



Opiyo v Bedrock Holdings (Cotec Security Group Limited) (Appeal E006 of 2025) [2025] KEELRC 1697 (KLR) (12 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1697 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E006 OF 2025**

JK GAKERI, J

JUNE 12, 2025

BETWEEN

JOSEPH ONYANGO OPIYO APPELLANT

AND

BEDROCK HOLDINGS (COTEC SECURITY GROUP LIMITED) RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment of Hon. Dennis Matutu, SPM delivered on 18th February, 2025 in Kisumu MCELRC No. E223 of 2022, Joseph Onyango Opiyo V Bedrock Holdings Ltd.
2. Briefly, the facts of the case are that the appellant was allegedly employed by the respondent in May 2009 as a Security Guard and served diligently until May, 2023 when his employment was terminated by the respondent when he sought leave.
3. The appellant testified that he proceeded on annual leave 3 times for the duration of employment and served diligently. The appellant prayed for a declaration that termination of employment was unfair, special damage of Kshs.675,499.99, comprising salary in lieu of notice, accrued leave days, unpaid house allowance and underpayment.

Respondent's case

4. The respondent averred that it employed the appellant under a written fixed term contract effective 6th December, 2020 to 5th December, 2021 and he did not apply for renewal and was paid all his dues.
5. According to the respondent, the appellant was treated fairly and his employment contract lapsed on 5th December, 2022 but he continued working until May 2021 when he was notified of the end of his contract of employment, when he sought leave.



6. After hearing witnesses and considering the documents on record and submissions of counsel, the learned trial magistrate found that the appellant was serving under a fixed term employment contract which lapsed, and awarded a certificate of service only. All other claims were dismissed.
7. This is the Judgment appealed against.
8. The learned trial magistrate's judgment is faulted on 6 grounds set out in the Memorandum of Appeal dated 4th March, 2025, that the court erred in law and fact by:
 - a. Finding that the appellant's employment was not unlawfully and unfairly terminated and was thus not entitled to the claims sought.
 - b. Finding that the appellant was not underpaid for the duration worked.
 - c. Disregarding the duration worked before and after the fixed term contract.
 - d. Failing to appreciate that the appellant had no control over the change of terms of employment from permanent to fixed term.
 - e. Finding that the five (5) months worked after expiry of the contract did not create a legitimate expectation of renewal of the contract.
 - f. Failing to find the mischief of end of contract whenever the appellant requested for leave.
9. The appellant prayed that the appeal be allowed and the Judgment delivered by Honourable D. Matutu SPM, be set aside and cost be awarded.

Appellant's submissions

10. As to whether the appellant's employment was terminated unfairly and unlawfully, counsel for the appellant submitted that since the appellant continued working after expiry of his contract on 5th December, 2021 and was paid is confirmed by the respondent, and had a payslip for May 2022, the court could infer renewal of the contract of employment from the conduct of the parties which appeared consensual.
11. Reliance was placed on the sentiments of the court in *Eunice Mwakali Munayu V Elys Chemical Industries Ltd*, where the court inferred a renewal based on conduct of the parties.
12. The decision in *Justin Beswick V Local Ocean Conservation (LOC) Kenya Ltd [2022] eKLR* was also cited to buttress the submission, to urge the court to find that the termination of the appellant's employment was unfair.
13. Additionally, counsel submitted that the respondent subjected the appellant to unfair labour practices contrary to the provisions of Article 41 of *the Constitution* of Kenya and cited the sentiments of Ndolo J in *Walter Ogal Anuro V Teachers Service Commission [2013] eKLR*, for the proposition that a termination of employment must be characterised by a substantive justification and procedural fairness as required by the provisions of Section 41 and 45 of the *Employment Act*.
14. Counsel submitted that the appellant was given end of contract annual leave on two occasions when he requested to proceed on leave, yet annual leave is an employee's entitlement under Section 28 of the *Employment Act*.
15. Concerning underpayment, counsel submitted that the appellant was underpaid for the entire duration of his employment and was claiming the sum of Kshs.293,899.92.



16. Reliance was placed on the decisions in *Samuel Bundi Mukora V Musa Chebirige t/a Farmers Inn Club* [2019] eKLR and *Gilbert Isandula Shikalo V Bernard Njoroge t/a Creative Metro Services* [2002] eKLR, to urge the court to award the amount by which the appellant was underpaid and 12 months compensation as the appellant was inter alia innocent and was not paid terminal dues as was held in *Irene Akoth V Tobias See & Others* [2021] eKLR.

Respondent's submissions

17. As regards termination of the appellant's employment, counsel for the respondent relied on the last fixed term contract of service between the appellant and the respondent to submit that the respondent did not terminate the appellant's contract but the contract of employment ended by effluxion of time.
18. Reliance was placed on the sentiments of Rika J in *Anne Theuri V Kadet Ltd* [2013] KEELRC 160(KLR) on lapsing of a fixed term contract as well as the sentiments of the Court of Appeal in *Registered Trustees of the Presbyterian Church of East Africa & another V Ruth Gathoni Ngotho – Kariuki* [2017] KECA (KLR) as well those in *Transparency International – Kenya V Teresa Carlo Omondi* [2023] eKLR.
19. On legitimate expectation, counsel submitted that the burden of proof lay on the appellant to demonstrate a rational and objective reason for the expectation.
20. As cited were the sentiments of the court in *CMC Aviation Ltd V Mohammed Noor* [2014] eKLR, to urge that the appellant's fixed term contract lapsed and the reliefs grounded on the allegation that employment was unfairly terminated were unavailable, as termination was mutual.
21. Counsel submitted that the claimant was neither entitled to pay in lieu of notice nor was he underpaid and was bound by his pleadings.
22. On house allowance, counsel submitted that the appellant negotiated an employment contract with no house allowance citing the decisions in *National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR and *Pius Kimaiyo Langat V Cooperative Bank of Kenya Ltd* [2017] eKLR to urge that it was not the domain of courts to rewrite contracts but to enforce them.

Analysis and determination

23. This being a first appeal, it behoves the court to reconsider, re-evaluate and analyse the evidence before it and arrive at its conclusions bearing in mind that it has neither seen nor heard the witness and thus make due allowance, as held in *Selle & another V Associated Motor Boat Co. Ltd* [1968] EA 123 and *Peters Sunday Post Ltd* [1958] EA 424 among others.
24. A first appeal is to all intents and purposes a re-trial of the suit, a re-assessment of the evidence.
25. The gravamen of this appeal is whether termination of the appellant's employment was unlawful or unfair or the contract of employment lapsed as submitted by the respondent.
26. It is common ground that the appellant was an employee of the respondent for many years as evidenced by the documents on record.
27. It is also not in contest that from 2020 the terms of engagement assumed the form of one (1) year fixed term contract of service with no provision for annual leave, but which the respondent was paying in cash. Leave was taken after the contract lapsed and the employee could apply for a new contract within one (1) month of expiry of the earlier contract of employment.



28. As to whether the terms of employment were altered from permanent to fixed term, the claimant adduced no evidence to prove that prior to the fixed term contract he was employed on permanent and pensionable terms. Indeed, other than the letter of recognition for the long service and confirmation letter dated 18th March, 2016, the appellant adduced no scintilla of evidence to show that he was an employee of the respondent from 2009. The payslip for November 2020 reveal that he was working for the respondent on that date.
29. Contrary to the respondent's contention that the appellant had no control over the terms of employment and hence the transition from permanent to fixed term contract, he had.
30. By signing the fixed term contract without reservations or protestation or qualification, the appellant was bound by its terms hook, line and sinker and could not allege otherwise. In any case he did not allege that he signed the contracts involuntarily.
31. Finally, on cross-examination, the appellant confirmed that the respondent did not force him to sign any document.
32. At common law signature prima facie means acceptance, unless it is vitiated by mistake, duress undue influence or misrepresentation. See *LE'strange V Graucob* [1934] 2 KB 394, and *Parker V South Eastern Railway Co.* [1877] 2 C. P. D 416.
33. In the court's view, the learned trial magistrate cannot be faulted for failing to find that the appellant had no control over the terms of engagement. He had a critical role to play. He had the option to reject the fixed term contract or accept the same conditionally and/or make his reservations known to the respondent.
34. Having laid it bare that the terms of engagement were on a one (1) year fixed term contract, it is common ground that the appellants last contract dated 5th December, 2020 run from 6th December, 2020 and lapsed on 5th December, 2021.
35. The appellant had applied for the contract vide an application letter dated 3rd December, 2021 with a reference from one Mr. Mathew Kera Opiyo of even date.
36. However, both parties are in agreement that after the contract lapsed, the appellant did not proceed on annual leave but continued rendering services and was paid until May 2022 when he sought leave and was notified vide letter dated 23rd May, 2022 that he could proceed on end of contract annual leave, but was at liberty to apply for employment by 15th June, 2022.
37. According to the respondent, the application for leave triggered the lapsing or end of the contract yet according to both parties it had lapsed on 5th December, 2021.
38. Does the continuation of rendering services and payment of salary constitute a sufficient basis to infer a renewal of the fixed term contract on similar terms?
39. Did the appellant have a sufficient and rational basis for a reasonable expectation of renewal of the contract?
40. It is trite law that a fixed term contract commences on a specified date and comes to an end when its duration lapses or by effluxion of time and there is no obligation on the part of the employer to give the employee a termination notice unless the contract so provides nor reason other than effluxion of the agreed duration.
41. The Court of Appeal has addressed this issue in a catena of decisions, such as, *Registered Trustees of the Presbyterian Church of East Africa & another V Ruth Gathoni Ngotho* (supra), *Francis Chire Chachi*



V Amatsi Water Services Co. Ltd [2012] eKLR, Registered Trustees De La Salle Christian Brothers t/ a St. Marys Boys Secondary School V Julius DM Bains [2017] eKLR and Transparency International – Kenya V Omondi [2023] KECA 174 (KLR).

42. In the latter case, the court was emphatic that-
- “... We dare say that an automatically renewable fixed term contract is a contradiction in terms, as it would subject the parties to an indeterminate employment contract. The respondent was under a fixed term contract with a definite commencement date and termination date. There was no ambiguity created to create an expectation of contract renewal by the appellant’s issuance of a fixed term contract. The contract terminated automatically when the termination date arrived. Whether a contract with a renewal clause will be extended or not, is an issue that is at the discretion of the employer and if cannot create a legal right under the doctrine of legitimate expectation”.
43. The court is in agreement with these sentiments which underline the general principle where an employee is serving under a fixed term contract.
44. However, the scenario may change based on the acts or omissions of the employer.
45. In Transparency International – Kenya V Omondi (supra) the court expressed itself as follows:
- “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...”
46. However, the appellant’s case is slightly different in that there was no discontinuation of service when the fixed term contract lapsed on 5th December, 2021.
47. The appellant continued rendering services after the one (1) year fixed term contract ended and the respondent continued paying the salary up to May 2022.
48. Clearly, the conduct of the parties leaves little doubt that the respondent had renewed the appellant’s contract on similar terms as before, as held in Eunice Mwikali Munyao V Elys Chemical Industries Ltd (supra).
49. In the court’s view, rendering of services to an employer for almost 5 months coupled with payment of salary by the employer leads to an inescapable conclusion there existed a contract of service between the parties based on the terms the employee was serving previously.
50. The appellant could not have been expected to lodge a formal application for employment to render the services he was already rendering.
51. Having found that there was a new contract of service between the appellant and the respondent on similar terms as before, and the respondent terminated the same vide letter dated 23rd May, 2022 styled as “End of contract annual leave”. I will now proceed to determine whether termination of the appellant’s employment by the respondent was unlawful or unfair.
52. It is trite law that for a termination of employment to pass the fairness test, it must be demonstrated that the employer had a valid and fair reason to terminate the employment and conducted the termination in accordance with a fair procedure, as held in Naima Khamis V Oxford University Press East Africa Ltd [2017] eKLR and Walter Ogal Anuro V Teachers Service Commission (supra).



53. In the latter case Ndolo J stated there must not only be a substantive justification for the termination of the employment, the procedure must have been fair too.
54. The respondent tendered no shred of evidence of having met the threshold prescribed by the provisions of the *Employment Act*.
55. Styling a termination of the appellant's employment as end of contract annual leave, could not avail the respondent for the simple reason that the appellant had a new contract of employment effective 6th December, 2021, when the previous contract lapsed and the new contract had not run its term in May 2022.
56. Flowing from the foregoing, it is the finding of this court that the appellant has demonstrated that termination of his employment by the respondent vide letter dated 23rd May, 2022 was not only unfair but also unlawful.
57. In the court's view, the learned trial magistrate fell into error by not appreciating that the appellant's fixed term contract had ended and he was serving under a new contract based on the conduct of the parties and the subsequent purport to terminate it on the ground of end of contract was not justifiable and amounted to an unfair termination of the appellant's employment.
58. Before leaving this issue, it is essential to address the related issue of whether the respondents style of employment was consistent with the principles of fair labour practices enshrined in Article 41 of *the Constitution* of Kenya, 2010.
59. From the evidence on record, the respondent offered the appellant a one (1) year fixed term contract and leave was granted outside the one (1) year and was thus not part of the Employment contract as the employee could only resume duty if he/she applied for a new contract of employment and the same was granted, which would appear to suggest that the respondent's employee could not proceed on annual leave during the currency of the one (1) year contract.
60. It requires no gainsaying that annual leave is one of the basic statutory entitlements of an employee by dint of Section 28 of the *Employment Act*.
61. Section 28(1) of the *Employment Act* is couched in mandatory tone that:
 1. An employee shall be entitled-
 - a. After every 12 consecutive months of service with an employer to not less than twenty-one working days of leave with full pay.
62. Strangely, the appellants contract of employment with the respondent had no provision for annual leave and the respondent was purporting to approve annual leave after the contract of employment has lapsed.
63. In a fixed term contract scenario, an employee cannot be said to be on annual leave after the contract has already lapsed on account that there is no employment relationship between the parties after effluxion of the duration of the contract.
64. The respondent's mode of allowing employees to proceed "on leave" after the employment relationship had terminated, was in the court's view inconsistent with principles of fair labour practices.
65. The trial court is faulted for not having taken note of the mischievous conduct of the respondent and this court is in agreement that respondent's conduct of terminating employment whenever an employee requested for annual leave constituted an unfair labour practice.



66. Having found that termination of the appellant's employment by the respondent was unfair and unlawful, it follows that the appellant is entitled to some of the reliefs sought.

Appropriate reliefs

Declaration

67. Having found as above, the declaration that termination of the appellant's employment was unprocedural, unfair and unlawful is merited.

Salary in lieu of notice

68. Having found that the termination of the appellant's employment was unfair, the appellant is eligible for salary in lieu of notice and the same is awarded Kshs.17,481.90.

Accrued annual leave days

69. Although the appellant testified that he was denied leave days, it is evident that he was being paid for the leave days as evidenced by the respondent's letter dated 15th October, 2020 and copies of payslips on record.
70. More significantly, the appellant did not show how the sum of Kshs.140,646.64 was arrived at. For instance, how many days leave was outstanding and when did the leave accrue?
71. The claim lacked supportive evidence and is declined.

Unpaid house allowance

72. The appellant's fixed term contract on record stated that the monthly salary was consolidated, although copies of the payslips on record described the salary as basic.
73. In this case, the contract of employment was the primary contractual document and its clauses prevailed over other documents issued by the employer without the employee's input.
74. The employee's right to housing under Section 31 of the *Employment Act* is qualified where the contract of service contains a provision which consolidates as part of the basic wage or salary of the employee an element intended to be used by the employee as rent or to enable the employee secure accommodation as was the instant case.
75. Noteworthy, the respondent's argument that the appellant opted to forego house allowance is not sustainable on account that it is a statutory right of an employee analogous to leave salary, sick leave and water among others.
76. The claim is declined.

Underpayment

77. The appellant's payslip for May 2022, which the respondent did not contest shows that his gross salary without leave encashment was Kshs.14000.00.
78. Was the appellant underpaid as alleged?
79. Under the Regulation of Wages (General) (Order), 2022, the salary of a day guard in Kisumu was Kshs.15,201.65 exclusive of housing allowance. The gross salary was Kshs.17,481.90 effective 1st May, 2022 less Kshs.14,000 paid, underpayment of Kshs.3,481.9



80. From 2018, the gross salary of a day guard was Kshs.15,608.84 less Kshs.13,200.00 paid as salary, underpayment of Kshs.2,408.84.

Total underpayment for 36 months is Kshs.87,791.3

12 month's compensation

81. Having found as above, the appellant is entitled to compensation by dint of Section 49(1)(c) of the Employment Act.

82. The court has considered that the appellant served the respondent for about 13 years, did not contribute to the termination and had no recorded warning.

83. Further, the appellant did not appeal the termination or express his wish to remain in employment or demonstrate his expectation of remaining in the respondent's employment.

84. In the circumstances, the equivalent of 5 months gross salary is fair Kshs.87,409.50.

85. The upshot of the foregoing is that the trial court's decision is set aside in its entirety and substituted with orders that:

- a. The declaration sought was merited.
- b. The appellant is awarded salary in lieu of notice Kshs.17,481.90.
- c. Underpayment Kshs.87,791.30
- d. Equivalent of 5 month's gross salary Kshs.87,409.50
Total Kshs.192,682.70
- e. Costs before the trial court and 50% costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 12TH DAY OF JUNE, 2025.

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

