



**Ombewa v Ezeetec Limited (Appeal E072 of 2022)
[2024] KEELRC 776 (KLR) (28 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 776 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E072 OF 2022**

**J RIKA, J
MARCH 28, 2024**

BETWEEN

FANUEL OMBEWA APPELLANT

AND

EZEETEC LIMITED RESPONDENT

*(An Appeal from the Judgment of the Hon. Principal Magistrate
A.N. Makau, delivered on 18th May 2022 in C.M.E.L.R.C)*

JUDGMENT

1. The Appellant is an unsuccessful Claimant, in the Claim filed before the Chief Magistrate's Court, whose details are shown above.
2. He claimed that he was employed by the Respondent as an Electrician, between 12th June 2017 to 15th April 2019.
3. He averred that the Respondent terminated his contract unfairly and unlawfully, and refused to pay his terminal benefits under his contract.
4. He prayed for notice; leave allowance; refund of NSSF contributions; service gratuity; house allowance; service; compensation for unfair termination; costs; and interest.
5. The Trial Court, relying on clause 5 of the contract of employment, declined the Claim in its entirety, finding that the contract was pegged to the completion of a project the Respondent was involved in.
6. The Appellant lodged this Appeal, relying on 9 Grounds, which may be summarized as follows: -
 - a. The Trial Court erred by failing to consider the evidence, pleadings, submissions and documents presented by the Appellant.



- b. The Trial Court erred in failing to consider that the Respondent did not participate in the hearing of the Claim, which made the Appellant’s case watertight and unchallenged.
 - c. The Trial Court erred by failing to issue an order for certificate of service in favour of the Appellant.
 - d. The Trial Court did not consider whether the Respondent applied Section 40 of the [Employment Act](#) on redundancy.
 - e. The Trial Court erred in failure to find that the Appellant was not issued notice.
7. Parties agreed to have the Appeal considered and determined on the strength of written submissions, which they confirmed to have filed and exchanged, at the last mention on 6th December 2023.
8. The Appellant does not seem to have filed a properly bound and marked Record of Appeal, although he confirmed to the Court on 11th October 2023, that typed proceedings of the Trial Court had been supplied.

The Court Finds : -

- 9. The Appellant pleaded at paragraph 3 of his Statement of Claim, that his contract was tied down to the completion of a project, which the Respondent was engaged in.
- 10. He pleaded that the Respondent disregarded the terms of the contract, without pleading with exactitude, which terms were disregarded.
- 11. He instead pleaded, that he was never called to a meeting where he was given an opportunity to be heard, and given the reasons for termination.
- 12. He did not elaborate at the trial, whether the project was ongoing at the time of termination. He just rehashed his pleadings about not being granted a hearing.
- 13. His contract states at clause 2 that “ this position is under fixed term contract for this project.” The project under reference was the construction of a 220 kv facility at Ring Road, Nairobi.
- 14. The Claimant was contracted for the life of the project, to offer electrical services.
- 15. There is evidence that 2 years after he was contracted, the project was winding up. 34 workers, including Electricians, Carpenters, Fitters, Welders and General Workers, were notified on 12th April 2019 that work had diminished, and was expected to diminish further in the coming weeks.
- 16. Although the Respondent applied the term ‘redundancy,’ in communicating to the Workers, the correct language would have been, that the project was winding up, and the limited term contracts, lapsing with the end of the project, in accordance with the terms of those contracts. Termination was not entirely at the initiative of the Respondent; it was mutual, the Parties having agreed from the beginning, that the contract would end, with the end of the project. Redundancy involves termination at the initiative of the Employer. It is termination by involuntary means. In the fixed-term contract under review, termination was voluntary, at the end of the limited term, as had been agreed by the Parties from the inception. The end of the fixed-term contract, did not result in redundancy.
- 17. The Court does not think that the Trial Court erred, by not examining termination under Section 40, and by relying on Section 45 of the [Employment Act](#). It did not misapprehend the law.
- 18. The evidence, pleadings, documents and submissions placed before the Trial Court enabled it to conclude that termination was based on valid reasons, under Section 43 and 45 of the [Employment Act](#).



There was no reason for the Trial Court to go into Section 40 of the *Employment Act*. The Appellant did not even plead redundancy, under Section 40 of the *Employment Act*, in his Statement of Claim, and only raised this argument of Appeal.

19. His grievances on trial were set out at paragraph 6[g] of the Statement of Claim, where he stated that termination was unfair, giving particulars of unfair termination to include: -
 - a. Lack of proper notice of termination.
 - b. Lack of opportunity to be heard.
 - c. No warning letters.
 - d. Malice.
20. Where is redundancy and Section 40 of the *Employment Act*, in these particulars?
21. Where a contract of employment is pegged to the life of a project carried out by the Employer, it comes to end with the end of the project. There is no reason for an Employer undertaking such a project to go about notifying the Employee and the Labour Office about the intended redundancy, and the reasons and extent of redundancy; there is nothing to consult about, because there are no steps the Employer would be expected to take to mitigate loss of employment, beyond the life of the project; and there is nothing to be paid as severance pay, unless the contract concluded between the Parties, makes provision for such a benefit. This position was clear from the date the Parties herein, executed the contract of employment. The contract was tied down to the life of the project. It was defined as fixed-term. Termination would only be challengeable if the contract had been terminated for other reasons, other than the winding up of the Employer's project.
22. The Appellant did not at any time, on Trial and Appeal, establish that the Ring Road Project was going on at the time his contract was terminated, and that he was the only Employee affected.
23. The Grounds raised on Appeal have no merit. The Appellant was employed in a project which ended with his contract.
24. There was no reason for the Appellant to expect the Trial Court to allow the Claim, on the ground of the Respondent's non-participation at the hearing. It was for the Claimant to establish his Claim. Failure by the Respondent to participate in the hearing, did not in any way, make the Appellant's case watertight and unchallengeable. It was for the Appellant to establish his Claim to the accepted standards, guided by Section 47[5] of the *Employment Act*.
25. He was offered notice of 2 weeks in accordance with a memorandum of understanding concluded between him and the Respondent.
26. He complains that he was not granted an order for release of his certificate of service. He did not pray for such an order at the Trial. He duplicated the prayers for service gratuity, and service, for the period worked. None of these prayers had support in his contract or the law. Although submitting that the Trial Court erred by not considering Section 40 of the *Employment Act*, he did not plead severance pay. There was nothing placed before the Trial Court, hinting at redundancy. He prayed for house allowance, while his contract included house allowance under clause 5.3. He did not avail NSSF records at the Trial, to support his prayer for refund of NSSF contributions.
27. The Court does not think that the Trial Court disregarded his pleadings, evidence, documents and submissions. It did not misapprehend the law. The Appeal has no merit.



It Is Ordered : -

- a. The Appeal is declined.
- b. No order on the costs of the Appeal.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 28TH DAY OF MARCH 2024.

JAMES RIKA

JUDGE

