



Haji v Exon Investment Limited (Employment and Labour Relations Cause 12 of 2023) [2024] KEELRC 462 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 462 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE 12 OF 2023
HS WASILWA, J
FEBRUARY 29, 2024**

BETWEEN

SAMEER SHERAH HAJI CLAIMANT

AND

EXON INVESTMENT LIMITED RESPONDENT

JUDGMENT

1. The claimant herein instituted this suit by a Memorandum of claim dated 8th February, 2023, alleging to have been unfairly terminated and seeking for compensation for the unfair termination. He sought for the following reliefs; -
 - a. A declaration be made to the effect that the claimant’s termination was unlawful, unfair and the same was not within the ambit of the *Employment Act*, 2007 and other employment laws.
 - b. The claimant herein be awarded 12 months’ compensation for the unfair termination as provided for under section 49 (c) of the *Employment Act*.
 - c. The Respondent pay the claimant one-month salary in lieu of notice.
 - d. The Respondent herein pay the claimant all the amount emanating from underpayment from the period the salary was increased.
 - e. The Respondent herein pay the claimant all the amounts emanating for all the accrued leave days earned but not taken for each of the two complete years of service.
 - f. The Court be pleased to order the Respondent to pay the claimant all dues emanating from working on public Holidays which remains unpaid for the period of time the claimant worked for the Respondent.



- g. The Court be pleased to order the Respondent to pay the claimant all dues emanating from working on rest days which remains unpaid for the period of time the claimant worked for the Respondent.
- h. The Respondent issue the claimant with certificate of service.
- i. The Respondent to pay interest on all the calculated amount from the time of filling of this cause till payment in full.
- j. The claimant be awarded costs of the cause.
- k. The court grants any other relief as it deems necessary.

Claimant's Case.

2. The claimant stated that he was employed by the Respondent on 3rd July, 2020 on a fixed term contract of one year and deployed to Nakuru office as workshop manager/Road patrol at a monthly net salary of Kshs 100,000.
3. That he worked diligently and on 9th January, 2021, he received a letter that his salary will be increased to Kshs 130,000 with effect from 1st January, 2021, but that he was not paid this increased amount till the contract lapsed.
4. On 2nd July, 2021, his contract was renewed for another fixed term period of one year to lapse on 2nd July, 2022, at a salary of Kshs 130,000, however that the Respondent continued paying him Kshs 100,000 till the lapse of the contract.
5. It is averred that upon lapse of this second contract, he continued working for the Respondent without any interruptions as such the contract was renewed under the doctrine of legitimate expectations.
6. He stated that while working for the Respondent, he received a call from the Respondent's managing director, Mr. Ateet D. Jetha on the 7th July, 2022, asking him to go to Mombasa for a meeting but the agenda was not disclosed. That he travelled to Mombasa and had the meeting on 11th July, 2022, where he was verbally informed that the contract will not be renewed and his services were terminated. Subsequently, he was directed to take stock of all goods and send to Mombasa, then handover.
7. The claimant stated that on his way to Nakuru, he received a call from the said managing director who directed him to travel to Garissa and rescue some company's trucks that were stuck. After clearing the stuck trucks, he came back to Nakuru office, took stock of remaining goods and transported them to Mombasa and cleared from the office. Therefore, that he was engaged for the entire month of July, 2022, when he was no longer an employee of the Respondent.
8. Based on the foregoing, the claimant stated that his termination was not done in accordance to the law as he was not given notice of termination, reason for termination or subject to any disciplinary hearing before the termination.
9. It is the claimant's case that, while in the Respondent's employment, he used to work for 12 hours a day, without any rest day or public holiday and the Respondent did not pay him overtime.
10. The claimant stated also that he was not allowed to go for leave during his tenure at the Respondent's employment. Further that upon termination, he was not paid his terminal dues or issued with certificate of service.



11. During hearing the claimant testified as CW-1 and adopted his witness statement dated 8/2/2023, he then produced the list of documents dated 8/2/2023 as his exhibits 2-11 respectively.
12. Upon cross-examination, the witness testified he was issued with fixed term contract, the first one running from 3/7/2020 to 2/7/2021 and the second one on 2/7/2021 ending on 2/7/2022, which indicated at clause 10 that the same was for a fixed time and not renewable automatically. He confirmed that he worked beyond the contract period and added that the Respondent allowed him to work beyond the contract period. He admitted that he did not receive any communication from the Respondent requiring him to work beyond the contract period.
13. On the trip to Mombasa he stated that he travelled on 7/7/2022 or 8/7/2022 using the Company's car and met the Respondent's CEO on 11/7/2022. That he cleared from the office on 30/7/2022. The witness also testified that he was called by Mr. Jetta to travel to Garissa and rescue some truck which he did using the company's car but did not have any evidence of the instruction given or the allegations that he travelled to Garissa.
14. Upon further cross examination, the witness testified that upon lapse of the contract he cleared from the company. He admitted that, according to clause 10 of the contract he was not entitled to notice. He also admitted to receiving his final dues as shown in exhibit 8, which he signed. He admitted to receiving a gross salary of Kshs 134,404.77 as appearing in the payslips produced. He also admitted to receiving money through Mpesa from the Respondent for rest days' pay and Public holidays not taken.
15. The witness admitted to going for leave though, he stated that he did not take all his leave days. He stated that upon expiry of the contract, he demanded for Kshs 135,000 to pay Respondent's creditors, which he received less Kshs 65,000. He stated that he was not aware a Cheque of Kshs 65,000 was issued to his advocates on record. He reiterated that he received Kshs 242,748 but that the same was not his full terminal dues.
16. On re-examination, the claimant testified that the Kshs 30,000 he received was for office expenses. He also stated that the Respondent has custody of most of the documentations. He stated that he received money to use for the company expenses after the lapse of the contract. Further that he used to do patrol in Nakuru -Mai Mahiu road all the way to Webuye as such, he used to work over the weekends.

Respondent's Case.

17. The Respondent entered appearance on the 16th March, 2023 and filed a response to claim on the 22nd March, 2023, denying all the contents of the claim and in particular stating that indeed the claimant was employed for a fixed term period of one years running from 3rd July, 2020 to 2nd July, 2021 on a monthly salary of Kshs 100,000, However that his salary was increased to Kshs. 130,000 in January, 2021, a sum that he received till the lapse of the contract.
18. Upon lapse of the first contract, the same was renewed for another one year running from 3rd July, 2021 to 2nd July, 2022 and the claimant was now paid Kshs 130,000, which was duly paid without fail.
19. The Respondent maintained that the claimant's services was not unfairly terminated as alleged but that the contract lapsed upon running its course. Therefore, that he was not entitled to any notice or the termination subjected to the provisions of sections 41,43 and 45 of the [Employment Act](#).
20. On the claim for overtime, the Respondent stated that the claimant was duly compensated through payment of allowance for the days that he worked on rest days and Public Holidays.



21. On the claim for leave days, the Respondent stated that the claimant was given an allowance for leave due and not taken at the end of contract. Further that upon lapse of the contract, he was issued with certificate of service and paid all his terminal dues of Kshs 241,748 as such nothing is owing to him.
22. The Respondent thus urged this Court to dismiss the claim with costs to them.
23. During hearing, the Respondent called Geoffrey Nyamu, the Human Resource officer, as RW-1 who adopted his witness statement dated 16/3/2023 and list of documents dated 10/3/2023 and the further list of documents dated 6/6/2023 as Respondent's Exhibit 1 to 24 respectively. He testified the claimant was employed on fixed term contracts which upon lapse, was not renew, as the office in Nakuru was no longer sustainable due to financial constraints. He testified that the claimant was initially paid Kshs 100,000 which was raised to Kshs 130,000 where Kshs 100,000 was paid through bank and Kshs 30,000 was paid via Mpesa.
24. He testified that upon the lapse of the contract, the claimant was owed Kshs 135,000, where the amount was paid leaving a balance of Kshs 65,000 which they wrote a cheque in his name and deposited at his advocates office, but the claimant refused to pick it up.
25. On leave, the witness testified that the claimant took all his leave days leaving a balance of 15 days, which he was paid in the terminal dues given to him. He reiterated that they have paid the claimant's all his dues save for the Kshs 65,000 which they are willing to pay.
26. Upon cross examination, the witness denied the allegations that the Kshs 30,000 paid to the claimant was office maintenance and payment of rent and security guard and stated that the same was part of his salary. He explained that they could not pay the Kshs 100,000 through bank because of financial constraints. He also clarified that the Kshs 135,000 paid after the end of the contract were salary arrears which were paid on 3/8/2022.

Claimant's Submissions.

27. The claimant submitted on one main issue; whether the claimant is entitled to the compensation for unlawful termination of employment. It was submitted that the Respondent allowed the claimant to work beyond the contract period and even send him to Garissa to rescue trucks that had stuck. It is argued that the Respondent ought to have called Mr. Ateet Jetha to dispute the allegations by the claimant if indeed the said director did not engage the claimant beyond the contract period. That since the said director was not called as a witness, the claimant is entitled to benefit from the established principle of legitimate expectation. In support of this, he relied on the case of *Teresa Carlo Omondi v Transparency International* [2017] eKLR where the Court was of the view that legitimate expectation is based on a right grounded on the larger principles of reasonableness and fair dealing between employers and employees.
28. He also cited the case of *Kenya Revenue Authority & 2 others v Darasa Investment Limited* [2018] eKLR where the Court relied on *Halsbury's Laws Of England*, 4th Edition, Vol. 1 (1) at page 151, paragraph 81 which outlined legitimate expectation as follows: -

“A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by authority, including an implied representation, or from consistent past practice”.
29. Based on the above definition, the Claimant submitted that though it's a general rule that under fixed term contract, one cannot claim legitimate expectation, there is an exception to the rule in instances



- where the Respondent knowingly allow the claimant to work in its establishment beyond the time stipulated in the contract.
30. Similarly, that in this case, the Respondent allowed the claimant to work beyond the contract period as such the doctrine of legitimate expectation applies, which meant that his contract had impliedly been renewed as such the termination of his employment ought to have been done in accordance to the law with notices being issued, reason for termination communicated and the claimant subjected to disciplinary hearing. Having failed to follow due procedure, the claimant urged this Court to find the termination was unfair and award the reliefs as sought in the claim.
 31. On the reliefs sought, the claimant submitted that he was not issued with any notice as such, he is entitled to Kshs 130,000 notice pay.
 32. On the claim for underpayment, the claimant submitted that the Respondent had indicated in his contract that he would be paid Kshs 130,000, however he was paid Kshs. 100,000 and the Kshs 30,000 send to him through Mpesa was for payment of rent for the yard and and the security guard. Therefore, that the balance of Kshs. 30,000 for the 19 months worked was never paid.
 33. On overtime claim, the claimant submitted that his nature of work required him to be on call 24 hours a day, but was never paid overtime, as such he is entitled to overtime pay. Similar Submissions were made for the claim for rest days and public holidays pay, which the claimant stated that he worked throughout the year without any rest day a week or off during public Holiday, therefore he ought to be paid for the 24 gazetted public holidays between 3/7/2020 and 31/7/2022 and 107 rest days for the duration he was in the Respondent's employment.
 34. The Claimant also prayed to be awarded leave pay and argued that the Respondent produced leave forms but the same did not confirm that he went for leave as is required by law.
 35. He also prayed to be given a certificate of service.

Respondent's Submissions.

36. The Respondent on the other hand submitted from the onset that upon lapse of the contract between the claimant and the Respondent, the claimant was paid his terminal dues calculated at Kshs 241,748.25 on 15/8/2022 through Equity Bank Cheque number 000148. Further that the claimant was owed salary arrears of Kshs 135,000, where by Kshs 20,000 was send to him through Mpesa on the 15/8/2022, another sum of Kshs 20,000 send via Mpesa on 1/9/2022 and another sum of Kshs 30,000 send to him via Mpesa on the 7/9/2022 leaving a balance of Kshs 65,000, which the Respondent drew a cheque in favour of the claimant but the claimant refused to take the cheque as such the balance is still owing and the Respondent is willing to clear the same.
37. Having laid the above background, the Respondent submitted on two issues; whether the claimant was terminated or his employment contract expired and whether the claimant is entitled to the termination dues sought.
38. On the first issue, the Respondent submitted that the claimant was employed on fixed term contract, a fact which the claimant himself affirmed in his claim. Further that the claimant admitted that his contract lapsed on 2/7/2022 but he continued working until 7/7/2022 when the Respondent informed him that his services expired and the contract would not be renewed. Additionally, that since the contract was not renewable automatically upon lapsed as indicated in clause 10 of the Employment contract, the doctrine of legitimate expectation is not applicable in this case. To support this position,



the Respondent relied on the case of *S S Mehat & Sons Limited v Saidi Abedi Mwanyenga* [2021] eKLR where the Court held that;-

“The Court has considered the submission for the respondent that refusal to renew amounted to breach of legitimate expectation to renew as there had been a practice of automatic renewal. However, the evidence was that for every renewal parties signed a contract for the next one-year tenure and without which, the Court finds that the relationship would automatically end. The Court further finds that a refusal to renew a lapsed contract does not amount to unfair termination for the reason that once the agreed contractual term lapses, there is no subsisting contract capable of being subject of termination. In the Court’s opinion, where there are agreed terms for renewal which are satisfied by the employee but the employer refuses to renew, the cause of action can only be for constructive renewal or an order to renew but not unfair termination. In the instant case there was no evidence that the appellant breached any contractual term to renew and the alleged legitimate expectation for renewal is found not to have existed at all.”

39. It was further submitted that the Respondent could no longer retain the claimant on contract basis because it fell in financial difficulties in April, 2022 and eventually closed the Nakuru office, a fact that the claimant admitted in paragraph 12 of his claim. Therefore, that it was unreasonable for the claimant to expect renewal when the very office he was managing was being closed. In this, they relied on the case of *Akinyi & 4 others v Kenya Medical Research Institute [KEMRI] & another* (Petition E007 of 2023) [2023] KEELRC 2060 (KLR) (30 August 2023) (Judgment), where the Court held that; -

“There was no legitimate and reasonable expectation that there would be renewal, with diminished funding. There was no guarantee that the Petitioners would continue working, beyond 30th September 2022. There were circumstances, beyond the control of the 1st Respondent, which made it impossible for the 1st Respondent, to sustain the Petitioners in employment.”

40. To buttress their arguments, they relied on the case of *Enid Nkirote Mukire v Kenya Yearbook Editorial Board* [2022] eKLR, where it was held that; -

“The courts have also held severally that there is no legitimate expectation of renewal of the employment contract unless the employer has expressly communicated this to the employee... Only what is in existence is capable of being preserved. If a contract had lapsed, there is nothing, no contract to preserve. I find no promise of renewal of contract or of absorption of the Petitioner in the employment of the Respondent capable of raising a legitimate expectation of the Petitioner for continued employment.”

41. On the burden of proof of legitimate expectation, the Respondent submitted that the same lies with the employee or the one that allegations. In this, they cited the case of *Teresa Carlo Omondi v Transparency International Kenya* [2017] eKLR where the Court held that; -

“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.”

42. Similarly, that the case before hand do not merit a claim for legitimate expectation because the claimant had only served two fixed term contract, which cannot be termed as repeated renewals. Further that there was no promise from the Respondent for renewal of the contract and also that the claimant cleared with the Respondent within the same month when the contract expired.
43. On the reliefs sought, the Respondent submitted with regard to notice pay, that the termination occurred as a result of lapse of contract of employment which does not attract notice pay. Similar submissions were made for the claim of 12 months’ compensation for unfair termination.
44. On the claim for underpayment, the Respondent maintained that they paid the claimant all his dues and the balance was paid in bits after termination, with a balance of Kshs 65,000 which the Respondent through their advocates tried paying by the letters of 21/3/2023. 29/3/2023 and the letter of 18/4/2023 but the claimant was adamant. He however indicated their willingness to pay the same to the claimant.
45. On the claim for leave pay, it was submitted that the claimant took all his leave pay and any pending leave was paid to him as part of his terminal dues. It was argued further that the leave forms produced showed the claimant took few leave days at a time and the only issue raised during hearing was the fact that the claimant did not take the 21 days leave at once, a fact that cannot disprove the fact that the claimant utilized his leave days.
46. On the claim for public holidays and off days, it was submitted that the claimant did not particularized the days worked and not paid for. Further that he did not produce any evidence in support of the claim under this head, as such the same should be disallowed. To support this, they relied on the case of *Peter Mutune v Yalfa Cargo Logistics* [2018] eKLR where the Court held that;-

“The Claimant has not availed to the Court sufficient material to support his prayers for Rest Days, Public Holidays, Overtime and Severance Pay. His evidence was that he rested on certain occasions. He did not specify which these occasions were, so as to assist the Court to have a reasonable inference on days he did not rest. He did not give details of Public Holidays worked.”

47. The Respondent also cited the case of *Miraj Bakari, Ali Nzembe & 24 others v Doshi Enterprises Limited* [2019] eKLR where the Court held that;-

“The prayer for off-duty days and public holidays is not supported by the evidence given by the 3 Claimants. There are no employment records exhibited by the Claimants showing they worked throughout. They acknowledged there were days when the galvanizing machine was under maintenance and days when they were not at work, for various reasons including illness. They were not at work all the time, and if they worked on public holidays, which they have not established, they were adequately compensated through other forms of off-duty days.”



48. On the claim for certificate of service, the Respondent submitted that it is willing and has always been ready to issue the claimant with certificate of service.
49. On costs of suit, the Respondent submitted that they have demonstrated to this court that the termination was not unfair but as a result of lapse of a fixed term contract as such the suit is not merited and therefore costs should be awarded to them for being dragged through litigation process.
50. I have examined all the evidence and submissions of the parties herein. From the evidence of the claimants herein, he admitted that his contract ended and he cleared from the employment of the respondent. If there was any other engagement by the respondent after the end of the contract, it was outside the original contract.
51. The claimant also admitted that he was not entitled to notice. He admitted receiving his final dues as per exhibit 8 herein leaving a balance of 65,000/=.
52. By virtue of this admission the only money not paid to claimant and which are admitted by the respondent was 65,000/=.
53. The claimant was a member of NSSF and so by virtual of section 35(6 of the [Employment Act](#), he was not entitled to any other terminal dues.
54. I find that the claim by the claimant succeeds only in part and I award him Kshs 65000/= due not paid plus costs and interest on this amount.

JUDGEMENT DELIVERED VIRTUALLY THIS 29TH DAY OF FEBRUARY, 2024.

HON. LADY JUSTICE HELLEN WASILWA.

JUDGE.

In the presence of:

Mr. Guto for Claimant. Present

No appearance for Respondent.

Fred Court Assistant.

