



**Muya v Fruitplus Ltd (Employment and Labour Relations Cause E787 of 2022) [2024] KEELRC 571 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 571 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E787 OF 2022**

**BOM MANANI, J**

**MARCH 14, 2024**

**BETWEEN**

**JAMES MULINGE MUYA ..... CLAIMANT**

**AND**

**FRUITPLUS LTD ..... RESPONDENT**

**JUDGMENT**

**Background**

1. The instant case challenges the Respondent’s decision to sever the employment relation between the parties. The Claimant contends that the decision was unfair.
2. The case is contested by the Respondent. It is the Respondent’s position that the contract between the parties lapsed by effluxion of time.

**Claimant’s Case**

3. The Claimant contends that the Respondent hired him as a driver on 1<sup>st</sup> March 2020. He avers that the relation between them was premised on fixed term contracts of service that were renewed successively.
4. The Claimant avers that the last fixed term contract between them lapsed on 28<sup>th</sup> February 2022. He contends that they were to execute a fresh contract but did not. However, he allegedly continued to offer his services to the Respondent during the month of March 2022.
5. The Claimant avers that on 31<sup>st</sup> March 2022, the Respondent’s management informed him that his services were no longer required. He contends that the Respondent’s management informed him that his contract which had lapsed on 28<sup>th</sup> February 2022 would not be renewed.



6. The Claimant avers that the Respondent offered to pay him terminal dues to close their relation. However, it (the Respondent) did not factor notice pay into the said dues. The Respondent also allegedly failed to pay him overtime dues of Ksh. 834,156.00.
7. The Claimant has also accused the Respondent of not cushioning him against the effects of the Covid 19 pandemic. He avers that the Respondent did not provide him with protection against the Covid 19 virus. He further contends that the Respondent did not pay him hardship allowance of approximately Ksh. 240,000.00 to cover the period he worked during the pandemic.
8. The Claimant also claims for Ksh. 17,377.24 being the amount that was allegedly wrongfully deducted from his salary on account of unauthorized absenteeism. It is his case that his absence from duty was caused by ill health.
9. It is his (the Claimant's) case that the Respondent's actions of deducting money from his salary and refusing to renew his contract contravened his right to fair labour practice. Further, he asserts that the failure to renew his contract violated his legitimate expectation that the contract would be renewed as had been the case with previous contracts.

### **Respondent's Case**

10. On its part, the Respondent contends that after the Claimant's contract came to a close on 28<sup>th</sup> February 2022, he was offered a new contract for a period of one month. The latter contract was to expire on 31<sup>st</sup> March 2022.
11. The Respondent avers that the parties signed a new contract on 1<sup>st</sup> March 2022 to evidence the above arrangement. According to the Respondent, the contract required the Claimant to apply in writing if he wished to have it renewed. It is only upon such application that it (the Respondent) was to consider extension of the contract.
12. The Respondent avers that the employment relation between the parties terminated on 31<sup>st</sup> March 2022 when the contract of 1<sup>st</sup> March 2022 lapsed. It (the Respondent) contends that it was under no obligation to extend the relation beyond 31<sup>st</sup> March 2022.
13. The Respondent avers that it (the Respondent) computed and paid to the Claimant his terminal dues. Therefore, the instant suit is misplaced.
14. The Respondent denies that it was under obligation to issue the Claimant with notice to terminate the contract between them or pay him salary in lieu thereof. According to it (the Respondent), the fact that the Claimant's employment was to lapse on 31<sup>st</sup> March 2022 was self-evident in the contract that he signed rendering it unnecessary to revisit the issue through issuance of notice to terminate.
15. The Respondent denies that it underpaid the Claimant. It contends that it paid him in accordance with the applicable Wage Order.
16. The Respondent denies that it owes the Claimant overtime dues. According to it (the Respondent), all of the Claimant's overtime dues were settled as evidenced in the pay slips that were issued to him.
17. Further, the Respondent denies that it owes the Claimant hardship allowance for services rendered during the Covid 19 pandemic. It is the Respondent's case that it provided the Claimant with all the requisite protection against the pandemic.



## Issues for Determination

18. After evaluating the pleadings and evidence on record, I am of the view that the following are the matters that require determination:-
  - a. Whether the Claimant's contract of service was unlawfully terminated.
  - b. Whether the Claimant is entitled to the reliefs that he seeks in the Statement of Claim.

## Analysis

19. It is not in doubt that the engagement between the parties was based on a series of fixed term contracts. The instruments that were produced in evidence show that the contracts were for fixed durations of six months each. However, the last one was for a lesser period.
20. The Claimant's case was that after the contract of 1<sup>st</sup> September 2021 lapsed on 28<sup>th</sup> February 2022, the parties did not execute a fresh contract. However, he continued to work during the month of March 2022.
21. According to the Claimant, the Respondent indicated to him at the close of March 2022 that it was not going to renew the contract that lapsed on 28<sup>th</sup> February 2022. However, by this time the relation between the parties had allegedly been renewed by implication as he (the Claimant) had continued to work for the entire of March 2022.
22. The Claimant contended that since his contract had been impliedly renewed, it could only be terminated by notice and in accordance with the provisions of the Employment Act. Therefore, the purported closure of the contract by the Respondent at the end of March 2022 on account of its non-renewal was illegal.
23. The Respondent filed a defense in which it stated that contrary to the Claimant's assertions, the parties entered into a new fixed term contract after the contract of 1<sup>st</sup> September 2021 lapsed on 28<sup>th</sup> February 2022. The Respondent stated that the latter contract was for a period of one month and ran up to 31<sup>st</sup> March 2022 when it expired.
24. It is the Respondent's contention that the Claimant voluntarily executed a written contract to evidence this arrangement. Thus, he is bound by it.
25. The Claimant did not file a reply to defense to controvert the above assertion by the defense. And neither did he file a supplementary witness statement to dispute the Respondent's contention.
26. It is only during trial that he (the Claimant) denied knowledge of the contract dated 1<sup>st</sup> March 2022. As a matter of fact, he insinuated that the signature on the instrument was not his. It was his case that since he was away from duty on 1<sup>st</sup> March 2022 when the contract was allegedly signed, the court should conclude that he did not sign the contract.
27. The court notes that the Respondent produced a fixed term contract dated 1<sup>st</sup> March 2022 which suggests that the parties entered into a fixed term contract for one month which was to lapse at the close of March 2022. The contract bears a signature that is said to be the Claimant's.
28. In my view, it was not appropriate for the Claimant to dispute the authenticity of the signature on the instrument at the trial without having filed an answer to defense or supplementary witness statement to controvert this fact. This was merely an attempt to evade the consequences of entering into the impugned contract.



29. Although the Claimant asserted that he could not have signed the contract on 1<sup>st</sup> March 2022 as suggested in the instrument as he was allegedly away on that date, the Respondent explained that the document was backdated by him (the Claimant). The court does not find this explanation unusual especially in view of the fact that the Claimant did not deny having signed this contract either in his pleadings or written witness statement.
30. The contract dated 1<sup>st</sup> March 2022 capped the employment relation between the parties to one month. If the Claimant wished to have it extended, he was required to have expressed this intention in writing at least three days before the lapse of the term of the contract. There is no evidence that he did so.
31. The Claimant having failed to apply for renewal of the contract, the relation between the parties lapsed by effluxion of time on 31<sup>st</sup> March 2022. The Respondent was under no obligation to serve him with notice to terminate the relation.
32. The assertion by the Claimant that the parties did not enter into a fixed term contract for the month of March 2022 is without basis. There is evidence that they indeed entered into a fixed term contract for one month.
33. The Claimant's assertion that he had legitimate expectation that the contract would be renewed beyond March 2022 is equally without basis. The contract between the parties required him to apply in writing for its renewal. He did not. Therefore, he cannot have expected that the Respondent would renew the relation.
34. The Claimant has prayed for various reliefs in the Statement of Claim. First, he claims for pay in lieu of notice to terminate the contract between the parties. However, it is clear from the evidence on record that this prayer is not tenable. The parties had a fixed term contract which provided for its sunset. Therefore, there was no need for the Respondent to issue the Claimant with notice of termination of the contract as this was self-evident in the contractual instrument.
35. The Claimant has also claimed for overtime pay. However, apart from providing records to show that he worked beyond hours, he did not provide preliminary evidence to suggest that he was not compensated for the overtime.
36. In the instant case, there is evidence that the Claimant was issued with pay slips which itemized his emoluments. The evidence suggests that the pay slips set out the Claimant's overtime entitlements. The Respondent produced the March 2022 pay slip to fortify this position.
37. The Respondent's attempts to produce the pay slips for other months to demonstrate how the Claimant's overtime entitlements were addressed were thwarted by the Claimant when he objected to their late introduction. Despite this, the Claimant did not deny that the Respondent supplied him with pay slips for the duration of their relation.
38. The Respondent asserted that the pay slips establish the fact that the Claimant was compensated for overtime worked every month. To demonstrate this fact, it (the Respondent) relied on the March 2022 pay slip which contains entries for overtime pay to the Claimant.
39. It was up to the Claimant to produce the pay slips in his possession to demonstrate that they did not contain overtime compensation. Apart from the March 2022 pay slip which contains entries on overtime pay, he did not provide any other pay slip. Instead, he objected to production of copies of the pay slips that were in possession of the defense on account of their late introduction.
40. The general principle in law is that if a party withholds relevant evidence that is in his possession from the court, it is most likely that such evidence is adverse to his case (*[Kenya Akiba Micro Financing](#)*



*Limited v Ezekiel Chebii & 14 Others* [2012] eKLR). In this case, Claimant not only failed to produce the pay slips that were in his possession and which would have shed light on the issue in dispute but also objected to production of copies of the slips that were in possession of the defense. The court is therefore entitled to draw an adverse inference that the only reason that informed the Claimant's decision not to produce the pay slips in his possession or have produced copies of the pay slips in possession of the defense is because they would have demonstrated that his overtime claims had been settled.

41. Having failed to produce the pay slips in his possession to support his assertion that overtime pay was not factored in his pay, the court finds that the Claimant's claim for overtime has not been sufficiently proved. Having regard to the facts of this case, the court is unable to invoke section 112 of the *Evidence Act* to shift the burden of proof on the issue to the Respondent. The Claimant cannot contend that evidence on overtime pay was in the exclusive possession and control of the Respondent since there is evidence tending to show that throughout his engagement with the Respondent, he was issued with pay slips that itemized his pay. These pay slips, if produced by him, would have demonstrated whether overtime was settled.
42. In any event, the Claimant resisted production of copies of these documents by the defense and cannot now turn around to assert that the defense failed to provide proof of payment of overtime. Consequently and on a balance of preponderances, the court finds that on the material before it, it is more likely than it is not that the Claimant's overtime dues were included in his monthly pay and settled.
43. The Claimant has also claimed for hardship allowance for having worked during the Covid 19 pandemic. However, there was no evidence that the parties had amended their contract to introduce such allowance. As a result, this claim is declined.
44. The Claimant has also claimed a refund of money that was deducted from his salary to cover the days that he was absent from work. He contends that the deductions were irregular since he was absent on account of sickness.
45. Section 31 of the *Employment Act* deals with sick leave. In order for an employee to be entitled to sick off with pay, he is required to have notified the employer of the sickness. In addition, the employee must have supplied the employer with a sick off sheet from a qualified doctor.
46. To support his contention that he was unwell, the Claimant produced a sick sheet from his doctor. However, the Respondent denied having received the document from the Claimant.
47. As noted earlier, the Claimant can only insist on paid sick off if he is able to demonstrate that he furnished the Respondent with the sick off sheet. He did not provide this evidence. Therefore, the Respondent was entitled to presume that he was absent without lawful cause and deduct pay for the period under review.

### **Determination**

48. The upshot is that the court finds that the instant action by the Claimant is devoid of merit.
  49. Accordingly, the claim is dismissed with costs to the Respondent.
- However, the Respondent is directed to issue the Claimant with a Certificate of Service under section 51 of the Employment Act.

**DATED, SIGNED AND DELIVERED ON THE 14<sup>TH</sup> DAY OF MARCH, 2024**



**B. O. M. MANANI**

**JUDGE**

In the presence of:

.....for the Claimant

.....for the Respondent

**ORDER**

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M. MANANI**

