



**Shivachi v Kenya Institute of Professional Studies (Cause 1277 of 2017)  
[2024] KEELRC 178 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 178 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1277 OF 2017  
JK GAKERI, J  
FEBRUARY 8, 2024**

**BETWEEN**

**MOSES MINISHI SHIVACHI ..... CLAIMANT**

**AND**

**KENYA INSTITUTE OF PROFESSIONAL STUDIES ..... RESPONDENT**

**JUDGMENT**

1. By a written Contract of Service dated 11<sup>th</sup> January, 2017, the Respondent employed the Claimant as a part-time tutor effective 11<sup>th</sup> January, 2017 for one semester.
2. The contract was renewable depending on performance and availability of services desired, with one month probation at Kshs.300/= per lesson.
3. It is the Claimant's case that when the contract ended, he continued with his duties but his employment was terminated on 3<sup>rd</sup> May, 2017 or thereabout unprocedurally.
4. The Claimant prays for;
  - i. A declaration that termination of the Claimant's services and/or employment by the Respondent was unfair, unlawful or illegal.
  - ii. One month's salary in lieu of notice.
  - iii. 12 months compensation.
  - iv. Unpaid salary for April 2017.
  - v. Certificate of service.
  - vi. Costs and interest.
  - vii. Any other relief the court may deem fit.



### **Respondent's case**

5. In its Response to the Statement of Claim filed on 18<sup>th</sup> August, 2017, the Respondent admits that it had engaged the Claimant as a tutor for one Semester but denies that it requested him to continue working thereafter or terminated his services.
6. The Respondent avers that the Claimant absconded and refused to account for the Respondent's property in his custody and did not clear with the Respondent.
7. The Respondent prays for dismissal of the Claimant's case with costs.

### **Claimant's evidence**

8. On cross-examination, the Claimant admitted that he was engaged for one semester of 3 months and his salary varied depending on the classes tutored.
9. That the Respondent did not intimate to him that the contract had been renewed and the Respondent was looking for a replacement and he was to leave when the replacement reported.
10. That he was removed from the Time-table when he brought a replacement in April 2017 but could not recall the date.
11. That the Principal called him and dismissed him but could not recall when, "around May 2017".
12. The witness reaffirmed that it was a 3 month contract. He admitted that he did not clear with the Respondent.
13. That he reported the matter to the Labour Officer on 5<sup>th</sup> May, 2017 and it was orally agreed that he be paid one (1) month salary.
14. That he was barred from entering the premises.
15. The Claimant claims to have attended 78 classes and the Respondent had the attendance sheets.
16. On re-examination, the Claimant admitted that he continued working after the contract ended as he awaited signing the new contract.
17. That the meeting at the Labour Office had no minutes and was praying for the salary for April only.
18. That he had no equipment belonging to the Respondent.

### **Respondent's evidence**

19. RWI, Josephine Ngari testified that she requested the Claimant to hold brief for another tutor and source for tutors to replace one who had deserted duty as the Claimant confirmed in his evidence, and the agreement was verbal.
20. That one camera went missing during a meeting of the Branch Manager tutors and students and the Claimant was the last person who had it and when called on 26<sup>th</sup> April, 2017 to account for it, he did not and did not report to the workplace on 27<sup>th</sup> April, 2017, (Thursday) and was not present when salary was released.
21. The witness testified that the Claimant was missing on 25<sup>th</sup> May, 2017 and did not return to the workplace thereafter and the case was reported at the Kamukunji Police Station, OB No. 48/25/05/2017.



22. On cross-examination, the witness confirmed that the Claimant was not dismissed but went missing while still an employee of the Respondent.

### **Claimant's submissions**

23. By 13<sup>th</sup> January when the court retired to prepare this judgement, the Claimant had not filed submissions.

### **Respondent's submissions**

24. Counsel submitted on whether the Claimant was an employee of the Respondent, whether he was unfairly dismissed from employment and entitlement to reliefs and costs.
25. On the 1<sup>st</sup> issue, counsel submitted that the Respondent's Human Resource Manager requested the Claimant to take over duties of a tutor who had deserted until a replacement was found which he did and his employment was not terminated as RWI testified.
26. Counsel urged the court to find that the Claimant was not an employee of the Respondent as he was engaged under a fixed term contract and no renewal had been agreed upon.
27. Reliance was made on the sentiments of the court in *Kipkepe Ltd V Peterson Ondieki Tai (2016) eKLR* on the burden of proof under Section 107 and 108 of the [Evidence Act](#).
28. Counsel urged that the Claimant had failed to prove that his employment was terminated as evidenced by the Respondent's response to the Claimant's demand letter.
29. Counsel cites the provisions of Section 47(5) of the [Employment Act, 2007](#) to urge that the Claimant had not discharged the burden of proof as his contract was not renewed and even if it was, the Claimant's employment was not terminated by the Respondent but he absconded duty and the Respondent's Human Resource Manager called him.
30. The sentiments of Abuodha J. in *Simon Mbithi Mbane V Inter Security Services Ltd (2018) eKLR* were also relied upon.
31. As regards the relief sought, counsel submitted that the Claimant was not entitled to any as he was not an employee of the Respondent at the time and his employment was not terminated.
32. Counsel wondered how the Claimant assessed his salary yet he adduced no evidence in support.
33. Finally, since costs were discretionary, counsel urged the court to exercise its discretion favourably upon the Respondent.

### **Findings and determination**

34. It is common ground that the Respondent employed the Claimant on 11<sup>th</sup> January, 2017 for a duration of one semester of 3 months and the contract was renewable.
35. It is equally not in dispute that the Claimant performed his duties as a tutor for the entire semester and was paid for services rendered and admitted as much on cross-examination.
36. On the alleged termination of employment, the Claimant's evidence is that on 3<sup>rd</sup> May or thereabout, his employment was unprocedurally terminated. The statement dated 3<sup>rd</sup> July, 2017 barely 2 months earlier makes no reference as to who did it and in what circumstances. The statement is silent on who made the unfounded allegation as the only person who spoke to him on the issue of the missing



camera was the Human Resource Manager who was emphatic that the Claimant's employment was not terminated by the Respondent.

37. Intriguingly, neither the Claimant nor the Respondent is clear as to when the semester for which the Claimant was employed ended. However, as it was 3 months, it must have ended before mid-April 2017.
38. The Claimant's and RWT's evidence is consistent that some other Tutor had deserted and the Claimant was requested to hold brief pending the engagement of a replacement whom he had been requested to source for and allegedly did.
39. On cross-examination, the Claimant admitted that he was to leave when the replacement came and was removed from the Time-table when the replacement came in April 2017. He could not recall the date.
40. Significantly, the Claimant admitted that he was supposed to sign a new contract but did not.
41. Typically, part-time tutoring is semester based even if renewable as semesters are almost invariably separated by a break during which time contracts are signed and tutoring units allocated before tutoring commences.
42. Without a signed contract, a tutor must prove that he/she actually tutored students by way of a Time-table and/or class attendance record. The Time-table shows the tutors, classes and timing for the entire week and remuneration is based on Classes Attendance Sheets. Such contracts are invariably fixed term and are only renewable when a new semester commences.
43. In the instance case, when the Claimant's contract lapsed, he was requested and agreed to hold brief for a tutor who had deserted duty and tutored students.
44. Was this tutoring a renewal of his contract?
45. The court is not so persuaded as he was stepping in for a deserter, a fact he admitted and only for the duration of the absence of a replacement.
46. Both parties agreed that the agreement was verbal.
47. The Claimant has not alleged he had a legitimate expectation that his contract would be renewed and as held in *Rajab Barasa & 4 others V Kenya Meat Commission (2016) eKLR*, cited by Onyango J. in *Stephen Kitheka V Kevita International Ltd (2018) eKLR*, that a fixed term contract will not be renewed automatically even where there exists a clause allowing such renewal.
48. The court is further guided by the sentiments of the Court of Appeal in *Registered Trustees of the Presbyterian Church of East Africa & another V Ruth Gathoni Ngotho (2017) eKLR* as follows;

“Bearing the foregoing in mind, we note that fixed term contracts carries no rights, obligations, or expectations beyond the date of expiry. Accordingly, any claim based after the expiry of the Respondent's contract ought not to have been maintained. This is in relation to the salary of the months of 5<sup>th</sup> of April up to May 2010. Similarly, since the Respondent's contract came to an end by effluxion of time, any claim for wrongful termination would not be maintained.”
49. For the foregoing reasons, it is the finding of the court that the Claimant has failed to demonstrate that he had a subsisting contract of service in early May 2017 or had a legitimate expectation that the now lapsed one-semester contract dated 11<sup>th</sup> January, 2017 would be renewed.



50. On the alleged termination of employment, the Claimant, as adverted to elsewhere in this judgement tendered no evidence as to when, how and by whom the contract was terminated.
51. Similarly, the alleged call by the Principal of the Respondent on a date he could not recall had no supportive evidence and only came up on cross-examination, almost 5 years later, yet the statement written 2 months after the event had no such indication.
52. As correctly submitted by the Respondent and emphasized in legions of decisions, the provisions of Sections 107, 108 and 109 of the *Evidence Act* are unambiguous that the party alleging the existence of a particular fact or set of facts must establish its or their existence by credible evidence. (See *Kipkebe Ltd V Peterson Ondieki Tai (Supra)*, *Mbita Ntiro V Mbae Mwirichia & another (2018) eKLR* and *Alice Wanjiru Ruhiu V Messaic Assembly of Yahweh (2021) eKLR*).
53. Similarly, the Claimant failed to discharge the burden imposed by Section 47(5) of the *Employment Act*, 2007 of proving that an unfair termination of employment had taken place.
54. The foregoing finding comports with the documents on record.
55. As early as 17<sup>th</sup> May, 2017, while responding to the Claimant's demand letter of even date, the Respondent maintained that it had not terminated the Claimant's employment and had only enquired about missing assets and the Claimant had not cleared with the Respondent, a fact he admitted on cross-examination.
56. Equally, when the Claimant reported the issue to the Labour Officer on 5<sup>th</sup> May, 2017, his only claim was the unpaid salary for April 2017.
57. Consistent with the Claimant's testimony, the meeting had no written outcome.

### **Reliefs**

58. Having found that the Claimant's contract of service terminated by effluxion of time at the end of the Semester and the holding brief was until a replacement was found, and having further found that the Claimant has failed to prove that his employment was unfairly terminated by the Respondent, it would appear to follow that the claims for declaration, salary in lieu of notice and compensation are unsustainable and unmerited and are accordingly dismissed.
59. The only merited prayers are;
  - i. Certificate of service as ordained by the provisions of Section 51 of the *Employment Act*, 2007 and
  - ii. Salary for the classes tutored in April 2017 when the Claimant stepped in for the deserting tutor.
60. In the upshot, judgement is entered in favour of the Claimant as follows;
  - a. Any amount unpaid for the classes tutored while the Claimant was holding brief.
  - b. Certificate of service to be issued within 30 days.
61. In the circumstances of this case, the court is satisfied that each party should bear its own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8<sup>TH</sup> DAY OF FEBRUARY 2024**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

