



REPUBLIC OF KENYA



Ndungu v Mount Kenya University (Employment and Labour Relations Cause 973 of 2018) [2024] KEELRC 52 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEELRC 52 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 973 OF 2018
MN NDUMA, J
JANUARY 25, 2024**

BETWEEN

LUCY WAMBUI NDUNGU CLAIMANT

AND

MOUNT KENYA UNIVERSITY RESPONDENT

JUDGMENT

1. The claimant filed suit against the respondent on 14/6/2018 claiming the following reliefs:
 - a. A declaration that the claimant's dismissal from the respondent's employment was discriminatory,
 - b. procedurally unfair, unlawful and unconstitutional.
 - c. Two months' gross salary in lieu of notice under section 49(a) – Kshs. 240,000/=.
 - d. Unpaid salary for part-time lectures
(December 2013 School Based session – for three (3) units that have not been paid a total of Kshs. 180,000/=
(Kshs. 60,000/= per unit taught) January/April Evening session for two units have not been paid a total of Kshs. 120,000/= - Kshs. 300,000/=
 - e. Unpaid salary for Industrial attachment
 - i. 1 April 2015 to 30 August 2015 10 sessions 50,000/=
 - ii. 1 Sept 2014 to 30 Dec 2015 12 sessions 60,000/=
 - iii. 1 Jan 2015 to 30 April 2015 15 sessions 75,000/=



- iv. 1 Apr 2015 to 30 Aug 2015 16 sessions 80,000/=
 - v. June 2015 10 sessions 30,000/=
 - vi. August 2015 10 sessions 30,000/=
 - Total 335,000/=
 - f. Unpaid leave for ten (10) days – Kshs. 26,667/=
 - g. Unpaid balance of her gratuity payment – Kshs. 40,201/=
 - h. Dues under her terminated contract under section 49(b) of the *Employment Act*, 2007.
 - i. Dues under section 49(c) of the *Employment Act*, 2007.
 - j. Interest on (b), (c), (d), (e) and (f)
 - k. Costs of this claim
 - l. Any other relief that the honourable court find/deem fit to grant.
2. The claimant adopted witness statement dated 14/6/2018 as her evidence in chief and produced exhibits ‘1’ to ‘16’ in support of the case. CW1 testified that she was employed by the respondent on 22/3/2012 as an Associate at Nairobi Campus at an hourly salary of Kshs. 1500/=. The employment continued to 9th May 2012.
 3. On 19/9/2012, the claimant was appointed as an Assistant Lecturer at a monthly salary of Kshs. 80,000/= and confirmed to the position by a letter dated 20/8/2013.
 4. The claimant stated that she also worked as a part-time lecturer Examinations Coordinator and an Industrial Attachment Representative.
 5. The contract provided two (2) months’ notice period to indicate willingness to renew contract. The contract was for three years to expire on 30/09/2015.
 6. That on 4/3/2015 the claimant gave notice of intention to renew contract.
 7. That on 27/7/2015 the claimant was transferred to Eldoret Campus with effect from 1/9/2015. The claimant continued to work as duly relocated from 1/9/2015.
 8. On 2nd January 2016, without any notice whatsoever and while at the new work Station at Eldoret Campus, claimant received a letter from the respondent, terminating his employment contract. The letter is titled expiry of contract and reads:

“...it has been established that your contract expired on 30/9/2015 and has not been renewed.”
 9. The claimant was served with a certificate of service on the same date indicating that he had served the university from 1/10/2012 to 2/1/2016. At the time the claimant earned a gross salary of Kshs. 120,000/=.
 10. The claimant testified that he was not paid in lieu of ten (10) days untaken leave days; full service gratuity because he received Kshs. 110,159/= instead of Kshs. 150,360/= and was not paid Kshs. 300,000/= for part-time lectures and Kshs. 325,000/= for Industrial Attachment.



11. The claimant further seeks payment in lieu of two months' notice of termination and that the claimant be paid compensation for unlawful and unfair termination of contract of employment.
12. The claimant produced the contract of employment dated 9/5/2012 in which he was appointed to serve as an Associate Faculty during the 3rd Trimester/semester 2011/2012 at Nairobi Campus. He was required to teach 9 hours per week – BSSC 111 – Theory of Criminal Behaviour and BSSC 114 Introduction to Diplomacy as part-time lecture at Kshs. 1,500/= per hour. He also produced letter of appointment as Assistant Lecturer dated 19/9/2012.
13. The claimant was subjected to close cross-examination by Mr. Omondi for respondent in which she explained that units in December 2013 and April 2014 were done on part-time basis and not full time. That she filled a form for part-time work only but not for full time work. CW1 stated that these were additional units given to herself beside her full-time work as Assistant Lecturer. CW1 said she received her gratuity later in 2016 while she was already at Eldoret Campus. CW1 said upon expiry of the fixed term contract, she continued working at Eldoret Campus and that is when her employment was unlawfully terminated by the respondent.
14. CW1 said she had submitted appraisal forms two months to expiry of the contract and applied for renewal. That she was then transferred to Eldoret after applying. That she raised concern about the transfer while awaiting renewal. That she worked and was paid for three (3) months upon transfer to Eldoret.
15. CW1 said she was told to continue on similar terms contained in the expired contract. That she got a circular and an email to that effect but she had no access to those documents which are in the custody of the respondent. CW1 questioned why she was sent many kilometres away if the respondent had no intention of renewing her contract. CW1 said she should have been consulted before termination and her terminal benefits should have been paid. CW1 said gratuity payment had a balance of Kshs. 40,201/=. That the two months' notice of renewal dated 4/3/2015 expired on 4/5/2015, but she worked upto end of December 2015 and was transferred by a letter dated 27/7/2015. That she went on leave and reported at Eldoret in September 2015.
16. That the letter of expiry of contract was dated 2/1/2016. Upon return to December holiday.
17. RW1 Janet Kajwang testified that she was the Human Resource Officer of the respondent. That she was employed by the respondent by a letter dated 9/5/2012. That she engaged the services of the claimant as an associate faculty for only the semester which comprised four (4) months. That the claimant was not given additional duties as alleged but was assigned a new position as an Assistant Lecturer under a three year fixed contract from 1/10/2012 to 1/10/2015. That the three letters addressed to the claimant dated 22/3/2012; 9/5/2012 and 12/9/2012 were for different appointments on contract basis only and upon expiry of a contract, she would be issued with a different letter if the respondent got or required her services.
18. That the claimant taught 3 full-time units in December 2013 for DIBEL students, 5 full-time units in January to April 2014, Senior and 3 full-time units in January to April 2015 session. That the claimant then accepted a full-time employment upon accepting the contract dated 19/9/2012 on a fixed term basis. That her terms were contractual and not permanent and pensionable.
19. That the claimant did not give any notice of renewal of contract on providing an appraisal form for consideration by the respondent.



20. That renewal of the fixed term contract was not automatic. That the claimant was assigned any tasks on supervision of students. That the Board of Trustees resolved not to renew her contract upon its expiry on 1/10/2015.
21. That the claimant however continued to work but this did not in any way mean that the respondent had agreed to create another contract with the claimant.
22. That the respondent communicated to the claimant on 2/1/2016 that her contract that expired on 1/10/2015 would not be renewed.
23. That the respondent did not make any representations expressly or implied that the fixed term contract would be renewed.
24. That the contract and the code of regulations required the claimant to make an application for renewal two months prior to the expiry of the contract and the Board was solely to decide whether to renew the contract or not.
25. That the claimant was paid salary for days worked; for accrued leave days and any other entitlement.
26. That the respondent has no other obligations to the claimant.
27. That the claimant's net terminal dues were Kshs. 110,150/= and same was paid to claimant and she cleared at work and was given certificate of service.
28. That the claimant was not unfairly dismissed.
29. Under cross-examination RW1 said that the claimant earned Kshs. 100,000/= per month at the time of separation. That Kshs. 20,000/= was responsibility allowance at Nairobi Campus and it was not payable at Eldoret Campus. RW1 said that the respondent did not reply to the notice of renewal. That the letters were traced only during the audit. RW1 said she did not know if the claimant had submitted claims for Industrial Attachment and part-time lecture payment.

Determination

30. The parties filed written submissions which the court has carefully considered together with the evidence adduced by CW1 and RW1. The issues for determination are:
 - i. Whether the contract of employment of the claimant expired by effluxion of time or her employment was unlawfully terminated by the respondent.
 - ii. Whether the claimant is entitled to the reliefs sought.
31. A fixed term contract with a start and end date is a lawful mode of employment as per section 10(3) of the *Employment Act* 2007. This was aptly held in the case of George Onyango versus the Board of Directors of Numerical Marching Limited and others [2014] eKLR. It is not in dispute that the claimant worked in terms of a three years fixed term contract that took effect from 1/10/2012 and was therefore to expire on 30/09/2015. The contract provided that the contract may be renewed on mutual agreement. The contract provided:

“Two months prior to end of your contract, you will be required to apply for renewal of contract. Failure to apply for contract renewal, the university will have a right to assume that you are not interested to participate in the next contractual period.”



32. The court is satisfied that the claimant invoked that clause of the contract and applied for a renewal of the contract more than two (2) months before the date of expiry on 30/09/2015.
33. It is also not in dispute that the respondent did not acknowledge and respond to the said notice but continued to engage the services of the claimant after the expiry of the fixed term contract until 4th January 2016. The respondent continued to pay the claimant Kshs. 120,000/= gross pay until the date of termination.
34. The claimant was paid gratuity in the sum of Kshs. 110,159/= on 12/11/2016 many months after she had stopped working.
35. The question that the court must answer is whether the respondent could rely on the expiry of the fixed term contract, to end the employment of the claimant on 2/1/2016 more than three months after the fixed term contract had expired but the claimant had continued to serve the respondent.
36. The fixed term contract was not expressly or tacitly extended by the respondent upon its expiry. The respondent continued to employ the claimant in terms that were no longer in writing. The employment relationship between the claimant and the respondent was governed by oral terms which were indefinite in nature. It is not in dispute that during this period after the expiry of the fixed term contract the claimant continued serving the respondent as an Assistant Lecturer at a monthly salary of Kshs. 100,000/= exempting the allowance of Kshs. 20,000/= which was hitherto paid at Nairobi Campus.
37. In Cause No. E 572 of 2021, Sandra M Waswa versus Global Campaign for Free Expression, the Court held that;

‘Be that as it may, the claimant was in employment for more than nine months after lapse of the contract. She was therefore on a month to month open ended contract and was entitled to be subjected to the provisions of section 41 and 43 of the Employment Act which provide for fair hearing and valid reason for termination’

And also in Kenya Airways Limited versus Satwant Singh Flora 2013 eKLR the Court expressed itself as follows-

‘On the question whether there, was a valid contract of employment between the parties after 14th January 1997 and whether one can be implied, it is not in dispute that the Respondent’s contract was terminated on 14th January 1997. However, the Respondent continued working up to the end of June, 1997, despite there being no written contract’.

38. In terms of section 37 of Employment Act which governs conversion of casual employment to term contract

“where a casual employee

 - a. Works for a period on a number of continuous working days which amount in the aggregate of the equivalent of not less than one month; or
 - b. Performing work which cannot reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.”



39. The court finds that in the absence of any agreement as to the renewal of the fixed term contract that expired on 30/09/2015, the claimant continued to serve the respondent between 1/10/2015 to 4/1/2016 on a month to month employment. This relationship persisted for not less than one month and indeed amounted in aggregate to more than three months.
40. Accordingly, the employment of the claimant converted to a protected employment in terms of section 35 (1)(c) of the Employment Act, 2007 which provides:
- “ A contract of service not being a contract to perform specific work without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be
- (c) Where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty eight days next following the giving of notice in writing.”
41. It follows that the respondent could not terminate the employment of the claimant on 2/1/2016 as it did without giving the claimant a twenty eight days’ notice.
42. The claimant is also in terms of section 35(4) entitled to dispute the lawfulness or fairness of the termination without notice or for any cause recognized by law.
43. The respondent having not given the claimant any notice for termination and having not provided the claimant with any valid reason for the termination of his employment on 2/1/2016, the court finds that the respondent was guilty of violating sections 35(1)(c) read with section 36, 41, 45 and 46 of the Employment Act 2007.
44. The termination of the employment of the claimant was unlawful and unfair. The claimant in the least expected to continue serving respondent for the next 3 years as was the case in the recently expired contract. The claimant did not contribute to the termination of his employment for he was not given any lawful cause of termination. The claimant suffered loss and damage for the sudden and non-expected loss of his income. The claimant was not compensated for the unlawful loss of his employment. The court invokes the provisions of section 49(1) (c) and (4) of the Employment Act, 2007 to find that the claimant who had diligently served the respondent from the year 2012 to 2015 is entitled to compensation equivalent to three months’ salary in the sum of Kshs. 360,000/= see the Cause No 890 of 2017, Francis Njeru Kariuki versus Crown Paints [2013] eKLR

Terminal benefits:

The claimant has proved that she is entitled to payment of terminal benefits as follows:-

- a. One month salary in lieu of notice in the sum of Kshs. 120,000/=
 - b. Kshs. 300,000/= being unpaid salary for part-time lecture for the period December 2013; and January to April 2014.
 - c. Kshs. 325,000/= being unpaid salary for industrial attachment for the period 1st April 2015 to August 2015.
 - d. Unpaid 10 days in lieu of leave days not taken Kshs. 26,667/=
 - e. Unpaid balance of gratuity in the sum of Kshs. 40,201/=
- Total amount Kshs. 811,868/=

45. In the final analysis judgment is entered in favour of the claimant against the respondent as follows:



- i. Kshs. 360,000/= in compensation
- ii. Kshs. 811,868/= terminal benefits
Total award Kshs. 1,171,868/=
- iii. Interest at court rates from date of judgment till payment in full.

Mathews N. Nduma

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY, 2024

Appearances

Mrs. Maina for the claimant

Mr. Omondi for Respondent

Ekale: Court Assistant

