



Temple Point Resort Limited v Omar (Suing on his behalf and on behalf of 10 others who are the former employees of Temple Point Resort Limited t/a Temple Point Resort) (Appeal E028 of 2023) [2024] KEELRC 1493 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 1493 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
APPEAL E028 OF 2023**

**M MBARŪ, J
APRIL 26, 2024**

BETWEEN

TEMPLE POINT RESORT LIMITED APPELLANT

AND

ABDUL OMAR RESPONDENT

SUING ON HIS BEHALF AND ON BEHALF OF 10 OTHERS WHO ARE THE FORMER EMPLOYEES OF TEMPLE POINT RESORT LIMITED T/A TEMPLE POINT RESORT

(Being an appeal from the judgment of Chief Magistrate at Malindi Hon. James Ongondo delivered on 29 November 2023 in Malindi CMELRC No.67 of 2019)

JUDGMENT

1. The appeal arises from the judgment in Malindi CMELRC No.67 of 2019 delivered on 29 November 2023. The background of the appeal is a claim filed by the respondents on his behalf and behalf of 10 other former employees of the appellant. The claim was that the respondents were employed by the appellant, a limited liability company running a hotel in Watamu, Malindi. The respondents were employed between 1st February 1992 and 1st December 2016 but on 18 April 2019, the appellant terminated their employment without good cause or justification. The respondents assumed it was due to redundancy. The respondents had worked continuously for the appellant for the entire period. Upon termination of employment, the respondents were not paid their terminal dues other than Ksh.4, 000 token which the appellant stated was a token of appreciation.
2. The respondents claimed that they were dismissed or declared redundant without due process. There were underpayments and despite working continuously for the appellant for periods beyond 6 months, they were not paid under Rule 18 of the Regulation of Wages (Hotel and Catering Trades Wages

- Council Establishment) Order under the Labour Institutions Act, 2007. There was no notice issued before termination of employment on account of redundancy. The respondents claimed payment of Ksh.2, 142,147 for;
- a. Notice pay;
 - b. Service pay;
 - c. 12 months compensation;
 - d. Underpayment of wages.
3. A schedule is attached to the Memorandum of Claim filed by the respondents.
 4. In response, the appellant's case was that the claim was only filed by one person, Abdul Omar and it is not a representative suit and he had no letter of authority to file the claim on behalf of others. The respondent took over the management of the Resort known as Temple Point Resort (formerly Salama Beach Hotel) in the year 2016 as part of recovering the loans owed to it by Salama Beach Hotel Limited. The appellant was incorporated on 13 October 2010, 18 years after the respondent's alleged employment. Sometime in the year 2016, it took over operations and administration of the hotel to recover its loan at Euros 6,907,801.89. Before the year 2016, the appellant had been contracted by Salama Beach Hotel Limited (Salama) to provide management services and advisory but the operations remained under the control of the entity including employment and remuneration of employees.
 5. The appellant also pleaded that based on records, Abdul Omar was first employed on 1st February 1992 by Venta Management Limited a company running the hotel and he served until December 2006 when management passed to Salama Beach Hotel Limited. He was paid severance at ksh.166, 207. He was again employed by Salama from 1st January 2007 as a Painter at a monthly wage of Ksh. 17,000 where he served until 30 November 2014 when he was declared redundant and paid Ksh.181, 021.05 in terminal dues. When the Appellant took over from Salama, it engaged the respondent to serve as a mechanic with effect from 1st January 2016 at a wage of Ksh.23, 100 per month. Being a separate entity from Salama, the appellant directly employed the respondent and there was no continuation of employment as alleged. The respondent was kept on a term contract. At the end of the terms, each respondent was issued a notice and it is only responsible for employment from the year 2016 and not before, the respondents were all paid their terminal dues by the various entities who employed them.
 6. The appellant also pleaded that the claim for notice pay is not due as notice was issued at the end of the term contract on 30 April 2019. There was no requirement to renew the contract. Service pay is not due as the appellant paid statutory dues. There was no underpayment and the respondents were employed and paid their due wages.

Justice Mwambure was employed by the appellant on 1st January 2016 as a housekeeper at a wage of Ksh.22, 333 per month.

Ibrahim Mwashigadi was employed on 1st January 2016 as a guard at a wage of Ksh.20, 843 per month.

Rosabella Jeptune Sang was employed on 1st December 2016 and is not entitled to any claim.

Mohamed Abdi was employed on 1st December 2016 and is not entitled to the claims.

Mbeyu Riziki Mumbo was employed on 1st January 2016 and is not entitled to claims made.

Franklin Maingi was employed on 1st January 2016 as a guard at a wage of Ksh.17, 380 and is not entitled to his claims.

Robert Charo was employed on 1st January 2016 as a pool attendant was a wage of Ksh.20, 128.

Sharon Mwende was employed on 1st March 2016.

Benson Kenga was employed on 1st January 2016 as a mason at a wage of Ksh.19, 304.

Jackson Kombe was employed on 1st January 2016 at a wage of Ksh.17, 160.

7. The trial court delivered judgment on 29 November 2023 with a determination that the appellant had admitted claims by Mbeyu Riziki, Rosa Cheptune. The five (5) claims remaining were assessed and found justified and awarded terminal dues;
 - a. One month's salary in lieu of notice;
 - b. Damages for wrongful terminal equivalent to 12 months' salary per the schedule attached to the claim;
 - c. Costs of the suit.
8. Aggrieved by the judgment, the appellant filed this appeal on eleven (11) grounds. That;
 1. The learned magistrate erred in law and fact when he held that non-renewal of fixed term contract upon their lapse on 30.4.2019 amounted to unfair and unlawful termination of employment.
 2. The learned magistrate erred in law and fact when he wrongly held that the applicant was under a legal obligation to give reasons for the non-renewal of the respondents' fixed-term contracts when there is no such requirement under the law.
 3. The learned magistrate erred in law and fact in entering judgment in favour of two (2) respondents Rosabella Jeptune Sang and Mbeyu Riziki Mumbo even though none of them testified or adopted their Witness Statement under oath.
 4. The learned magistrate erred in law and fact in entering judgment in favour of three (3) respondents i.e. Abdul Omar, Benson Kenya, and Robert Charo for a period of which none of these three were ever employees of the appellant.
 5. The learned magistrate erred in law and fact in awarding the claim for underpayments to 3 respondents Abdul Omar, Benson Kenga and Robert Charo despite evidence that their employment salary of 3 was over and above the prevailing Regulation of Wages (General) (Amendment) Orders.
 6. The learned magistrate erred in law and fact in awarding the claim for Service Pay to all respondents when in fact the appellant had duly paid statutory payments.
 7. The learned magistrate erred in law and fact in awarding one month's salary in lieu of notice to all respondents as part of compensation in complete disregard of the fact that the respondents' fixed term contracts of employment lapsed by effluxion of time.
 8. The learned magistrate erred in law and fact by failing to properly and exhaustively evaluate the evidence on record before arriving at his conclusions and thereby made inferences leading to a conclusion supported by evidence and or based on any documentation.

9. The learned magistrate misapprehended the claim before the court and the applicable law and made unjustified wrong conclusions that are manifestly excessive damages, unsupported by reason or justification and to the detriment of the appellant.
 10. The learned magistrate erred in law and fact in finding that no evidence was presented to prove that the respondents were paid their dues even though the appellant had meticulously listed, indexed, produced and filed such evidence in court.
 11. The learned magistrate erred in law and fact when he awarded the respondents the maximum 12 months gross salary in compensation each in addition to the terminal benefits of Ksh.2, 142,147 in complete disregard of the statutory principles set out in Section 49(4) and 50 of the *Employment Act*.
9. On these grounds, the appellant is seeking that the appeal be allowed the judgment of the trial court be set aside and the claims made be dismissed with costs.
 10. Both parties attended and agreed to address the appeal by way of written submissions.
 11. The appellant submitted that the 11 respondents filed suit claiming there was unfair termination of employment and or redundancy. The appellant filed a response and addressed each claim and that the respondents were under various employers and when the appellant took over Salama in the year 2016 employed them under contract. The fixed-term contracts lapsed on 30 April 2019 but the trial court held that there was unfair termination of employment and proceeded to award the claims as pleaded. The trial court failed to appreciate there were two categories of employees;
 - a. Those who claimed to have been employed by the appellant before 1st January 2016 – Abdul Omar, Benson Kenga and Robert Charo; and
 - b. Those who were employed by the respondent after 1st January 2016 – Mbeyu Riziki Mumbo, Rosabella Jeptune Sang and Franklin Maingi.
 - c. 4 respondents withdrew their claims against the appellant – Justine Mwambire, Ibrahim Mwashigadi, Sharon Mwendu and Jackson Kombe.
 - d. 2 respondents did not testify and purported to adopt their witness statements without consent from the appellant.
 - e. 5 respondents testified in support of their claims – Benson Kenga, Mohamed Abdi, Abdul Omar, Robert Charo and Franklin Maingi.
 12. The appellant submitted that the trial court should have considered 5 claims only. The judgment of the trial court ought to have been for the 5 respondents who testified in court.
 13. On the issue of non-renewal of fixed-term contracts, the appellant submitted that the employer has no obligation in law or in fact to issue a notice when there is a fixed-term contract as held in Samuel Chacha Mwita v Kenya Medical Research Institute [2014] eKLR. A fixed-term contract has a start and end date. In the case of *Transparency International (Kenya) v Teresa Carlo Omondi Civil Appeal No.81 of 2018*, the Court of Appeal held that a fixed-term contract of employment does not create a legitimate expectation that it should be renewed. The employer has no obligation to renew a fixed-term contract or to justify termination of employment on other grounds beyond the lapse of the term contract. Termination of the contract is by mutual agreement under the contract.
 14. The appellant submitted that in the case of Margaret A. Achieng v National Water Conservation & Pipeline Corporation [2014] eKLR the court emphasized that automatic renewal of a fixed-term

contract would undermine the very purpose of the contract and revert into an indeterminable contract of employment. In this case, the respondents were on fixed-term contracts which lapsed on their term. The appellant produced evidence demonstrating that each respondent was engaged on a short-term fixed for 3 months. The employer has the prerogative to choose the manner of employment as held in *Krystalinne Salt Limited v Kwekwe Mwakele & 67 others* [2017] eKLR.

15. Only 5 respondents testified in support of their claims and were cross-examined on their claims;
16. Benson Kenga was employed as a mason on 1st January 2016 on 3 months fixed term contract which expired on 31st March 2016. On 1st November 2017, he signed a 3-month contract which was extended 5 times.
17. Mohamed Abdi was employed through a fixed-term contract from 1st November 2017, he signed a total of 6 contracts of 3 months each and the last ended on 30 April 2019.
18. Abdul Omar was employed by the appellant on 1st January 2016 as a painter on a 3-month contract which expired on 31st March 2016. On 1st February 2019, he signed a further contract for 3 months ending on 30 April 2019.
19. Robert Charo was employed as a pool attendant on 1st January 2016 on a 3-month contract which expired and he continued to receive 3 months contracts until 30 April 2019.
20. Franklin Maingi was on 7 fixed-term contracts of 3 months each.
21. On the issue of judgment for Rosabella Jeptune Sang and Mbeyiu Riziki Mumbo, the appellant submitted that the trial court erred in allowing their claims despite not being called to testify or adopt their witness statements. The statements of a witness cannot be admitted into evidence as a testimony through consent. The witness must be called under oath as held in *Reef Hotel Limited v Josephine Chivatsi* [2021] eKLR.
22. The appellant submitted that the trial court erred in making an award for 3 respondents for periods outside their employment by the appellant. Abdul Omar, Benson Kenga and Robert Charo only became employees of the respondent through contracts issued in the year 2016 and not before as the appellant was only registered as a company on 13 October 2010. A CR12 search result was submitted and not challenged. Placing the obligations of other entities upon the appellant was not justified. The appellant only took over management of Salama to recover its debt through Milimani HCCC No. E034 of 2018 *Temple Point Resort Limited v Salama Beach Hotel Limited* and Insolvency Petition No. E016 of 2018.
23. The appellant submitted that awards of underpayments were not justified and went contrary to the applicable Wage Orders. The respondents were employed as general employees and the wages paid were above the minimum wage.

In the year 2016,

Abdul Omar was paid Ksh.23, 100 while the minimum wage was Ksh.11, 219.50;

Benson Kenga was paid Ksh.17, 160 while the minimum wage was Ksh.11, 219.

In the 2017,

Abdul Omar was paid Ksh.23, 100 while the minimum wage was Ksh.13, 309.80;

Benson Kenga was paid Ksh.17, 160 while the minimum wage was Ksh.13, 309.80.

In the year 2018;

Abdul Omar was paid Ksh.23, 100 while the minimum wage was Ksh.13, 975.55.

Benson Kenga was paid Ksh.17, 160 while the minimum wage was Ksh.11, 975.55.

24. There was no underpayment.
25. On the award of service pay, this was in error as the appellant remitted all statutory dues for the respondents. There are NSSF records filed to confirm remittances.
26. The award of notice pay given the fixed-term contract was awarded in error. The evidence produced was not taken into account. The award of 12 months compensation was excessive and without reasons as held in *Apex Steel Limited v Dominic Mutua Muendo* [2020] eKLR that under Section 47(5) of the *Employment Act* (the Act), a claim for unfair termination must be proved by the employee and the employer is required to justify the reasons for termination. In *Peter Otabong Ekisa v County Government of Busia* [2017] eKLR the court held that the employee must establish a prima facie case that there was no valid reason leading to termination of employment and the employer has the burden to justify the reasons for dismissal. For these reasons, the appeal should be allowed with costs.
27. The respondents submitted that the trial court addressed the issues in dispute comprehensively and arrived at a proper judgment which should be conformed to costs.
28. The claim by Rosabella Jeptune Sang and Mbeyu Riziki Mumbo and the judgment thereof was procedural. The allegations that they did not testify were because their evidence was admitted by consent.
29. Rule 25(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides that evidence can be given orally or through an affidavit or written statement.
30. The respondents submitted that they worked for the appellant continuously per the Certificates of Service. Abdul Omar is noted to have worked as a painter from 1st February 1992 until 30 April 2019, a period of 27 years.
31. Section 51(2) of the Act provides that a Certificate of Service shall state the date when employment commenced and the date when employment ceased. The appellant issued the respondents with Certificates per Section 51 of the Act for the entire duration of employment.
32. Section 51(4) of the Act provides that any false statement which is issued by the employer is an offence. To hence write false information on the Certificate of Service stating a duration that is not correct is wrong but in this case, the record bears the number of years served;
 - a. Abdul Omar worked for 27 years and 3 months;
 - b. Benson Kenga Kitsao worked for 12 years and 4 months;
 - c. Mohammed Abdi worked for 2 years and 5 months;
 - d. Franklin Malingi worked for 6 years and 5 months;
 - e. Rosabella Jeptune Sang worked for 2 years and 5 months;
 - f. Robert Charo worked for 18 years and 6 months;
 - g. Mbeyu Riziki Mumbo worked for 4 years.

33. The respondents submitted that they were not on short-term contracts. The Certificates of Service indicate the total number of years worked. It was continuous service. Rule 18 of the Regulation of Wages (Hotels and Catering Trades Wages Council Establishment) Order under the *Labour Institutions Act* provides that no person shall be employed on temporary or seasonal terms of employment for a period exceeding 6 months. An employee on a seasonal or temporary contract shall be deemed converted to regular terms of employment on completion of 6 months of continuous service. In the case of *KUDHEIHA Workers v Wild Waters Entertainment Park* [2016] eKLR the court held that under Section 63(2) of the *Labour Institutions Act*, the Regulations thereof apply to employment.
34. The respondents submitted that the appellant has alleged that 3 respondents were not its employees before the year 2016 – Abdul Omar, Benson Kenga and Robert Charo. The appellants issued these respondents with Certificates of Service for the entire period of employment. Employment is noted as being under the appellant. In the case of *Issa Shekue Shali v Buscar Limited* [2018] eKLR the court held that it is sufficient that the employee can show that he worked for the employer’s business, regardless of whichever form that business adopts. In this case, it is immaterial that the appellant changed from Temple Point Village to Venta Club Temple Point, Venta Management Ltd and Salama. What is in issue is the continuous service of the respondents.
35. The question of whether Salama and Temple Point Resort Ltd are the same was addressed in the case of *Robert M Mwachengo v Salama Beach Hotel t/a Temple Point Resort Ltd* [2018] eKLR that the two entities are related closely because the letterheads for the respondent bear the name Temple Point Resort on the logo, they use the same telephone numbers and postal address. The assertion by the appellant that they were taking over Salam to recover a debt of Euros 6,907,801.89 is addressed in garnishee proceedings in the case of *Moses Mwatemo v Salama Beach Hotel Limited; NCBA Bank (K) PLC (Formerly NIC Bank & Another (Garnishee); Temple Point Resort Limited (Objections)* [2021] eKLR. The court in this case held that the respondent was trading as Temple Point Resort Limited.
36. The respondents submitted that there was underpayment of wages. Abdul Omar was an artisan in the maintenance department. Benson Kenga was a graded artisan in the maintenance department. The Certificates of Service confirmed these facts and therefore erroneous for the appellant to allege that they were ungraded artisans.
37. Under the Regulation of Wages (General) (Amendment) Order 2015, a graded artisan had a minimum wage of Ksh.26, 751 while Abdul Omar was earning Ksh.23, 100 per month, an underpayment. Benson Kenga was earning Ksh.17, 160 per month which is below the minimum wage. They are entitled to the claimed underpayment.
38. The respondents submitted that there was unfair termination of employment and they are entitled to compensation. Sections 41, 43, and 45 of the Act require notice, hearing and valid reasons to be issued before termination of employment. The notice which was issued on 18 April 2019 had no assigned reason. There was no due process. This resulted in unfair termination of employment.
39. All the respondents were paid Ksh.4, 000 as a send-off package. The assertion by the appellant that terminal dues were paid is without evidence. Save for the admitted payment of Ksh.4, 000 on 30 April 2019, the alleged previous payments are without evidence. The appeal should be dismissed with costs.

Determination

40. This is a first appeal. The court is required to address the facts with a full and independent consideration of the evidence. Re-evaluate both issues of fact and law, and the issues raised and give reasons thereof.

While considering the entire scope of section 78 of the Civil Procedure Act appreciate the entire evidence and come to a different conclusion. In *Peters v Sunday Post Limited*(1968) EA 123 the Court of Appeal for East Africa held that;

It is a strong thing for the appellate court to differ from the finding, on a question of fact, of a judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has indeed jurisdiction to review the evidence in order to determine, whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.

41. In this regard, the entire record will be reviewed. The issues which emerge for determination are;
- Whether there was unfair termination of employment;
 - Whether judgment entered for Rosabella Jeptune Sang and Mbeyu Riziki Mumbo is justified;
 - Whether a judgment for claims before the year 2016 is proper;
 - Whether the awards made are justified.
42. Four respondents withdrew their claims - Justine Mwambire, Ibrahim Mwashigadi, Sharon Mwende and Jackson Kombe. On 4th October 2023, Jackson Kombe was called under oath and his advocates moved the court to be excluded from the proceedings. The advocate also applied to withdraw claims by Justine Mwambire and Sharon Mwende. This was allowed.
43. Only 5 respondents testified – Benson Kenga Kitsao, Mohamed Ibrahim, Abdulrahim, Robert Charo, and Franklin Malingi Mwangumba.
44. Rule 9 of the Employment and Labour Relations Court (Procedure) Rules, 2016 (Court Rules) allows many claimants with the same cause of action and against the same respondent to file the Memorandum of Claim and claim under a single claimant. The condition is that the single claimant must particularize each claim and set out with clarity that the claim is against the respondent. The Court Rules further allow for consolidation of suits or a test suit in terms of Rules 23 and 24 respectively.

Rule 9 requires that;

9.

- (1) A suit may be instituted by one party on behalf of other parties with a similar cause of action.
- (2) Where a suit is instituted by one person, that person shall, in addition to the statement of claim, file a letter of authority signed by all the other parties:

Provided that in appropriate circumstances, the Court may dispense with this requirement.
- (3) The statement of claim shall be accompanied by a schedule of the names of the other claimants in the suit, their address,

description, and the details of wages due or the particulars of any other breaches and reliefs sought by each claimant

45. The respondents filed the Memorandum of Claim as a representative claim with a schedule of the names of all the claimants and a description and details of the wages and particulars of each claim.
46. The appellant did not raise any objections or request that each respondent be called in court to confirm each claim where this was found necessary. To this extent, the respondents and the trial court well proceeded under the provisions of Rule 9 of the Court Rules.
47. Each respondent had his/her claim set out.
48. Regarding the claims by Rosabella Jeptune Sang and Mbeyu Riziki Mumbo, the trial court held that these claims were allowed by consent. There is an order of the court recorded on 4 October 2023.
49. The appellant has contested these claims on the basis that the respondents were never called to testify or adopt their witness statements.
50. On the application of Rule 9 of the Court Rules, upon the outline of the claims by Rosabella Jeptune Sang and Mbeyu Riziki Mumbo, the trial court should and ought to have assessed each claim on its merits. Without any consent allowing their claims, the responses and records filed should have been analyzed with a finding.
51. On the nature of employment, it is settled law, that the employer is the custodian of work records. The legal duty to submit work records upon a claim being filed vests on the employer under Section 10(6) and (7) of the *Employment Act* (the Act);
 - (6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.
 - (7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer
52. Under this mandate, the appellant filed the various work records of the respondents.
53. The respondents also filed part of the work records.
54. From the filed records, the court can discern the following;
 - a. The appellant was incorporated on 13 October 2010;
 - b. The appellant took over management of Salama in the year 2016 to recover its debt following High Court proceedings Milimani HCCC No. E034 of 2018 Temple Point Resort Limited v Salama Beach Hotel Limited and Insolvency Petition No. E016 of 2018.
 - c. The respondents were placed under a fixed-term contract with extensions until notices dated 18 April 2019 indicating that contracts ending 30 April 2019 would not be renewed.
 - d. The respondents filed their requisite notices some being;
 - Abdul Omar last contract extended from 1st February to 30 April 2019;
 - Benson Kenga, notice ending his last contract dated 18 April 2019;
 - Mohamed Abdi, last contract was extended from 1st February to 30 April 2019;

Sharon Mwende, notice dated 18 April 2019 ending his last contract on 30 April 2019.

- e. The respondents had specific letters of appointment;

Abdul Omar

On 1st February 1992, he was employed as a painter by Temple Point Village, Salama Beach Hotel;

On 22 January 2007, there was a redundancy declared by Venta Management Limited. He was to be re-employed by Salama from 1st January 2007;

On 26 January 2007, he was paid redundancy dues of Ksh.168, 549.

On 28 September 2010, he was appointed as a painter by Salama;

On 1st September 2014, his employment was terminated on account of redundancy;

On 30 November 2014, he was paid redundancy dues of Ksh.181, 231.05.

On 1st January 2016, he was appointed as a mechanic by Temple Point Resort for 3 months.

On 1st November 2017, another contract was issued for 3 months (seasonal contract);

The contract was renewed over time until notice dated 18 April 2019.

He has signed these letters in acceptance.

Rosabella Cheptune Sang

On 1st December 2016 was appointed as a security guard for 3 months.

There were extensions until notice dated 18 April 2019.

Mbeyu Riziki Mumbo

On 1st November 2017 was appointed a room steward for 3 months;

Contracts extended until notice dated 18 April 2019.

55. This is the general trend in all employment relationships. Each employment relationship was regulated under a written contract. Each respondent signed in acceptance. Upon the appellant taking over, they maintained 3 month contracts with renewals until the last ending 30 April 2019.
56. The respondents have urged the court to rely on the Certificates of Service in terms of Section 51 of the Act. The notices issued to the respondents noted the number of years worked. Indeed this is correct. But unlike Certificates of Service which should be issued at the end of employment stating the number of years worked, a contract of employment/service is issued at the beginning of employment indicating the terms and conditions of employment. Whereas the Certificate of Service ordinarily states when employment started and ended per Section 51 of the Act, a contract of Service may be oral or written in terms of Sections 7, 8, 9 or 10 of the Act. Under Section 10 of the Act, the employer is allowed to issue a fixed-term contract and under Section 18 of the Act, the employer should pay terminal dues under the mode of employment.
57. Both provisions for issuance of a Certificate of Service and contract of service are not contradictory. In my mind, each serves a different purpose. A contract of service cannot be regulated under Section

- 51 of the Act. Payment of terminal dues is regulated under Section 18 of the Act and not Section 51 of the Act.
58. The respondents have further relied on the provisions of Rule 18 of the Regulation for Wages (Hotels and Catering Trades Wages Council Establishment) Order to assert that following their continuous service for periods of over 6 months as temporary employees they automatically converted to full-time employees for the respondent. However, the regulatory framework of the law cannot be superseded by subsidiary provisions. In this case, fixed-term contracts extended over time in writing are lawful and valid under Section 10(3) (c) of the Act. The conversion envisaged under Rule 18 of the Regulation for Wages (Hotels and Catering Trades Wages Council Establishment) Order relates to temporary or seasonal employment that is not regulated in writing which is not the case here.
59. Fixed-term contracts are a lawful and legitimate mode of employment in terms of Section 10(3) (c) of the Act. An employer is allowed to issue a fixed-term contract of employment based on its needs and operations. The fixed-term contract has a start and end date without a requirement to issue termination notice which is essentially infused into the term contract. In *Bernard Wanjohi Muriuki v Water & Sanitation Company Ltd & Another* (Cause No.1541 of 2010, the court held that an employer is under no obligation to give reasons for non-renewal of a contract as to require such reasons would visit unwarranted burden on the part of the employer.
60. The Court of Appeal in the case of *Transparency International-Kenya v Teresa Carlo Omondi Civil Appeal No.81 of 2018* held that fixed-term contracts do not create legitimate expectations, and non-renewal does not amount to unfair termination.
61. In the case of *Margaret A. Ochieng' v. National Water Conservation and Pipeline Corporation* [2014] eKLR the court held that fixed-term contracts carry no expectancy of renewal.
62. The Supreme Court of Kenya in *Petition No. 14 of 2014, Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others* defined legitimate expectation to mean that;
- ...there must be an express, clear, and unambiguous promise given by a public authority; the expectation itself must be reasonable; the representation must be one which it was competent and lawful for the decision-maker to make; and there cannot be legitimate expectation against clear provisions of the law or *the Constitution*.
63. In this case, the appellant continued to issue the respondents 3 months fixed term contracts. Each has a start and end date. Each renewal did not dictate another renewal. There was a deliberate and keen effort to issue 3 months contract which was filed together with the responses before the trial court. As outlined above, fixed-term contracts are lawful and legitimate modes of employment. The employer is not required to issue notice for non-renewal or reasons for termination of the contract which is infused into the term contract.
64. Under a fixed-term contract, notice before lapse is not a legal requirement and hence, the award of notice pay should not arise. Without the respondents establishing any legitimate claim that they expected continuation of employment beyond the term contracts, the award of notice pay by the trial court is not justified.
65. Equally, the employer is not legally bound to give reasons for terminating a fixed-term contract. To assign compensation to the alleged unfair and unlawful termination of employment should not arise in this case.
66. In any event, the award of 12 months compensation is the maximum. The allocation of the maximum should only be issued upon laying the legal basis for the same. In the case of *Leonard Gethoi Kamweti*

v National Bank of Kenya Limited [2020] eKLR the court held that in awarding the maximum compensation, the court must assign reasons for doing so and by carrying out an evaluation of the effect such an award has on the employer and the economy in general.

67. The awards such as the one made by the trial court in the judgment appealed from are made without any consideration of principles on assessment of damages and without assigning any reasons why a particular award is made as held in United States International University v Eric Rading Outa [2016] eKLR.
68. In this case, compensation does not accrue. Employment terminated under the fixed term contracts with no obligation for notice or reasons.
69. The above put into account, that each employment relationship is regulated by a written contract, upon the end of the last contract on 30 April 2019, any claims arising from any contract should and ought to have been addressed within the provisions of Section 90 of the Act. The respondents filed their claims on 21st June 2019. This allowed them to only go back up to 20 June 2016 – the cut-off date.
70. Any claim alleged to have accrued on or before such cut-off date is time-barred.
71. In addressing the claims, notice pay is not due following the lawful lapse of the fixed-term contracts.
72. Service pay is not due since the respondents were registered with NSSF and NHIF as evidenced by their payment statements filed under pages 23 to 73 of the Record of Appeal. These were part of the records filed by the respondents.
73. The claims for underpayment relate to the period of 1st May 2016 to 30 April 2019. This relates to Abdul Omar and Benson Kenga.

Abdul Omar;

74. On 1st January 2016, he was appointed by the appellant in the position of mechanic at a wage of Ksh.23, 100 per month.
75. Under the Regulation of Wages (General) (Amendment) Orders effective from 1st May 2015, the minimum wage due to a mechanic is under other areas Ksh.11, 279.50 with the benefit of a 15% house allowance.
76. There is no evidence that the respondent was a graded artisan. His role was that of a mechanic under his term contract. For the period of 1st January 2016 to 30 April 2017 there was no underpayment.
77. From 1st May 2017, the minimum wage increased to Ksh.13, 309.80. The respondent was on a wage of Ksh.23, 100 per month. There was no underpayment.
78. From 1st May 2018 until the end of the contract on 30 April 2019 the minimum wage increased to ksh.13, 975.55. There was no underpayment.

Benson Kenga

79. He was employed under a contract dated 1st January 2016 as a mason at a monthly wage of Ksh.17, 160.
80. Under the Wage Orders, the minimum wage for a mason was Ksh. 11, 279.50 which increased to Ksh.13, 975.55 as of 30 April 2019. The respondent did not submit his certificate that he was a qualified mason or ungraded artisan as alleged. There was no underpayments.
81. The learned magistrate in the judgment delivered on 29 November 2023 made the awards without analyzing the law and giving reasons. Each claim is addressed with a finding. The respondents'

employment was regulated under term contracts and each ended on its terms. Any claim arising from each contract should have been addressed under Section 90 of the Act.

82. The assessment above addressed, the appeal is with merit and is hereby allowed. Judgment in Malindi CMELRC No.67 of 2019 is hereby set aside. Each party bears its costs.

DELIVERED IN OPEN COURT AT MALINDI THIS 26TH DAY OF APRIL 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Nasra

..... and