



REPUBLIC OF KENYA



**Tarmal Wire Products Limited v Kurwa (Appeal E061 of 2023)  
[2024] KEELRC 942 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 942 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E061 OF 2023  
M MBARŪ, J  
APRIL 18, 2024**

**BETWEEN**

**TARMAL WIRE PRODUCTS LIMITED ..... APPELLANT**

**AND**

**PARIS SHEHI KURWA ..... RESPONDENT**

*(Being an appeal from part of the judgment of Hon. Nyariki  
delivered on 4 July 2023 in Mombasa CMELRC No.539 of 2022)*

**JUDGMENT**

1. The appeal arises from the judgment in CMELRC No.539 of 2022 delivered on 4 July 2023 and seeking that the same be set aside with costs.
2. The background of this appeal is a claim filed by the respondent on the grounds that he was employed as a machine assistant by the appellant on 3 September 2016 at a gross wage of Ksh.9, 600 per month. He worked until 13 October 2021 when his employment was terminated without due process. Osman the operations manager approached the respondent and told him his employment had been terminated and should leave the premises immediately. He claimed that during his employment, he was underpaid contrary to Legal Notice No.2 of 2019 which mandated the appellant to pay Ksh.15, 383.45 per month. There was no house allowance paid or statutory remittances. The respondent claimed the following:
  1. Notice pay Ksh.9,600;
  2. House allowance for 61 months Ksh.87,840;
  3. Unpaid leave for 5 years Ksh.77,600;
  4. Underpayments for 61 months Ksh.352,790;



5. Unpaid overtime for one hour for 30 days for 61 months Ksh.259,402;
  6. 12 months compensation for unlawful termination Ksh.115,200;
  7. Service pay for 5 years ksh.24,000;
  8. Unpaid NHIF for 61 months Ksh.30,500;
  9. Certificate of service;
  10. Costs.
3. In response, the appellant admitted that the respondent was employed as a general labourer on various fixed-term contracts with his last contract being for 13 September to 13 October 2021 earning a wage of Ksh.9, 664 inclusive of house allowance. Upon the expiry of the contract, the respondent was not issued with a new contract hence employment between parties lawfully ended on 13 October 2021. Employment terminated by effluxion of time.
4. The respondent took his annual leave and there was no overtime work and all NSSF deductions were remitted as required.
5. The learned magistrate in the judgment made a finding that there was unfair termination of employment after the respondent had worked for the appellant from the year 2016 to 2021 as per the NSSF records. That he was therefore on a month to month open ended contract and was not subjected to the provisions of Sections 41 and 43 of the Employment Act. The trial court awarded the respondent the following;
1. Notice pay Ksh.9,600;
  2. House allowance for 61 months Ksh.87,840;
  3. Underpayments Ksh.352,790.45;
  4. 12 months compensation Ksh.115,200;
  5. Service pay Ksh.24,000;
  6. Unpaid NHIF Ksh.30, 000.
6. Aggrieved by the judgment, the appellant filed this appeal. The appeal is on two (2) grounds that;
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 himself in holding that the claimant was entitled to the prayers sought and thereby granting the same.
7. The parties attended court on 27 February 2024 and agreed to address the appeal by way of written submissions.
8. Only the appellant complied.
9. The appellant submitted that the respondent was engaged in a contract which was fixed. This evidence was submitted in court and the respondent admitted that the alleged termination date was similar to the end of his contract on 13 October 2021 and the wage paid included a house allowance. The evidence that employment was by word of mouth was discounted by the fixed-term contract. The finding by



the trial court that employment terminated unfairly was erroneous as the fixed term contract did not require the appellant to issue notice or reasons for termination of employment.

10. The appellant submitted that the term contract lapsed on 13 October 2021 and hence not subject to notice pay as awarded by the trial court. In the case of *Transparency International v Teresa Carlo Omondi* Civil Appeal No. 81 of 2018 the Court of Appeal held that a fixed-term contract of employment has a start and end date and ends on its terms. The employer has no obligation to justify termination of employment on other grounds beyond the lapse of the fixed period.
11. The respondent's contract provided for a house allowance which was paid monthly. The respondent worked at Mazeras which is categorized as 'other areas' under the Wage Orders. A consolidated wage of Ksh.9, 664 was paid as opposed to Ksh.8, 327.15.
12. In his evidence, the respondent confirmed that HSSF was paid and the appellant filed a statement to this effect. There was no justification for the allocation of service pay or NSSF dues. The appeal should be allowed with costs.
13. As noted above, there are no written submissions by the respondent.

### **Determination**

14. This is a first appeal. The court is mandated to re-evaluate the evidence before the trial court and its judgment and make conclusions as to whether or not to allow the appeal. To achieve this, a fresh assessment of the entire record is necessary, however, regard must be that the court has no opportunity to hear the witnesses.
15. The appellant's case is that the employment between the parties was regulated under a fixed-term contract. The respondent denied ever signing any written contract. The trial court analysed the record and evidence and made the finding that;
16. According to the respondent, the parties were in agreement that the claimant had a fixed term contract and the contract was terminated on 13<sup>th</sup> October 2021. The claimant contended that there was no written contract between him and the respondent as he was employed by word of mouth and his only proof that the respondent had employed him were the NSSF remits by the respondent from September 2016 to October 2021 which the respondent confirmed.
17. In his evidence-in-chief, the respondent denied that he had no written contract. That he had been employed by word of mouth.
18. Upon filing his Memorandum of Claim on 20 September 2022, the appellant filed a response on 27 October 2022 and attached various work records including the fixed-term contract dated 13 September 2021.
19. The work records are filed under the requirements of Rule 13 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 (Court Rules). This is to allow each party to see and review the record and evidence submitted before going to trial. Any document challenged as to its authenticity, application or submissions should and ought to be addressed at this stage. Before going for a hearing.
20. Such would allow the party alleging that the subject contract of employment is not authentic to have it subjected to the necessary assessment. To hold and wait until the hearing to raise questions would negate the essence of Rules 4, 13, and 14 of the Court Rules.
21. The contract dated 13 September 2021 has a thumbprint and signature of the respondent. It was filed together with the response to allow him to see the evidence in advance. He did not challenge this record.



22. A fixed-term contract is a lawful and valid mode of employment under the provisions of Section 10(3) (c) of the *Employment Act* 2007 (the Act). Such provisions allow the employer the flexibility to organize its employees as required by the business. A written contract allows the employee to appreciate the terms and conditions of employment. As correctly cited by the appellant in the case of *Transparency International (Kenya) v Teresa Carlo Omondi* [2023] eKLR has held that a fixed-term employment contract does not create a legitimate expectation of renewal. Further, the non-renewal of fixed-term employment does not amount to unfair termination of employment warranting compensation.
24. This position is reiterated in the case of *Masiga & 15 others v Menengai Farmers Limited* (Civil Appeal E069 of 2021) [2022] KEELRC 4140 (KLR) (4 April 2022) (Judgment) that;

Fixed term contracts are lawful and legitimate mode of employment in terms of section 10(3) (c) of the *Employment Act*, 2007;

- (c) 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;

Equally, the employer has the prerogative to issue seasonal/piece-work contracts based on the need, reason, purpose, time and type of work to be performed in terms of section 18 of the *Employment Act*, 2007. In this regard, where an employee is under a seasonal and or piece-work contract, the consideration and wage due is paid in accordance with the proportion to the amount of work which has been performed, upon completion of the work, or a daily rate or as agreed in terms of section 18(1)(b) of the Act;

in the case of *Apex Steel Limited v Dominic Mutuamuendo* [2020] eKLR the court held that;

... the general principle is that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry. It further relied on *Johnstone Luvisia v Allpack Industries Limited* [2019] eKLR where this court declined to give a declaration of unfair termination where a fixed term contract had come to an end. Therefore, it submitted that, in this case also, the respondent was not unlawfully dismissed but it is his fixed term contract that lapsed.

25. In this case, the fixed-term contract submitted speaks to an employment relationship with a start and end date. The learned magistrate while analysing the evidence failed to address the contested contract and the fact that this was a proper and legitimate mode of employment. The employment relationship terminated on 13 October 2021 as outlined under the term contract.
26. No notice, reasons or cause to assert there was an unfair termination of employment arose.
27. On the reliefs sought by the respondent, the claim for house allowance was on the basis that the due wage was for a machine assistant at a wage of Ksh.15, 383.45. The contract dated 13 September 2021 was for the position of general labourer for work at Mazeras, listed under other areas under the Regulation of Wage Orders. The respondent filed the subject Wage Orders as part of his record. The court has assessed the due basic wage and 15% house allowance benefit and a wage of Ksh.9, 600 was over and above the minimum wage allowed. There was no underpayment or a house allowance due beyond what was paid for a general labourer.



28. Of interest, the respondent did not address the payments made under his various contracts for 61 months from September 2016 to allow the court to undertake an analysis of what was paid and what was due as regulated under the Wage Orders. He generally pleaded that he was paid a wage of Ksh.9,600 per month. This wage applied over the years was generous.
29. On the award of service pay, the respondent admitted in his evidence that there was a deduction and remittance of NSSF. The appellant hence complied with the provisions of Section 35(5) and (6) of the Act. Service pay is not due.
30. On the award of unpaid NSSF dues, this is not payable to the employee but to the statutory body. Where the employer fails to make a remittance, a report should go to the statutory body and the Labour Officer to address and issue the required penalty and sanction respectively.
31. On costs, the appeal is with merit. The respondent attended for hearing directions but failed to file any written submissions. The appellant is awarded costs.
32. Accordingly, the appeal is allowed as prayed. The judgment in Mombasa CMELRC No.539 of 2022 is set aside in its entirety. The appellant is awarded the costs of the appeal.

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

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

