



**Tarmal Wire Products Limited v Juma (Appeal E142 of 2023)
[2024] KEELRC 914 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 914 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E142 OF 2023
M MBARŪ, J
APRIL 18, 2024**

**BETWEEN
TARMAL WIRE PRODUCTS LIMITED APPELLANT
AND
RAMA MUHI JUMA RESPONDENT**

*(Being an appeal from the judgment of Hon. Akee in Mombasa
CMELCR No.E488 of 2022 delivered on 6 December 2023)*

JUDGMENT

1. The appeal arises from the judgment in Mombasa CMELRC No.E488 of 2022 delivered on 6 December 2023 where the trial court made an award of general damages for unfair termination of employment at Ksh.200, 000 with costs and interests. The appellant is seeking that the judgment of the trial court be set aside.
2. The background of the appeal is a claim filed by the respondent on the grounds that he was employed as a machine assistant on 1st July 2019 at a wage of Ksh.8, 000 per month. He worked until 30 April 2022 when the appellant terminated his employment without due process and Mr. Ogola directed him to hand over all company property. He was not paid his terminal dues which included underpayments, overtime, and house allowance and hence claimed the following:
 1. Notice pay Ksh.8,000;
 2. House allowance for 34 months Ksh.40,800;
 3. Underpayments for 34 months Ksh.251,037;
 4. 12 months compensation Ksh.96,000;
 5. Unpaid leave for 2 years Ksh.27,430;



6. Unpaid overtime for an hour each day for 34 months Ksh.144,585;
 7. Service pay ksh.8,000;
 8. Costs.
3. In response, the appellant admitted that the respondent was employed as a general labourer following his application, he was issued with various fixed-term contracts from 1st February 2022 to 30 April 2022 earning a wage of Ksh.7, 241 plus a house allowance of Ksh.1, 086 which reflected the applicable Wage Orders at the time being ksh.8, 327. The respondent worked up to 7 April 2022 into the expiry of his contract and then absconded duty. On 11 April 2022, the respondent issued him with a notice to show cause for absconding duty. This was issued through registered post to his last known address in the work records but he never responded. On 13 May 2022, the appellant called the respondent for a disciplinary meeting which he attended but refused to respond. The respondent went on his annual leave and the wage paid was inclusive of a house allowance and the claims made are not justified.
 4. In the judgment, the trial court made a finding that there was unfair termination of employment and an award of 12 months.
 5. Aggrieved by the judgment, the appellant has two (2) grounds of appeal;
 1. The learned magistrate erred in law and in fact in holding that the claimant was unfairly terminated in total disregard to the law, the facts and the evidence on record.
 2. The learned magistrate erred in law and misdirected herself in awarding the claimant general damages of Ksh.200,000 plus costs and interests.
 6. Both parties attended and agreed to address the appeal by way of written submissions.
 7. The appellant submitted that the respondent was serving under his last fixed-term contract from 1st February to 30 April 2022 but absconded duty on 7 April 2022. On 11 April 2022, the appellant issued him with a notice to show cause but refused to respond. A disciplinary hearing was called for 13 May 2022 which he attended but refused to respond.
 8. On the issue of the finding that there was unfair termination of employment, the appellant submitted that the respondent absconded duty on 11 April 2022, he was issued with a notice to explain his misconduct and failed to address it. He was invited to a disciplinary hearing on 17 May 2022 but he failed to address it. When he was asked about his non-response and absconding duty, the respondent admitted that he could not remember where he was. He was not at work and his absence was formally addressed through notice which he failed to address.
 9. In the case of David Njeka v Lagage Dry Cleaners Ltd [2013] eKLR the court held that an employee who is issued with a notice to show cause but fails to address cannot turn around and allege unfair termination of employment. In the case of Joseph Nzioka v Smart Cottings Ltd [2017] eKLR the court held that dismissal on account of absconding duty must be preceded by evidence showing that a reasonable attempt was made to contact the employee and a notice to show cause notice issued.
 10. The appellant went out of his way to contact the respondent after absconding duty but he was not responsive. The finding that there was unfair termination was not justified and should be set aside.
 11. The award of Ksh.200, 000 in general damages for unfair termination of employment is not based on any principles of law. The respondent was earning Ksh. 8,327 and a multiplier of 12 amounts to Ksh.99, 924 and not Ksh.200, 000 which is excessive and without justification.



12. The respondent submitted that he worked for the appellant until 30 April 2022 when Ogola directed him to hand over his duties and then terminated his employment. He had been employed as a machine attendant at a wage of Ksh.8, 000 which was an underpayment. There was no notice issued before termination of employment and the award by the trial court was justified.
13. The respondent submitted that in evidence, the appellant called its witness Osman Yakub who testified that the respondent was on a fixed-term contract from the year 2019. No employment contract was filed for the years 2020 and 2021 save for the last 3 months contract. No notice was issued for the non-renewal of the last contract. No communication was issued at the end of employment as alleged. The registered mail was not confirmed as having been issued because the respondent worked until 30 April 2022.
14. The alleged absconding of duty was without evidence. No effort was taken to inquire about his whereabouts. In the case of Samuel Chacha Mwita v Kenya Research Institute [2014] eKLR the court held that a term contract is lawful but it was unfair for the appellant to issue the respondent a 3-month contract without periodic breaks. He was entitled to a renewal of each contract. In the case of Everline Manuni v Mudete Tea Factory [2018] eKLR the court held that the continued issuance of short-term contracts for over 10 years entitled the employee to a renewal. To proceed and summarily dismiss the respondent on 30 April 2022 was unfair and the trial court correctly made an assessment and should be confirmed.
15. In the case of Walter Ogal Anuro v Teachers Service Commission [2013] eKLR the court held that before termination of employment, the employer must follow the due process which the applicant failed to address.
16. The respondent also submitted that the award of Ksh.200, 000 with costs applied to the claims made and factored notice pay, house allowances due and unpaid leave days. He had claimed a total of Ksh.575, 852.50 but the total award was reduced to Ksh.200, 000. The appeal should be allowed with costs.

Determination

17. This is a first appeal. An appellate Court will not interfere with a discretionary decision of the trial court appealed from on the simple ground that if sitting at first instance, would or might have given different weight to that given by the court to the various factors in the case. In *Selle v Associated Motor Boat Co.* [1968] EA 123 the Court had this to say on appeals;

The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.

18. The appeal herein is on two fronts. One relates to the finding that the finding that there was unfair termination of employment was unfair. The second relates to the award of Ksh.200, 000 general damages for unfair termination of employment.



19. On the one hand, the respondent's case was that he worked until 30 April 2022 when Ogola directed him to hand over his duties. His employment was terminated henceforth.
20. The appellant on its part asserts that the respondent was on a fixed-term contract ending 30 April 2022 but on 11 April 2022 he absconded duty and efforts to trace him did not bear fruits. He was invited to a disciplinary hearing on 17 May 2022 but he failed to address it.
22. The respondent does not deny that he last served under a 3-month contract dated 1st February 2022 and ending on 30 April 2022. However, the appellant did not produce his previous contracts from the year 2018.
23. The appellant produced the last contract which is part of the Record of Appeal.
24. Under this contract dated 1st February 2022, the respondent was employed as a general labourer. His wage was Ksh.7, 241 and a house allowance of Ksh.1, 086. The place of work was noted as Mazeras.
25. A fixed-term contract is a valid and legitimate mode of employment. An employer is allowed to issue a fixed-term contract under Section 10(3) (c) of the *Employment Act*, 2007 (the Act). The respondent has well relied on the case of Samuel Chacha Mwita v Kenya Research Institute [2014] eKLR where the court affirmed the sanctity of a fixed term contract. It has a start and end date.
26. In this regard, the fixed-term contract had an end date of 30 April 2022. The respondent worked until this date when Ogola directed him to hand over his duties. However, the appellant asserts that the respondent deserted duty on 11 April 2022. He was issued with a notice to show the cause through his last known address but he failed to address it. He was invited to attend a disciplinary hearing on 17 May 2022 but he failed to address. Did this create a legitimate expectation for renewal of the fixed-term contract?
27. The court of appeal in *Transparency International - Kenya v Omondi* (Civil Appeal 81 of 2018) [2023] KECA 174 (KLR) (17 February 2023) (Judgment) the Court of Appeal in addressing the issue of expectation for renewal of a fixed term contract held that;

There is no dispute that the respondent was employed by the appellant on a two- year fixed term contract from October 1, 2010 to September 30, 2012. It is trite law that a fixed-term contract of employment is a lawful mode of employment with a start and end date.

The pertinent question in this appeal is whether, once the fixed term contract comes to an end, can it be termed as dismissal or unfair termination? In other words, could the non-renewal of the contract of employment create a legitimate expectation that is capable of enforcement through an award of damages?

...

The court is in agreement with these sentiments. We dare say that an automatically renewable fixed-term contract is a contradiction in terms, as it would subject the parties to an indeterminate employment contract. The respondent was under a fixed-term contract with a definite commencement date and termination date. There was no ambiguity created to create an expectation of contract renewal by the appellant's issuance of a fixed-term contract. The contract terminated automatically when the termination date arrived.

Whether a contract with a renewal clause will be extended or not, is an issue that is at the discretion of the employer and it cannot create a legal right under the doctrine of legitimate expectation.



28. The affirmation is that a fixed-term contract terminates employment as agreed by the parties without creating any expectation for renewal. What then is legitimate expectations?
29. In the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2015] eKLR, the Supreme Court of Kenya addressed the matter at length the issue of legitimate expectation and held that the law does not protect every expectation but only those which are 'legitimate'. The requirements for the legitimacy of the expectation include the following: the representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification. The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject.
30. Further, in the case of Kenya Revenue Authority v Export Trading Company Limited (Petition 20 of 2020) [2022] KESC 31 (KLR) (Civ) (17 June 2022) (Judgment) the court held that;

The doctrine of legitimate expectation requires the entrenchment of a duty to act fairly. A breach of article 47 attracts remedies in Judicial Review especially where an aggrieved person had cause to expect that the attendant aspects of fair administrative action would be adhered to. ...

... the emerging principles on the legitimate expectation to be that;

1. there must be an express, clear and unambiguous promise given by a public authority;
2. the expectation itself must be reasonable;
3. the representation must be one which was competent and lawful for the decision- maker to make; and
4. there cannot be a legitimate expectation against clear provisions of the law or *the Constitution*.

31. These principles will apply to private persons and non-state actors.
32. In this case, the respondent was under a fixed-term contract which is admitted. Whether the appellant issued notice for renewal or show cause notice for absconding duty, his case is that employment was terminated on 30 April 2022 the due date when his contract ended.
33. On the findings by the trial court that there was unfair termination of employment, the record assessed, that parties were bound under the fixed term contract. Employment terminated lawfully and despite contract renewals, there was no duty to renew the last contract issued.
34. Notice pay and compensation were remedies removed from the respondent.
35. With regard to the claims made for payment of terminal dues, the trial court should and ought to have assessed each claim separately and on its merits. To allocate a general amount in general damages is not required under Section 18 of the Act.
36. On the claim for house allowances, the cause of action arose with the end of the last contract ending 30 April 2022. The respondent was entitled to claim under his employment going back to 3 years under Section 90 of the Act. This went back to the 1st May 2019. His claims go back to 43 months.
37. A general labourer placed for work at Mazeras was in the County outside the Mombasa area. The wage is regulated under the Wage Orders. From 1st May 2019, the wage due was ksh.7,240.95 per month with the benefit of 15% house allowance at ksh.1,086.20 total gross wage of Ksh.8,327.10.



38. The respondent pleaded that he was paid a wage of Ksh.8, 000 per month.
39. The fixed term contract dated 1st February 2022 has well allocated the due wages at Ksh.7, 241 basic pay and house allowance of Ksh.1, 086. On the claim before the trial court, the appellant did not file any payment statements. There is no record of the payments made to the respondent upon his assertion that he was only paid Ksh.8, 000 per month.
40. An assessment of the underpayment reveals an amount of Ksh.327.10 per month. For the 34 months of Ksh.11, 121.40.
41. The total due covers the gross wage inclusive of the house allowance due for an employee placed at Mazeras.
42. There is no record filed for the annual leave allocated to the respondent. For the 34 months, based on the basic wage, the award for 2 years and 10 months prorated under Section 28 of the Act amounts to 50 days. The total due in annual leave pay is ksh.18, 826.60.
43. On the claim for service pay, in his evidence, the respondent confirmed that he was registered with NSSF and the appellant was effecting remittances. Service pay is not due. The appellant filed evidence of the NSSF statement.
44. Overtime is claimed on the grounds that the respondent worked one hour above each day. This claim is not particularized save to state he worked until 3 pm each day. The start hour is not stated to allow the appellant a fair chance based on the pleadings to file the required worksheets. Even in a case where this was to be claimed as due, on the gross wage of Ksh. 8,327.10 each hour at Ksh.1, 040.90 x 1.5 is Ksh.1, 561.30 daily is not in tandem with what is claimed. It is not humanly possible that the respondent was at work continuously and without stoppage for the entire period and he continued to work overtime.
45. On costs, the appeal was largely successful save for the reviewed awards, each party to meet its costs.
46. Accordingly, the appeal partially succeed and the judgment in Mombasa E488 of 2022 is hereby reviewed in the following terms;
 1. Underpayment Ksh.11, 121.40.
 2. Leave pay Ksh. 18,826.60.
 3. For this appeal and proceedings before the lower court, each party bears its costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 18 DAY OF APRIL 2024.

M. MBARÚ JUDGE

In the presence of:

Court Assistant: Japhet

..... and

