



**Rugendo v Choice Surveillance Limited (Appeal E204 of 2022)
[2025] KEELRC 1356 (KLR) (5 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1356 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E204 OF 2022
NJ ABUODHA, J
MAY 5, 2025**

BETWEEN

NANCY KATHOMI RUGENDO APPELLANT

AND

CHOICE SURVEILLANCE LIMITED RESPONDENT

(Being an appeal arising from the Judgment and decree of Honourable GRACE A. OMODHO(PM) delivered in Nairobi CMELRC No. E827 of 2021 on 31st October, 2022)

JUDGMENT

1. Through the Memorandum of Appeal dated 31st October 2022, the Appellant appeals against part of the Judgment of Honourable Magistrate Grace A. Omodho delivered on 31st October, 2022.
2. The Appeal was based on the grounds that:
 - i. The trial court erred in law and fact by finding that the Appellant had not discharged the burden of proof in her case.
 - ii. The Learned trial magistrate misdirected herself on the law and evidence tendered at trial in finding that there was no discrimination against the Appellant on account of her pregnancy.
 - iii. The trial magistrate erred in law and fact in finding that the Respondent complied with the requirements of the *Employment Act*, 2007 in declaring the Appellant redundant and terminating her on such ground.
 - iv. The trial court failed to appreciate the import and applicability of the decisions in *Kenya Airways Limited v Aviation & Allied Workers Union & 3 Others* (2014) eKLR and *Stephen Waititu v Kenya Tea Packers Limited & Another* (2020) eKLR hence offending the principle of stare decisis.



- v. The Learned trial magistrate misdirected herself on the law and facts in failing to find that the termination of the Appellant on account of redundancy was premeditated.
 - vi. The trial court erred in law and fact by returning that save for a certificate of service the Appellant was not entitled to other reliefs sought in her statement of claim.
3. The Appellant prayed that the Appeal be allowed with costs of this Appeal and lower court, the Judgment of the trial court made on 31st October 2022 by Honourable Grace A. Omodho be set aside and substituted with an order of this court allowing the Appellant's claim.
 4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant's Advocates Limo & Njoroge Advocates filed written submissions dated 20th January, 2025 and on the issue of whether the Appellant discharged the burden of proof in her case counsel submitted that the Employment Act imposes the primary burden of proofing the reason for termination on the employer as mandated by section 43 of the Act. That section 5(7) of the act shifts the evidential burden to the employer once an employee raises a prima facie case of discrimination.
6. Counsel relied on the case of GMV vs Bank of Africa while submitting that proving discrimination does not require strict proof by employee once they establish a prima facie case it was upon the employer to justify its actions. That the Appellant provided credible evidence of her pregnancy and the proximity of her termination to her expected maternity leave. That the Respondent failed to rebut this evidence or prove redundancy under section 40 of the Employment Act.
7. On the issue of whether there was constructive renewal of the Appellant's contract counsel submitted that if the Appellant had no contract with the Respondent as alleged then what was the termination notice dated 24th February, 2021 terminating? That the Appellant was employed by the Respondent as an accounts Assistant on a one-year fixed term contract that commenced on 1st January, 2020 and was set to expire on 31st December, 2020. That after the expiry of the fixed term contract the Appellant continued to perform her duties uninterrupted and without objection from the Respondent.
8. Counsel further submitted that where an employee continues working after expiry of a fixed-term contract without any objection or termination notice from the employer the contract is deemed to have been constructively renewed on the same terms and conditions as the original contract. That the principle is grounded on doctrine of legitimate expectation and is further supported by judicial precedent. That such employment contract had been automatically renewed by operation of the law while relying on the case of Ruth Gathoni Ngotho-Kariuki vs Presbyterian Church of East Africa and Presbyterian Foundation (2012) eKLR.
9. Counsel submitted that the Respondent neither issued a notice of termination nor indicated any intention not to renew the Appellant's contract. That instead the Appellant continued working in her role as accounts Assistant discharging her duties diligently until she was abruptly terminated on 24th February, 2021. That the Respondent by allowing the Appellant to work past 31st December, 2020 the Respondent constructively renewed her contract and created a legitimate expectation of renewal.
10. Counsel invited the court to the doctrine of contra-preferentem rule while submitting that the contract dated 1st January, 2020 included provisions that were inherently ambiguous. That the contract provided that it was renewable unless terminated by either party upon issue of written notice of not less than one month while simultaneously stating that it carries no expectation of extension or renewal.



That this created ambiguity of the interpretation while on one hand giving the Appellant a legitimate expectation of renewal while on the other extinguishing such an expectation.

11. Counsel submitted that the Respondent being the author of the contract was bound by the contra-proferentem rule a well-established principle of contract interpretation that where a term in a contract is ambiguous it should be construed against the party that drafted it. That the contradictory provisions should be resolved in favour of the Appellant giving effect to the clause that allowed for renewal unless terminated by notice. That the trial court failed to appreciate this principle and misapplied the law in finding that no contract existed. That the same should be set aside and find that the Appellant contract was constructively renewed hence her termination procedurally and substantively unfair entitling her to the reliefs sought.
12. On the issue of whether the Respondent complied with the requirements of the *Employment Act* in declaring the Appellant redundant counsel submitted that section 40 of the *Employment Act* provides for the legal process requiring prior notice to the employee and the labor office, consultation with the employee and payment of severance benefits. That the Respondent failed to meet these statutory requirements rendering the purported redundancy procedurally and substantively unfair.
13. Counsel submitted that the Respondent admitted that the reason for termination of the Appellant's contract was due to redundancy and went on to rely on a letter to the labour officer dated 22nd January, 2021 declaring the Appellant redundant. That the letter did not meet requirements of section 40(1) (a) of the Act which provides for a general notice of intention to declare redundancy before identifying the employees likely to be affected. Counsel relied on the case of Kenya Airways Limited V Aviation Workers Union & 3 Others (2014) eKLR on the essence of the said notice.
14. Counsel submitted that the letter to labour officer named the Appellant directly demonstrating that the redundancy process has already been predetermined without prior consultation. Counsel relied on the case of Margaret Mumbi Mwago v Intrahealth International (2017) eKLR that redundancy decision that pre-identifies affected employees before consultation was inherently flawed. That no meaningful consultation was held since the Respondent claimed to have consulted the Appellant in a meeting referenced in an email dated 15th January, 2021 which the Appellant disputed attending such a meeting and no minutes or evidence were produced to confirm its occurrence. That the email was admitted in to evidence without the certificate of authenticity required under section 106B of *Evidence Act*. That the Respondent alleged that the Appellant's position was declared redundant due to economic challenges caused by COVID-19 pandemic with no evidence of redundancy plan, objective selection criteria or the abolition of the Appellant's position.
15. Counsel relied on the case of Onesmus Kinyua Magoiya v Prudential Life Assurance Kenya (2022) eKLR while submitting that employers must demonstrate that redundancy decisions are based on fairness, good faith and transparency. That the employer must prove that the redundancy was genuine, necessary and unavoidable which the Respondent failed to prove as such. That while the Respondent cited economic challenges of COVID-19 pandemic as the reason for redundancy it failed to provide evidence of financial hardship (Books of accounts among others) or operational restructuring that necessitated the termination of the Appellant's employment.
16. Counsel submitted that the Respondent continued to employ the Appellant during the height of the pandemic in 2020 and terminated her employment when she was seven months pregnant and about to proceed on maternity leave. That the timing of the termination coupled with absence of redundancy plan or evidence of abolished positions supports the conclusion that the redundancy was a pretext for unlawful termination.



17. On the issue of whether the trial court failed to adhere to the principle of stare decisis counsel submitted that the trial court erred by failing to apply relevant precedent in Kenya Airways case above as well as that of Stephen Munene as stated above hence offending the doctrine of stare decisis.
18. On the issue of whether the Respondent discriminated against the Appellant on account of her pregnancy counsel relied on Article 27(4) of *the Constitution* and sections 5(3) and 46(a) of the *Employment Act* on prohibition of discrimination on basis of pregnancy. Counsel also relied on International Labour Organization' Maternity Protection *Convention No. 183 of 2000* on right of pregnant employees to non-discriminatory treatment.
19. On the issue of whether the termination of the Appellant's employment was premeditated counsel submitted that the Respondent's failure to consult the Appellant coupled with the proximity of her dismissal to her maternity leave demonstrates that the redundancy was a pretext for discrimination.
20. On the issue of whether the Appellant was entitled to the reliefs sought counsel submitted that the Appellant was entitled to the reliefs sought in her claim.

Respondent's Submissions

21. The Respondent's Advocates Kinyanjui, Kirimi & Company Advocates filed its submissions dated 20th January, 2025 and submitted on the role of the first appellate court while relying on the case of Mutaki v Tire World Limited (Employment and Labour Relations Appeal E015 of 2022) (2024) KEELRC 1047(KLR) 9May 2024) (Judgment).
22. On the issue of whether the Appellant was lawfully terminated and if the Appellant had discharged her burden of proof counsel submitted that the Appellant was employed by the Respondent for a period of 12 months from 1st January,2020 to 31st December,2020. That the contract was terminable by either party upon issue of a written notice of not less than one month. That there was a clause in the contract that expressly stated that the contract carries no expression of extension or renewal.
23. Counsel further submitted that the Appellant's ground that she was illegally terminated though her contract was for a fixed term that it had been constructively renewed when she worked for the month of January up to 24th February,2021 was unmeritorious since the Respondent had informed the Appellant vide email of 15th January,2021 and after a physical meeting with the Appellant that it had no intention whatsoever to renew the contract. That the Appellant was trying to use the court to force the Respondent to renew her contract which attempt was untenable.
24. Counsel submitted on standard of proof in civil matters which is on balance of probabilities with test of reasonableness applying as per section 45(4) (b) of the Act. Counsel also relied on section 47(5) of the Act on the required burden of proof as well as section 43 of the Act on the prove of reasons for termination on employer.
25. Counsel submitted that the termination of employment by the Respondent followed the required standard by the law. That when the Respondent realized it was untenable to engage the services of the Appellant further due to financial constraints they immediately followed the due procedure under the Act and informed her by having a physical meeting with her. That the Respondent also followed the procedure as outlined under section 40 of the *Employment Act*.
26. Counsel submitted that the Respondent followed the laid down procedure by notifying the labour officer vide the letter dated 22nd January,2021 after engaging the Appellant. That the Appellant was ultimately terminated vide the letter dated 24th February,2021 and she was fully compensated for the month of January and February she had worked for. Counsel relied on the case of *Wanyonyi v Principal*



Kamusinde Secondary School & Another (Employment and Labour Relations Appeal E010 of 2023) (2024) KEELRC 648(KLR) (14 March 2024) (Judgment) on the burden of proof.

27. Counsel submitted that the employer while terminating on account of redundancy was necessitated on operational requirements and in any case the Appellant's contract had expired and there was no intention of renewing the same which had expired on 31st December, 2020. That the Respondent had not created any legitimate expectation that there will be renewal of the contract. That it gave sufficient notice vide the email of 15th January, 2021 that it did not intend to renew the same.
28. Counsel submitted that fixed term contracts do not carry any expectation of renewal and the employer is not obliged to explain the reasons for non-renewal. Counsel relied on the case of Transparency International -Kenya V Omondi (Civil Appeal 81 of 2018) (2023) (KECA) 174(KLR)(17 February 2023) (Judgment) on the same. That the contract provided that either party could terminate the contract by giving one month notice and the Respondent exercised this right hence it could not be unfair termination since parties are bound by their contract.
29. On the issue of whether the Appellant was discriminated against counsel submitted that the trial court found that the Appellant had not tendered any evidence that proved that she was discriminated against on account of pregnancy. That when an employee alleges to have been discriminated against she must demonstrate that she was treated differently based on her situation to her detriment. Counsel relied on the case of Mwajomba v Mambogani Limited (Cause E430 & 448 of 2020(Consolidated)) (2024) KEELRC 722(KLR) (14 March 2024) (Judgment) on this assertion.
30. Counsel submitted that the Appellant had not issued any notice to the Respondent that she was pregnant and intended to go for her maternity leave. That the Appellant assumed that the Respondent was aware of her pregnancy without informing the Respondent. That the Respondent as an employer was not meant to keep an eye on her employee's health and body changes. The Appellant could not rely on the allegation that the pregnancy was visible at the time of termination.
31. Counsel submitted that there was no nexus between the adverse employment decision made against the Appellant and her pregnancy. That the Appellant's termination was not on account of her pregnancy but because her contract had come to an end and also she had been declared redundant. That the Claimant had no documents to show that she was expectant.
32. On the issue of whether the Appeal has any merit counsel submitted that the appeal was frivolous and unmerited. That the Respondent rightfully exercised its human resource function. Counsel relied on the case of Geoffrey Mworia v Water Management Authority & 2 Others (2015) eKLR on court's not interfering with employer's entitlement to perform any of human resource functions unless there was contraventions of constitution or legislation among others.

Determination.

33. The court has considered the grounds in the Memorandum of Appeal, the Record of Appeal and the submissions filed by the parties which were very ably made by both parties and I thank them for their industry.
34. The Judgment of the trial court was that the Claimant failed to prove her claim and she was only awarded prayer for certificate of service. That the Claimant failed to prove discrimination and lack of contract hence she was lawfully out of employment. The Appellant was aggrieved by the said judgment and fronted six grounds in her Memorandum of Appeal dated 31st October, 2022. In order to efficiently determine the appeal the Court will reduce the grounds of Appeal to four namely:-



- a. Whether the trial court erred in finding that the Appellant’s contract was not constructively renewed at the time of termination
- b. Whether the trial magistrate erred in finding that the Respondent was lawfully terminated.
- c. Whether the trial court erred in finding that the Respondent was not discriminated on account of pregnancy
- d. Whether the trial court erred in not awarding the reliefs sought by the Appellant in her claim.

Whether the trial court erred in finding that the Appellant’s contract was not constructively renewed at the time of termination

35. It is not in dispute that the Appellant was engaged on a fixed term contract from 1st January, 2020 to 31st December, 2020 after being engaged from February 2019 on a separate contract. The Appellant continued working despite the expiry of the said contract on 31st December, 2020 without any renewal or notice of termination. The Appellant alleged that the conduct of the Respondent amounted to constructive renewal of her contract because she continued working despite the expiry of the contract on 31st December, 2020 up to 24th February, 2021 when she was terminated.
36. The contract provided for renewal unless terminated by one month notice on one hand while at the other hand it provided that there was no guarantee of the extension or renewal of the contract. The appellant contended that constructive renewal should outweigh the clause for no legitimate expectation for renewal. The Respondent on the other hand alleged that they notified the Appellant vide the email of 15th January, 2021 and held a physical meeting with her that they intended not to renew her contract. The trial court on the other hand found that there was no existing contract at the time of termination.
37. The court appreciates that fixed term contracts are not renewable automatically as was held in the case of *Rajab Barasa & 4 Others v. Kenya Meat Commission* 2016] eKLR, where it was held that a fixed term contract will not be renewed automatically even when there exists a clause allowing for such renewal. Further, fixed term contracts carry no legitimate expectation of renewal. In the case of *Osoti v Trees for the Future INC (Cause E002 of 2023)* [2024] KEELRC 962 (KLR) (2 May 2024) (Judgment) the court observed as follows: -

The general rule is that a fixed term contract carries no expectation for renewal. It is however settled that a fixed term contracts with a renewal clause may create expectancy of renewal on the part of the employee based on previous contract renewals.

38. This court takes the view that the Appellant was initially engaged by the Respondent from February, 2019 hence she had legitimate expectation for renewal of her contract. Regarding the considerations to be made when considering whether a legitimate expectation for renewal of a fixed term contract was created, the sentiments of Rika J. in *Teresa Carlo Omondi v Transparency International- Kenya* [2017] eKLR guide this court as follows-

“The burden of proof, in legitimate expectation claims, is always on the Employee. It must be shown that the Employer, through regular practice, or through an express promise, leads the Employee to legitimately expect there would be renewal. The expectation becomes legally protected, and ought not to be ignored by the Employer, when managerial prerogative on the subject is exercised. Legitimate expectation is not the same thing as anticipation, desire or hope. It is a principle based on a right, grounded on the larger principles of reasonableness



and fair dealing between Employers and Employees. The Employee must demonstrate some rational and objective reason, for her expectation. The representation underlying the expectation must be clear and unambiguous. The expectation must be induced by the decision maker. The decision maker must have the authority to renew. Repeated renewals, extended service beyond the period provided for in the fixed term contract, and promise of renewal, are some of the elements that would amount to objective reasons underlying expectation of renewal. The presence of these elements however, is not to be taken as conclusive proof of legitimate expectation.”

39. In the case of *Otiende v Ligawa & another* (Petition E052 of 2022) [2023] KEELRC 3363 (KLR) (13 December 2023) (Judgment) the court observed as follows: -

In the Court’s view, the conduct of the Respondents not only created a legitimate expectation on the Petitioner but also led to an inference that he was still an employee until released formally in terms of clause 1(iv) of the contract.

40. The conduct of the Respondent in this case where it continued paying the Appellant her salary, never notified its intention of not renewing the contract before it expired and it never objected to the Appellant’s continuation of work amounted to the Appellant’s legitimate expectation. To this extent the trial Court erred in not upholding that the claimant’s contract of employment continued after expiry when she continued to offer services to the respondent until 24th February, 2021 when the same was purportedly terminated. Counsel for the appellant therefore posed a valid question when he asked what was being terminated if there was no contract? This ground of appeal succeeds.

Whether the trial magistrate erred in finding that the Respondent was lawfully terminated.

41. The burden of proof in employment matters is as provided for under section 47(5) of the *Employment Act*. The employee must prove that unfair termination occurred. The employer on the other hand must justify the reasons for termination. The Court having found that the appellant’s contract continued after the expiry date to 24th February, 2022 when the same purportedly terminated, the burden to justify the reason for termination now rests on the respondent.

42. The notice of termination dated 24th February, 2021 stated that the Respondent was terminating the Appellant due to Covid 19 pandemic effective the same date as the company could not sustain to pay her. The termination offered her pay for February, 2021, one- month notice pay and annual leave pay. The termination was therefore through no fault of the appellant but due to Covid-19 pandemic over which the Court takes judicial notice that very many jobs were lost as a result. The termination was thus akin to redundancy hence the relevant provisions of the Act ought to have been adhered to.

43. Section 2 of the *Employment Act* defines redundancy thus:-

means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.

44. In *Kenya Airways Limited VS. Aviation and Allied Workers Union of Kenya and 3 Others* (2014) eKLR, the Court of Appeal pronounced itself as follows:

“Thus, redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer



and the termination is in accordance with a fair procedure. As Section 43(2) provides, the test of what is fair reason is subjective. The phrase “based on operational requirements of the employer” must be construed in the context of the statutory definition of redundancy.

What the phrase means, in my view, is that while there be underlying causes leading to a time redundancy situation such as reorganization, the employer must nevertheless show that the termination is attributable to redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.”

46. The Respondent stated that the decision to terminate was necessitated by lack of funds to sustain the appellant’s salary due Covid-19. This was a valid reason but the respondent had a responsibility to follow the provisions of section 40 of the *Employment Act* especially as concerns payment of terminal dues. The appellant was informed at a physical meeting about the intention to terminate her service due to Covid-19. This was evidenced by an email dated 15th January, 2021. The respondent further notified the labour office of the same through a letter dated 22nd January, 2021.
47. The respondent in the termination letter offered to pay the appellant salary for February, 2021, one-month notice pay and annual leave pay. The respondent did not make any offer for severance pay which is a requirement under section 40 of the Act. The claimant having only worked for a year is entitled to 15 days pay as severance pay that is to say Kshs. 30,000/- which this Court hereby awards.

Whether the trial court erred in finding that the Respondent was not discriminated on account of pregnancy

48. The Appellant alleged that the trial court erred in finding that she was not discriminated. The Appellant admitted that she never notified the Respondent of her pregnancy status and there was no way she would expect that the Respondent was aware of her pregnancy just because the pregnancy was visible at the time of termination.
49. This court adds that discrimination being a constitutional violation had to be pleaded with precision as was emphasized in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR. The court notes that the Appellant did not plead specifically how she was discriminated on account of her alleged pregnancy. The court therefore agrees with the trial court that the discrimination was not properly and specifically pleaded. This ground of appeal therefore fails.

Whether the trial court erred in not awarding the reliefs sought by the Appellant in her claim.

50. The Appellant challenges the trial court for failure to award her dues sought in her claim. The trial court awarded her only the certificate of service. The Court has noted that the respondent offered to pay the appellant her dues in accordance with section 40 of the *Employment Act* except for severance pay which the Court has awarded at Kshs. 30,000/-. The Court further found that that the reasons for termination of the appellant’s service were justifiable in law hence the issue of unfair termination of service did not arise.
51. In Conclusion, in addition to the terminal dues offered by the respondent in their termination letter dated 24th February, 2021, will pay the appellant the sum of Kshs. 30,000/- on account of severance pay.
52. The appeal being partially successful, each party shall bear their own costs.
53. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF MAY, 2025



DELIVERED VIRTUALLY THIS 5TH DAY OF MAY, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

