. He appealed against this, but the second Respondent did not respond.
27. He didn't report on 18th September 2023, as he was unwell. When he went to pick up a sick day from the Hospital, he was issued a show-cause letter, to which he responded.
28. On 25th August 2023, he applied for annual leave. However, his application was declined because he had already been transferred. He was urged to apply for leave from the new station.
29. He was paid part of his gratuity, following his application for payment of a two-year gratuity.

The Respondent's case.

30. The Respondents presented one witness, Dr. Victor Toli, to testify on their behalf.
31. The witness stated that the 2nd Respondent employed the Claimant as a medical officer via a letter of offer dated 8th May 2020 on a one [1] year contract.
32. On the expiry of the contract, he was issued a renewal contract dated 16 November 2021, renewing his contract for one year from 1 October 2021 to 30 September 2022.
33. Upon the expiry of the Claimant's renewed contract on 30th September 2022, his contract of employment was further renewed for one year with the date of expiry appointed as 30th September 2023.
34. By his [the witness] letter dated 23rd August 2023, he transferred the Claimant from Witu Health Centre to Lamu County Hospital. The Claimant was released for the new station on 28th August 2023, per the release letter of the same date. He reported to his new station on the 11th September 2023.
35. The Claimant failed to resume duty thereafter, prompting the witness to instruct the Medical Superintendent to issue him a show cause letter dated 18 September 2023 on the grounds of absconding from duty. He didn't respond. The allegation that he replied through his letter dated 21st September 2023 is untrue.
36. The issue of absconding was not pursued further as it was overtaken by events on the expiry of the Claimant's contract due to the expiration of time on 30 September 2023. The parties were discharged from their contractual obligations at the expiry of the Claimant's employment contract.
37. The alleged summary dismissal and unfair termination don't arise in the circumstances.
38. The Claimant's allegation that he worked under horrid conditions is unfounded. The hospital had two doctors and several clinical officers, which is why he could afford two weeks off.
39. He was paid all his salary.
40. Cross-examined by Counsel for the Claimant, the witness stated that the Claimant came into employment through a written agreement. The contract was renewed formally in November 2021. From May to November 2021, he was not serving under a written agreement. As such, he was engaged on a month-to-month basis.
41. At the expiry of the 2nd contract, there was a renewal contract for a further year, October 2022 to September 2023. However, unlike the other two contracts, it wasn't in writing.
42. Apart from the payslips, no document indicates that his contract was to end on September 30, 2023.



43. Before directing that a show cause letter be issued against the Claimant, he didn't make any inquiry to ascertain why the Claimant was not reporting for duty.

Analysis and Determination

44. I have carefully considered the pleadings, evidence and submissions by the parties herein, and the following issues emerge for determination;
- a. Under what form of employment contract was the Claimant at the time of separation?
 - b. Subject to [a]above, was the termination of his employment unfair?
 - c. Is the Claimant entitled to the reliefs sought?
45. The common factor regarding the relationship between the Claimant and the Respondent was that the same was commenced through a written one-year fixed-term employment contract. However, the combatants herein were uncompromisingly in conflict regarding the nature of the contract under which the Claimant served at the time of separation. The Respondent maintained that after the first fixed-term contract lapsed by effluxion of time, there were two more fixed-term contracts, each for one year. As such, the Claimant's last contract was a fixed-term contract with an appointed lapse date. On the other hand, the Claimant took a position that after the lapse of the second fixed-term contract, there was no written agreement; therefore, from the date the second agreement lapsed, up to the time of separation, he served under a month-to-month contract of service.
46. The Respondent's witness, in his witness statement, asserted that when the Claimant was exiting employment, he served under a third written contract with a lapse date of 30 September 2023. However, under cross-examination, he admitted that, unlike the 1st two fixed-term contracts, the third contract wasn't in writing. Inexplicably, the Respondent's witness didn't state or attempt to state why the third contract wasn't reduced to writing like the others.
47. Under section 10[7] of the *Employment Act*, where a dispute arises on a term of contract of service that is required to have been reduced into writing in terms of section 9 of the act, the burden is on the employer to prove or disapprove the disputed term by either producing the written contract or particulars of the disputed term. Thus, the burden of proving that immediately before separation, the Claimant served under a fixed term contract with an appointed date of lapse rested on the 2nd Respondent. See also *Wanjohi v SGA Security Solutions Limited* [2022] KEELRC 3852[KLR].
48. The 2nd Respondent, contrary to the statutory dictate under Section 10[7] of the *Employment Act*, failed to furnish this court with a written contract to prove the term mentioned above, which no doubt was in controversy. It is not lost on me that, inexplicably, the Respondents didn't bother even to show why the third contract was not written like the initial two.
49. The Respondents' Counsel submitted that the Claimant's pay slip bore the acronym RoD, which, according to the Respondents' witness, meant the contract's expiry date, and that therefore, there was proof of the term. I have not lost sight of the fact that the Claimant denied knowing that that is what it meant. This Court takes the view that a pay slip, which is a document prepared by the employer without the input and control of the employee, can seldom be proof of a term of employment, especially when the term is seriously contested, as is in the instant suit. This position finds fortification in the Court of Appeal's reasoning in the case of *Grain Pro Kenya Inc. Ltd v Andrew Waithaka Kiragu* [2019] eKLR.
50. Relying on the case of *Grace Wangui Munyaka v Board of Governors, Nyeri Baptist High School* [2013], Counsel for the Respondent urged the Court to conclude that in the absence of a written



contract after the expiry of a written one, the contract is deemed to have been renewed in terms similar to the expired contract by the conduct of the parties and operation of the law. I have carefully considered the facts of this cited decision and hold that they are radically different from those of the instant case, and it is not relevant in the circumstances of this case.

51. Parties are bound by their pleadings. Nothing turns on a matter not pleaded, therefore. The implication that the Counsel for the Respondent was not pleaded by the Respondents, expressly or implicitly. No evidence was presented to be the basis for this Court to imply, as Counsel for the Respondents urged, that this Court should.
52. In the end, I come to the inescapable conclusion that after the lapse of the second contract, the Claimant served the 2nd Respondent on a month-to-month open-ended contract until the time of separation. As such, all the rights and protections under sections 41, 43, 45, and [47[5] of the Employment Act were available to him. Rights and protections that could not be available to him if his contract of service were held to be a fixed-term contract like the initial two.
53. The Claimant contended that his employment was unfairly terminated. Having held as I have hereinabove, I am convinced that in the circumstances of the matter, a summary dismissal against the Claimant occurred. Section 44 [1] of the Employment Act provides for when summary dismissal takes place, that;

“Summary dismissal shall take place when an employer terminates the employment of an employee without notice or less notice than that to which the employee is entitled by any statutory provision or contractual term.”

The Claimant’s employment was terminable by notice under the provisions of section 35 of the Act. No such notice or any notice was given before her employment was terminated.

54. Section 44[3] of the Act provides that an employer may dismiss an employee summarily when the employee has, by his conduct, indicated that he has fundamentally breached his obligations arising under the contract term. The Respondent did not demonstrate that the Claimant fundamentally breached her obligations under the employment contract or in any manner or at all. In fact, it was expressly stated by the Respondent’s witness that the pursuit of disciplinary action against the Claimant on the grounds of desertion of duty was abandoned. As a result, I hold that no evidence was placed before me to demonstrate that he committed a gross misconduct that could justify a summary dismissal or any form of termination at the initiative of the employer, the 2nd Respondent. It goes without saying, therefore, that there was no valid or fair reason for the dismissal.
55. Unless under the provisions of section 44 of the Act, no employer has a right to terminate a contract of service without notice or with notice less than that to which the employee is entitled by any statutory provision or contractual term, as decreed in section 44[2] of the Act. Any termination that is contrary to this provision shall be unlawful, therefore.
56. Section 41 of the Act sets out the procedural threshold that should be met whenever the employer contemplates terminating an employee’s contract of service or dismissing the employee summarily from employment. First, the employer is obligated to inform the employee of the intention of termination and the grounds forming the basis thereof. Secondly, accord the employee an opportunity to make representation on the grounds, and lastly, consider the representation by the employee or the accompanying person contemplated under the provision before making a decision.



57. Without much ado, it can be easily concluded that the stipulations of section 41 of the Act were not adhered to. The dismissal of the Claimant from employment was therefore procedurally unfair by dint of the provisions of section 45[2] of the *Employment Act*.
58. In view of the above, I conclude that the termination of the Claimant by the Respondent was both procedurally and substantively unfair.

Whether the Claimant is entitled to the reliefs sought.

i. One month's Salary in lieu of notice.

59. Section 35(c) provides for 28 days' notice before an employee's employment is terminated. As I have found herein above, the nature of the Claimant's employment was one terminable by the stated notice. The Claimant was not issued with the same or any notice before the summary dismissal. By dint of the provisions of section 35 as read together with section 36 of the *Employment Act*, I hereby award him one month's salary in lieu of notice, KShs. 243,215.

ii. Unpaid/Untaken leave days for the 2 years.

60. The Claimant sought a sum of Ksh—486,430.00 for compensation for earned but unutilised leave days. I have carefully considered his evidence under cross-examination and hold that he is not entitled to an award under this head, as he admitted having proceeded for his annual leave for the time he served the 2nd Respondent.

iii Compensation for Public Holidays worked.

61. The Claimant did not place any evidence before this Court to show the Public holidays on which he worked without compensation. He is thus inviting the Court to venture into the space of speculation. This invitation is declined. Therefore, his claim under this head remains one that was just thrown to the Court, without supporting evidence. It is hereby rejected.
62. By parity of reasoning, the Claimant's claim under the heads of transfer allowance and Baggage allowance is rejected.

iii. Compensation for the unfair termination.

63. The authority to make this award flows from the provisions of section 49 [1] [c] of the *Employment Act*. However, it is important to point out that the authority is discretionarily exercised depending on the circumstances of each case. Considering the period, the Claimant worked for the 2nd Respondent, the 2nd Respondent's failure to adhere to the dictates of procedural and substantive fairness, and the fact that he didn't in any proven manner contribute to the termination, and conclude that the Claimant is entitled the compensatory relief contemplated under the section, to three (3) months gross salary.
64. In the upshot, judgment is hereby entered for the Claimant against the Respondent in the following terms;
- a. A declaration that the termination of the Claimant from employment was both procedurally and substantively unfair.
 - b. Salary in lieu of notice.....KShs. 243, 215.00
 - c. Compensation pursuant to the provisions of section 49[1][c] of the *Employment Act*,729,645.



- d. The 2nd Respondent to issue a certificate of service to the Claimant within 30 days of this Judgment.
- e. Cost of suit.
- f. Interest at court rates on the awarded sum from the date of this judgment till full payment.

READ, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF APRIL 2025

OCHARO KEBIRA

JUDGE.

In the presence of

..... For the Claimant.

.....For the Respondent.

