



**Mweni v Child Welfare Society of Kenya (Appeal E040 of 2024)
[2025] KEELRC 1951 (KLR) (30 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1951 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E040 OF 2024
M MBARÚ, J
JUNE 30, 2025**

BETWEEN

ANNAH MWANIA MWENI APPELLANT

AND

CHILD WELFARE SOCIETY OF KENYA RESPONDENT

*(Being an appeal from the judgment of Hon. Gathogo Sogomo in
Mombasa CMELRC E526 of 2023 delivered on 15 March 2024)*

JUDGMENT

1. The appeal initially proceeded ex parte, and judgment was delivered on 26 September 2024. However, upon application dated 3 December 2024, the respondent sought to set aside the judgment. Through a ruling delivered on 27 February 2025, the judgment was set aside to allow the matter to be heard afresh.
2. The appeal arises from the judgment in Mombasa CMELRC E526 of 2023 delivered on 15 March 2024. Aggrieved by the judgment, the appellant has six (6) grounds that;
 - a. The learned magistrate misdirected himself in law and fact in finding that the appellant was fairly terminated from work in the absence of the show cause letter, notice invitation to the disciplinary meeting and being informed to attend the disciplinary meeting with a witness of choice.
 - b. The learned magistrate misdirected himself in law and fact and applied wrong principles of law in finding that the appellant was fairly dismissed from work without taking into account that the appellant had a legitimate expectation that her contract of employment would be renewed as before she was not served with any notice of non-renewal of his contract of employment.



- c. The learned magistrate misdirected himself in law and fact, and misdirected himself in applying Section 47(5) of the *Employment Act* in shifting the burden of justifying the grounds for the termination of employment or wrongful dismissal to the appellant instead of the respondent.
 - d. The learned magistrate misdirected himself in law and fact in failing to find that the appellant's dismissal from employment ought to have been both procedurally and substantively fair under sections 43, 44 and 45 of the *Employment Act*.
 - e. The trial magistrate disregarded the overwhelming evidence tendered by the appellant to prove that she was entitled to terminal dues upon unlawful dismissal from work as enshrined in section 49 of the *Employment Act*.
 - f. The learned magistrate disregarded the submissions made by the appellant.
3. The appellant seeks the judgment to be set aside and the claims awarded as prayed with costs.
 4. The background of the appeal is a claim filed by the appellant on the basis that on 18 January 2011, she was employed by the respondent as a caregiver on permanent and pensionable terms. In July 2012, the respondent started issuing her one-year contracts, which were renewed consistently until 3 July 2023, when the respondent terminated her employment without giving notice of non-renewal of the contract. On this day, the manager, Norah Okonda, called the appellant, who informed her that her employment had been terminated immediately without notice or reason. The appellant had continued to offer her employment continuously and had a legitimate expectation that her contract would be renewed. Her salary was Ksh 33,396 per month, but on 20 July 2023, the appellant was summoned from the Nairobi office and issued a cheque of Ksh 282,149 meant to compensate her for the untaken leave days, pension and salary for June 2023. The appellant claimed the following dues:
 - a. Notice pay Ksh 33,396;
 - b. salary for June 2023, Ksh 33,396;
 - c. Pension contributions 200 x 150 months Ksh.30,000;
 - d. House allowance for 66 months at 15% Ksh 751,410;
 - e. Unpaid leave days for 13 years, Ksh 434,148;
 - f. 12 months' compensation Ksh 400,752
 - g. Costs.
 5. No response was filed before the trial court. In the appeal, the respondent filed Grounds of Opposition to the appeal and asserted that there was no service of the trial court summons to attend and defend the claimant. The appellant was paid her terminal dues and signed a discharge form in full and final payment.
 6. In the judgment, the learned magistrate dismissed the claim because the appellant was on a term contract and did not require notice or reasons for termination. The pay slips submitted had a house allowance provided, and the wage paid was above the minimum under the Wage Orders. The claim for unpaid salary for June 2023 was covered in the cheque issued for Ksh 282,149. The claim for untaken leave days was dismissed because the appellant had not lodged a claim for untaken leave days while in employment and for pension refunds, as the appellant was registered with NSSF, and hence this is not due.



7. The Appellant submitted that her contractual relationship with the Respondent existed from July 2012, with contracts consistently renewed despite terminating by effluxion of time. These consistent annual renewals created a legitimate expectation of renewal, which the Court must protect under Section 45(5)(d) of the *Employment Act*. This provision requires the Court to consider an employer's past practices in similar circumstances. The Court of Appeal case of *Keen Kleeners Limited v Kenya Plantation and Agricultural Workers' Union* (Civil Appeal 101 of 2019) [2021] KECA referenced the case of *Teresa Carlo Omondi v Transparency International-Kenya* [2017] Eklr, where the Court held:

In legitimate expectation claims, the burden of proof is always on the Employee. It must be shown that the Employer, through regular practice or an express promise, leads the Employee to expect that there would be renewal legitimately. The expectation becomes legally protected and should not be ignored by the Employer when managerial prerogative 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 unambiguous. The decision maker must induce the expectation. The decision maker must have the authority to renew. Repeated renewals, extended service beyond the period provided for in the fixed-term contract, and a promise of renewal are some elements that would amount to objective reasons underlying the expectation of renewal. However, the presence of these elements is not to be taken as conclusive proof of legitimate expectation.

8. There was a legitimate expectation that the respondent would renew the contract.
9. The appellant submitted that, on procedural and substantive fairness, the Respondent did not appear before the Trial Court to explain why her contract was not renewed when a legitimate expectation for such renewal had been established. The employer must prove the reasons for terminating the employment relationship under Section 43, as read with Section 45 of the *Employment Act*.
10. The appellant contends that she was unfairly dismissed and that the lower court erred in its judgment in disallowing her claim. She then urged this Court to set aside the lower Court's decision and allow the claim as prayed with costs in both the appeal and trial court case.
11. The Respondent submitted that the Appellant's reliance on the doctrine of legitimate expectation, based solely on past contractual renewals, is a misapprehension of its true essence. The respondent contends that legitimate expectation is not a mechanical exercise of repetition or mere assumption. Instead, it is a nuanced judicial construct requiring a precise interplay of assurance, reliance, and legal propriety, not a blunt instrument to impose obligations where none exist. In *Kenya Revenue Authority v. Export Trading Company Limited* [2022] KESC 31 (KLR), the Supreme Court held that;

Whether a legitimate expectation arose is more than a factual question. It is not merely confined to whether an expectation exists in the mind of an aggrieved party, but whether, viewed objectively, such expectation is, in a legal sense, legitimate.

12. The Respondent submitted that continuity alone does not create a vested right to renewal. Instead, the doctrine requires an unequivocal assurance that is objective and legitimate. Legitimate expectation does not circumvent contractual autonomy, as each renewal marked the conclusion of a distinct employment relationship without an implicit promise of further engagement. In *Amatsi Water Services Company Limited v. Francis Shire Chachi* [2018] eKLR, and *National Water Conservation & Pipeline Corporation vs. Jayne Kanini Mwanza*, Civil Appeal No. 178 of 2014 (UR), the courts have



held that a fixed-term contract terminates on its sunset date unless expressly extended. Courts cannot rewrite freely entered contract terms.

13. Employment law operates on express terms, not sentimentality or habitual renewal. A hope or fervent expectation does not automatically crystallise into a legally enforceable right. For such an expectation to be legally rooted, it must be based on a clear, consistent, and authoritative assurance from the Respondent, going beyond mere past practice and manifesting as a definite commitment to future renewal. Thus, reliance on historical renewals is a misplaced sense of entitlement without such a promise.
14. The burden of proof is on the employee to show the employer led them to expect renewal through regular practice or express promise legitimately. Which expectation must be based on a rational and objective reason, with an unambiguous representation induced by the decision maker who has the authority to renew. While repeated renewals can contribute, they are not conclusive proof of legitimate expectation as held in *Teresa Carlo Omondi v Transparency International-Kenya* [2017] eKLR.
15. The Respondent submitted that legitimate expectation cannot override the inherent nature of fixed-term contracts, which are meant to lapse unless expressly extended. Also, even where a contract contains an express renewal clause, courts have held that such a clause alone does not create a legitimate expectation of renewal. The law requires tangible evidence of a promise or representation, either express or implied, beyond the contract's text, that reasonably leads the employee to believe renewal is a foregone conclusion as held in *Mbatia v. Kirinyaga Water & Sanitation Company (KIRIWASCO) (Employment and Labour Relations Cause 851 of 2022)* [2023] KEELRC that a renewal clause alone is insufficient; there must be evidence of a promise by the Respondent to establish hope of renewal.

Determination

16. The appellant filed her employment contract and Certificate of Service with the Memorandum of Claim. The contract is dated 1 July 2022, and under clause (3), it was to run for one (1) year ending 30 June 2023.
17. There is the letter of employment dated 1 June 2016 for one year from 1 June 2016 to 30 June 2017, and a similar letter dated 1 July 2019 for a one-year term.
18. The Certificate of Service is dated 1 July 2023, indicating employment commenced on 1 July 2012 and ended on 30 June 2023.
19. The learned magistrate analysed these facts and held that under Section 47(5) of the *Employment Act*, the burden of proving that a dismissal is unfair is on the employee, while justifying the termination of employment is upon the employer. The appellant failed to present any tangible evidence that she was in a permanent and pensionable job, and hence, she failed to discharge the burden placed upon her.
20. Whereas an employer is allowed the latitude to issue a fixed-term contract under the provisions of Section 10(3) of the *Employment Act*, under such fixed-term contract, parties are allowed to agree on the terms and conditions regulating such employment. in the case of *Mbatia v Kirinyaga Water & Sanitation Company (KIRIWASCO) (Employment and Labour Relations Cause 851 of 2022)* [2023] KEELRC the court held that for an employee to claim under the doctrine of legitimate expectation and that the fixed term contract would be renewed, the following elements must be demonstrated;
 - a. There must have been a representation or promise in relation to the issue at hand.
 - b. The representation must have been clear, unambiguous and devoid of relevant qualifications.
 - c. The expectation that is premised on the representation must be reasonable.



- d. The representation must have been made by the decision-maker.
 - e. The decision-maker must have had the competence and legal backing to make the representation.
21. In the case of *Masiga & 15 others v Menengai Farmers Limited* (Civil Appeal E069 of 2021) [2022] KEELRC, the court held that;
- “... the general principle is that fixed-term contracts carry no rights, obligations, or expectations beyond the expiry date. It further relied on *Johnstone Luvisia v Allpack Industries Limited* [2019] eKLR, where this court declined to declare unfair termination where a fixed-term contract had ended. Therefore, it was submitted that, in this case, the respondent was not unlawfully dismissed, but his fixed-term contract lapsed.”
22. Taking the above into account, in the absence of the respondent filing any response, the appellant provides the material.
23. Under the contracts of employment, clause (4) addressed Notification and Application. Parties agreed that;
- Should you be interested in renewing your contract, the availability of funds will determine such a contract, your performance, your conduct, your productivity to this organisation, and the prevailing human resource needs. While a detailed CWSK’s Child Protection Policy document will be provided to you, please note that the Child Welfare Society of Kenya is a non-smoking and non-alcoholic area.
- The fixed-term contract would be renewed on these terms.
The appellant should be interested in the renewal of the contract;The availability of funds, performance, conduct, and productivity would determine renewal.Prevailing human resource needs.
24. While the appellant had a fixed-term contract with specified start and end dates, the respondent had a corresponding duty to renew the employment contract upon a demonstration of interest and an assessment of the availability of funds, performance, conduct, and productivity, primarily based on human resource requirements. This establishes the context within which the employment contract would be renewed or terminated.
25. In the case of *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party)* [2021] eKLR, the court held that while the employer has the right to terminate a probationary contract, such action should be taken within the equal protections afforded to other employees under Section 41 of the *Employment Act*, which mandates that notice is issued before termination of employment. In this case, before the renewal or non-renewal of the term contract, the parties agreed to the conditions outlined in clause (4).
26. The respondent’s entry into these proceedings on appeal, without addressing the matter in the lower court, leaves the claim unanswered. As outlined above, the respondent applied to set aside the ex parte judgment on the basis that there was no service of summons. With the setting aside addressed, nothing has been done to suspend the lower court proceedings to enable the respondent to attend and provide a response.
27. The only matter presented at this point is the discharge voucher and payment of Ksh. 216,011. The appellant did not interrogate these documents, as this ought to be done at the trial court.



28. The only matter that can arise under sections 17 and 19 of the *Employment Act* is for the respondent to pay the dues herein less what the appellant has already acknowledged in payment of her terminal dues.
29. The court thoroughly addresses the application of the discharge voucher, stating that it does not negate the employee's rights under section 35(4) of the *Employment Act*. When the lawfulness and fairness of termination of employment are in question, despite the discharge voucher, the employee cannot be barred from court, as held in *Nation Media Group Limited v Munene* [2025] KECA 114 (KLR) and the case of *Kiget v Majani Mingi Group of Companies* [2023] KECA 1269 (KLR).
30. Hence, on the claim before the trial court, to require the appellant to go beyond the claim to demonstrate the reasons leading to the non-renewal of the contract under Section 47(5) of the *Employment Act* was to negate the principles under the law and place an unfair burden on her. Upon the claim, the respondent was absent from demonstrating the procedures before the contract's non-renewal; there was nothing to justify the termination and non-renewal of the contract. The parties had agreed on the modalities to regulate the renewal of the contract; hence, the appellant had a legitimate expectation that before renewal or non-renewal, an exercise would be gone into by the respondent in establishing the human resources needs, her performance, conduct and availability.
31. In the absence of any material evidence from the respondent to address clause (4) of the contract ending on 30 June 2023, the failure to address the non-renewal of the agreement resulted in unfair termination of employment.
The claim for notice pay and compensation is justified.
The appellant earned a Ksh wage of 33,396, due for notice pay.
32. When determining unjust termination of employment, the court considers that the appellant was promptly paid the dues that the respondent deemed justified. This places the respondent in a favourable position. Compensation is granted for three months, totalling Ksh. 100,188.
33. On the claim for wage due in June 2023, indeed, in the terminal dues paid through cheque on 20 July 2023, the appellant acknowledged that this included the wage owing.
34. The appellant submitted the payment statement for the claim for pension dues deducted at Ksh. 200 per month. The deduction relates to NSSF dues. This amount is not due to the employee but to the statutory body.
35. On the claim for house allowance, the payment statement allocated a basic wage of Ksh 33. 396.
36. The claimant was employed as a caregiver. This is not a regulated position. The appellant does not state any qualifications to be placed under specific Wage Orders. The position of caregiver is placed vis-à-vis the General Wage Orders applicable at the time. The wage paid is over and above the minimum the learned magistrate awarded.
37. On unpaid leave, the appellant admitted that the cheque issued to her comprised the untaken leave days. However, there is no breakdown of how much annual leave pay was allocated in the general sum of Ksh 282. 149. The employer must submit work records in Sections 10(6) and (7) of the *Employment Act*. In the absence of such records, in strict adherence to the provisions of Section 28(4) of the *Employment Act*, the appellant can only claim accrued leave days going back to 18 months. This is 33 days based on the basic wage of Ksh 33. 396 total due is Ksh 36. 735.60.
38. As outlined above, the dues paid and acknowledged by the appellant should be considered in the respondent's processing of the awards mentioned above.



On these findings, the claim for costs is hereby justified.

39. Accordingly, judgment in Mombasa CMELRC E0526 of 2023 is hereby set aside and judgment entered for the appellant in the following terms;
- a. Employment terminated unfairly;
 - b. Compensation Ksh 100,188;
 - c. Notice pay Ksh 33,396;
 - d. Leave pay Ksh 36,735.60;
 - e. The dues (b), (c), and (d) above to be paid less what the appellant has received and acknowledged in terminal dues;
 - f. Costs of the appeal and proceedings before the trial court.

DELIVERED IN OPEN COURT AT MOMBASA, THIS 30 JUNE 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

