



**Wafula v Kenya Kazi Services Limited (Cause 951 of 2017)  
[2024] KEELRC 937 (KLR) (29 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 937 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 951 OF 2017**

**JK GAKERI, J  
APRIL 29, 2024**

**BETWEEN**

**MAURICE WEKESA WAFULA ..... CLAIMANT**

**AND**

**KENYA KAZI SERVICES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a Memorandum of Claim filed on 27<sup>th</sup> May, 2017 alleging unfair termination of employment and non-payment of terminal benefits and accrued dues.
2. It is the Claimant's case that he was employed by the Respondent as a Security Officer on 30<sup>th</sup> June, 2004 and worked until 31<sup>st</sup> August, 2016 by which time his salary had risen to Kshs 33,349.00 per month.
3. The Claimant avers that on 17<sup>th</sup> August, 2016 while on duty, he was attacked by unknown persons and suffered serious injuries and received treatment at St. Teresa Hospital Kiambu and as he was recovering, he received a letter from the Respondent informing him that his contract was due to expire on 31<sup>st</sup> August, 2016 for no justifiable cause.
4. It is the Claimant's case that the termination of employment was devoid of procedure as prescribed by the law.
5. The Claimant prays for;
  - i. A declaration that the dismissal was unfair.
  - ii. 4 months' salary in lieu of notice Kshs 133,396.00
  - iii. Salary for August 2016 Kshs 33,349.00



- iv. 12 months compensation Kshs 401,188.00
- v. Severance pay 12 years Kshs 230,878.00
- vi. Annual leave Kshs 323,229.00

Months gross salary

- vii. Such other orders or directions as the court may deem fit to meet the ends of justice.
- viii. Costs of this claim.
- ix. Interest at court rates.
- x. Certificate of service.

**Respondent's case**

- 6. In its Reply to the Memorandum of Claim filed on 16<sup>th</sup> August, 2017, the Respondent avers that it engaged the Claimant on 20<sup>th</sup> June, 2004 as a Security Officer and he resigned from the Commercial Guards Department on 8<sup>th</sup> July, 2011 and joined the Embassy Guards Department on a fix year fixed contract due to end on 31<sup>st</sup> August, 2016, based on the US Embassy Contract with the US Embassy Kenya Office.
- 7. That the contract was extended for another 5 years and so was the Claimant's employment with the Respondent, a fact the Claimant was aware of and all his dues were computed and paid prior to the extension of contract.
- 8. The Respondent denies owing the Claimant the reliefs claimed and pray for dismissal of the suit with costs.
- 9. The Claimant responded to the Respondent's Reply to the Memorandum of Claim and denied having resigned or taking up services at the Embassy under a 5 year contract and insists on payment of terminal dues.

**Claimant's evidence**

- 10. The Claimant's written statement summaries the occurrences on 17<sup>th</sup> August, 2017 and thereafter. The statement is silent on the Claimant's employment history or the reliefs sought.
- 11. On cross-examination, the Claimant confirmed that he joined the Respondent on 20<sup>th</sup> June, 2004 on permanent terms but had no documentary evidence of the employment.
- 12. He denied having resigned on 8<sup>th</sup> July, 2011 to join the Embassy. That he merely changed from Commercial to Embassy.
- 13. The witness, however, admitted having signed a 5 year contract from 1<sup>st</sup> July, 2011 to 1<sup>st</sup> August, 2016 and filed the instant suit while still in employment of the Respondent.
- 14. It was his testimony that his employment was terminated in 2018 following a disciplinary hearing.
- 15. That he was still in employment from 2017 and 2018.



16. On re-examination, the Claimant testified that from 2011 to 2016, he was employed on permanent terms in a different department and had not resigned as an employee of the Respondent but was re-employed under a new contract

### **Respondent's evidence**

17. On cross-examination, RWI Norine Silwe testified that she issued the Claimant's contract of employment in 2017.
18. It was his testimony that between 2004 and 2011, the Claimant was a permanent employee of the Respondent.
19. The witness confirmed that the Claimant did not resign from the Respondent's services and the Respondent's letter dated 8<sup>th</sup> July, 2011 had no acknowledgement by the Claimant or his signature.
20. That the Claimant signed the letter dated 15<sup>th</sup> July, 2011 and his Payroll Number was E2163 and the contract made no reference to the US Embassy or termination of the previous contract.
21. The witness confirmed that the Respondent did not issue a certificate of service to the Claimant in 2011 though he was paid salary for August 2016.
22. That he was not paid years of service.
23. That the Claimant had several warnings.
24. That the Claimant's shift was 12 hours and had reasons for not pressing the GEMS on 3 occasions on 22<sup>nd</sup> March, 2018, 10<sup>th</sup> May, 2018 and 20<sup>th</sup> June, 2018. His explanations were that he was fighting a snake, the gadget had a technical problem and the supervisor was at fault and he was not subjected to any disciplinary hearing.
25. The witness testified that the disciplinary committee recommended termination of employment for failure to press the GEMS.
26. That the Claimant's Payroll Number changed from E2163 to E2793 in 2017 on re-employment and before he joined the US Embassy it was E5129.
27. On re-examination, the witness testified that the Claimant's cause of action is for the period 2004 to 2016.
28. That the Claimant did not work for the Respondent for 14 years continuously.

### **Claimant's submissions**

29. By 5<sup>th</sup> March, 2024 when the court retired to prepare this judgment, the Claimant had not filed submissions.

### **Respondent's submissions**

30. Counsel for the Respondent submitted on the Claimant's contract of employment, whether termination was unfair, compensation and costs.
31. On employment, counsel submitted that the Claimant had not provided evidence of employment from 2004 or salary of Kshs 33,349/= and the Respondent employed persons on fixed term contracts



32. Counsel urged that when the Claimant transitioned from Commercial to the Embassy Department, he received a new contract dated 15<sup>th</sup> July, 2011 and was on a 5 year contract which prescribed his terms of engagement and the Claimant was aware of the same including the date of termination.
33. On termination, counsel submitted that since the Claimant relied on the notice of non-renewal of contract dated 26<sup>th</sup> August, 2016 received while he was under treatment, he was aware of the nature of the contract.
34. Counsel cited the sentiments of the court in *Apex Steel v Dominic Mutua Mwendo* (2020) eKLR and *Bernard Wanjohi Muriuki v Kirinyaga Water & Sanitation & another* (2012) eKLR on the essence of a fixed term contract.
35. Reliance was also made on the provisions of Section 45 and 47(5) of the *Employment Act*, 2007 to urge that the Claimant had not discharged the burden of proof.
36. Counsel admitted that the Claimant was not at work from August 2016 to March 2017 when he was recalled and offered a new contract due to expire on 28<sup>th</sup> February, 2022.
37. On the reliefs sought, counsel urged that the Claimant was not entitled to pay in lieu of notice as his contract of employment lapsed on effluxion of the duration and was paid the salary for August 2016 as evidence on record showed and had no claim for unfair termination.
38. On service pay, the Claimant was paid Kshs 35,544.60 under the contract ending 31<sup>st</sup> August, 2016.
39. On annual leave, counsel submitted that the Claimant's payslip for August 2016 shows that he was paid Kshs 1,247/= in lieu of leave days earned.

### **Findings and determination**

40. Before delving into the issues that commend themselves for determination, it is essential to examine the employment history of the Claimant in order to contextualize the dispute between the parties.
41. It is common ground that the Claimant was employed by the Respondent on 20<sup>th</sup> June, 2004 as a security guard in the Commercial Department.
42. Neither of the parties availed evidence of the employment contract or terms of engagement.
43. What is not in dispute is that by a barely legible hand written letter dated 8<sup>th</sup> July, 2011, the Claimant voluntarily resigned from the Commercial Department to join the Embassy Sector. The letter makes reference to an interview held on 6<sup>th</sup> July, 2011 and the Respondent accepted the resignation vide letter dated 8<sup>th</sup> July, 2011.
44. Documents availed by the Respondent reveal that the Claimant was paid final dues on 6<sup>th</sup> January, 2011 after he transitioned to the new contract in September 2011. He was paid service pay.
45. Although the letter has no acknowledgement by the Claimant, it is decipherable that he was aware of it and the effect of the acceptance of the resignation is explicit.
46. The resignation was followed by a written offer to the Claimant dated 15<sup>th</sup> July, 2011 by the Respondent offering the Claimant a 5 year contract of employment effective 1<sup>st</sup> September, 2011 to 31<sup>st</sup> August, 2016.
47. The contract was subject to a 3 months probationary period terminable by 7 days' notice, salary at Kshs 14,357.00, house allowance of Kshs 2,500.00, a cleaning allowance of Kshs 400.00 per month, a night allowance of Kshs 50.00, yearly performance bonus, leave travel allowance of Kshs 1,250/=, long



- service pay and an annual salary increment of 3% from 1<sup>st</sup> September, 2012 to 1<sup>st</sup> September 2015 and 30 days annual leave.
48. Significantly, although the Claimant's written statement alleges that he was attacked on 17<sup>th</sup> August, 2017, the Memorandum of Claim and the counsel's letter dated 28<sup>th</sup> March, 2017 are explicit that the alleged attack occurred on 17<sup>th</sup> August, 2016.
  49. For unexplained reasons, the Claimant was admitted in Hospital on 20<sup>th</sup> August, 2016 and discharged on 26<sup>th</sup> August, 2016.
  50. It is unclear why it took three days after the alleged attack for the Claimant to proceed to the hospital.
  51. Equally, only the hand appear to have had a problem and was swollen.
  52. Strangely, the Medical Claim Form on record to AAR Insurance Kenya Ltd completed by the Claimant and a Waitimu, is undated, though it makes reference to pain on the Right forearm on account of an assault by thugs, the day before.
  53. The issues for determination are;
    - i. Whether termination of the Claimant's employment by the Respondent was unfair.
    - ii. Whether the Claimant is entitled to the reliefs sought.
  54. On the 1<sup>st</sup> issue, while the Claimant submits that termination of his employment was unfair, the Respondent submits that the contract of employment ended by effluxion of time as it was a fixed term contract.
  55. Both the provisions of the *Employment Act*, 2007 and case law are unambiguous that for a termination of employment to pass the fairness test, it must be established that the employer had a valid and fair reason to terminate the employee's employment and conducted the termination in accordance with a fair procedure as by law required, as aptly captured by Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR.
  56. The provisions of Sections 41, 43, 44, 45 and 47(5) of the *Employment Act*, 2007 address the substantive and procedural elements on termination of employment.
  57. In the instant case, the Claimant alleges that after the attack on 17<sup>th</sup> August, 2016, and as he was receiving treatment at the St. Teresa Hospital, Kiambu, he received a letter informing him that his contract was due to expire on 31<sup>st</sup> August, 2016. The letter makes reference to an earlier notice dated 28<sup>th</sup> July, 2016 and is emphatic that the contract would not be renewed.
  58. Significantly, the letter tabulates the dues payable to the Claimant including salary, leave days and gratuity. The Claimant accuses the Respondent for not having cited a justifiable cause for the non-renewal and inadequacy of notice.
  59. Needless to belabour, the contract dated 15<sup>th</sup> July, 2016 executed by the Claimant in August 2011 was unequivocal that, it would run for 5 years from 1<sup>st</sup> September, 2011 to 31<sup>st</sup> August, 2016 and had no provision for extension or renewal.
  60. When the Claimant executed the contract dated 15<sup>th</sup> July, 2011, he obtained a new Payroll Number E2163 as he previously had Payroll Number 5129 as evidenced by the Statement of Final dues dated 6<sup>th</sup> January, 2012 and the Respondent's letter of acceptance of the resignation in July 2011.



61. As correctly submitted by the Respondent’s counsel, a fixed term contract has a beginning and an end as ordained by the provisions of Section 10(3)(c) of the [Employment Act](#), 2007 that;
- “Where the employment is not intended to be for an indefinite period, the period for which it is expected to continue, or if it is for a fixed term, the date when it is to end.”
62. In the instant case, the contract was contemplated to end on 31<sup>st</sup> August, 2016 and the Respondent was neither legally obligated to give a notice nor give a reason for the termination of employment, other than effluxion of time.
63. As held by the Court of Appeal in [Registered Trustee of Presbyterian Church of East Africa & another v Ruth Gathoni Ngotho-Kariuki](#) (2017) eKLR, a fixed term contract carries no rights, obligations or expectations after expiry.
64. The court expressed similar sentiments in [Amatsi Water Services Co. Ltd v Francis Shire Chachi](#) (2018) eKLR.
65. The court is also in agreement with the sentiments of Rika J. in [Bernard Wanjohi Muriuki v Kirinyaga Water & Sanitation Co. & another](#) (*supra*) cited by the Respondent’s counsel that the employer is not required to provide a reason for non-renewal of a fixed term contract unless the contract so requires or implies a renewal.
66. (See also [Keen Kleeners Ltd v Kenya Plantation & Agricultural Workers Union](#) (2021) KECA 352).
67. Evidently, the Claimant’s employment contract dated 15<sup>th</sup> July, 2011 lapsed and terminated by effluxion of time and the Respondent was not to blame for that.
68. Although RWI testified that the Claimant did not resign from the Respondent’s employment on 8<sup>th</sup> July, 2011, he moved out of the Commercial Department presumably for better remuneration and executed a new contract with clear terms and conditions.
69. It is not in dispute that the Claimant agreed to go through probation for 3 months yet he had been the Respondent’s employee.
70. In the court’s view, this was a new and self-contained engagement by the Respondent which formed the basis of the relationship between the Claimant and the Respondent.
71. Puzzlingly, even assuming that the Claimant was still in the Respondent’s employment after 31<sup>st</sup> August, 2016, why did he not reclaim his job and had to await to be recalled by the Respondent in 2017?
72. Section 47(5) of the [Employment Act](#), 2007 provides;
- “For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”
73. In the instant case, the Claimant has failed to evidentiary demonstrate that his separation with the Respondent on 31<sup>st</sup> August, 2016 was unfair or unlawful.
74. From the evidence on record, it is clear that the Claimant was re-employed by the Respondent in early 2017 and signed the contract on 3<sup>rd</sup> February, 2017 and filed the instant suit on 17<sup>th</sup> May, 2017.



75. The documents on record further reveal that the Claimant's employment was terminated after a disciplinary hearing on 13<sup>th</sup> September, 2018 and the claimant subsequent appeal was heard and the termination was upheld.
76. The Claimant has not challenged the termination of employment as his case is based on the non-renewal of the contract dated 15<sup>th</sup> July, 2011.
77. To the question whether termination of the Claimant's employment was unfair, the court returns that the Claimant has failed to prove any unfair termination of employment by the Respondent as the contract of employment lapsed on 31<sup>st</sup> August, 2016 by effluxion of time.

Whether the Claimant is entitled to the reliefs sought

- a. Declaration
78. Having found that the Claimant's contract of employment ended on expiration of the contractual period of 5 years, the declaration sought is unmerited and is declined.
- b. 4 months' salary in lieu of notice
79. Having found as above, the prayer for salary in lieu of notice for any number of months is untenable and is declined.
- c. Salary for August 2016
80. A copy of the Claimant's payslip for August 2016, which he availed as evidence reveal that he was paid a gross salary of Kshs 33,349.00 and a net salary of Kshs 15,935.00 via his account at the Co-operative Bank Account No 011163XXXXXXXX
81. The Respondent provided a similar copy of the Claimant's payslip.
82. The Claimant adduced no evidence to show that the salary for August 2016 was not deposited in his account at the Co-operative Bank.
- The prayer is dismissed.
- d. Severance pay for 12 years and 2 months
83. Contrary to the Claimant's contention that no payment was made after he resigned from the Commercial Department to join the Embassy Sector, evidence availed by the Respondent reveals that he was paid final dues as the statement dated 6<sup>th</sup> January, 2012 reveals.
84. He was paid for accrued leave days and service pay, the sum of Kshs 29,078.25 after deductions.
85. This statement suggests that the Claimant had no pending claims prior to joining the Embassy Sector and the prayer for severance pay for 12 years is unsustainable.
86. More significantly, it is unclear to the court what the claim for severance pay entails as it is only payable in a redundancy and the Claimant was not declared redundant and is thus not entitled to severance pay.
- The prayer is declined.
- e. Annual leave for years served
87. The Claimant tendered no scintilla of evidence to show that he did not proceed on annual leave. Neither the written statement dated 18<sup>th</sup> May, 2017 nor the oral testimony adduced in court make reference to leave days or how many they are.



88. Notably, the final dues statement dated 6<sup>th</sup> January, 2012 show that the Claimant was paid in lieu of accrued leave days, Kshs 8,463.00 and copies of Leave Application Forms produced by the Respondent show that the Claimant applied for and proceeded on annual leave in 2007, 2008, 2009, 2010, was paid for 2011, 2012, 2013, 2014, 2015 and 2016.

The prayer for leave is unmerited and it is dismissed.

f. 12 months compensation

89. Having found that the Claimant has failed to discharge the burden of proof under Section 47(5) of the *Employment Act*, 2007, the prayer for compensation for unlawful or unfair termination of employment is unsustainable and is declined.

90. The same fate befalls the prayer for 12 months gross salary for wrongful dismissal.

g. Certificate of service

91. The Claimant is entitled to a certificate of service by dint of Section 51 of the *Employment Act*, 2007 and filed a copy of the document dated 3<sup>rd</sup> October, 2016 which he did not contest.

92. However, since the suit was commenced after the Claimant was re-employed, a fact he admitted on re-examination, he is entitled to another certificate of service for the duration served and the same be issued within 30 days.

93. Other than the prayer for a certificate of service, the Claimant's suit lacks merit and it is accordingly dismissed.

94. Parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 29<sup>TH</sup> DAY OF APRIL 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**

