



Njunge v Wilfreight Express Cargo Ltd (Employment and Labour Relations Cause 1044 of 2017) [2024] KEELRC 1759 (KLR) (28 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1759 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1044 OF 2017**

**K OCHARO, J
JUNE 28, 2024**

BETWEEN

TABITHA WAITHERA NJUNGE CLAIMANT

AND

WILFREIGHT EXPRESS CARGO LTD RESPONDENT

JUDGMENT

Introduction

1. By a Statement of Claim dated 31st May 2017, the Claimant seeks: -
 - a. A declaration that the Claimant's termination from her employment was unfair, wrongful and devoid of procedure.
 - b. The Claimant be paid her terminal benefits as set out in paragraph 12 hereinabove totalling to Kshs. 1,307, 288/-.
 - c. The Respondent to pay the costs of this claim.
 - d. Interest on the above at Court rates.
 - e. The Respondent be ordered to give the Claimant a certificate of service in accordance with Section 51 of the *Employment Act* 2007.
 - f. The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
2. In response to the Statement of Claim, the Respondent filed a Response dated 6th July 2017 wherein it denied the Claimant's claim in total and a counterclaim wherein it sought for payment of a sum of Kshs. 135,000 being the balance of a loan that it advanced her.



3. The Claimant filed a Reply to Memorandum of Response and Defence to Counterclaim dated 5th January 2018.

Claimant's case

4. The Claimant's case is that she first came into the employment of the Respondent as a Human Resource Assistant on 12th March 2015 under a letter of appointment. Her starting monthly salary was KShs. 35,000 which was later increased to KShs. 70,000. The letter of appointment fixed her contract period as two months. The contract period was extendable for three months depending on circumstances.
5. The Claimant contends that according to the Respondent's policy, her reporting time was 7.30 am and her existing time was 5.30 pm. Therefore, she worked nine hours instead of the legally stipulated eight hours a day.
6. The Claimant contends that at the lapse of the contract forestated, she continued working for the Respondent without any further written up to 20th March 2017, when her employment was verbally terminated by the Finance Manager/Controller. He informed her that her services were no longer required as he was able to handle her duties. The Manager directed her to leave the Respondent's premises immediately.
7. The Respondent subsequently through its letter dated 24th March 2017, issued her with a demand notice for an outstanding loan sum of KShs. 135,000/-.
8. She contends that the Respondent terminated her employment without; giving her reasons for the action; issuing her a show cause letter; and subjecting her to a disciplinary hearing. The termination was unfair as it lacked procedural fairness.
9. The Claimant asserts further that the Respondent refused to pay her full terminal dues. Further, she was not paid her salary for March 2017, and house allowance for the entire time she was in the service of the Respondent.
10. During the hearing of the Claimant's case on 30th January 2023, the Claimant testified and adopted her Witness Statement dated 31st May 2017 as her evidence in chief. She also produced the documents filed as part of her List of Documents dated 31st May 2017 as her evidence.
11. In her evidence under cross-examination, the Claimant stated that cumulatively she worked for the Respondent for a period of two years and nine months- February 12, 2015 to 20th March 2017.
12. Referred to her email dated 14th December 2017, she stated that in the same she raised a concern that her contract period had been reduced to two years. However, she had not been supplied with the contract document. She had been asking for the same but it wasn't given.
13. The email was prompted by the fact that when she resumed her maternity leave, the Manager had informed her that she was serving under a three-year fixed contract term, but subsequently, he started talking of two years.
14. The witness testified further that she wrote a bye-email to his colleagues on the 20th of March 2017. In the email, she stated that her term of two years had come to completion, as these are the words that the Director used when he ordered her to leave. In his email dated 20th March 2017, the Director asked her to continue being at home until she decided to apply for an extension of her contract. She did not apply for the extension.



15. The appointment letter was specific on the working hours, 7.30 am-5.30 pm. During her tenure, the Respondent allowed her to pursue further studies. However, her classes were in the evenings not during working hours.

Respondent's case

16. The Respondent presented its Managing Director, Bryan Ochieng Wayende to testify in support of its defence. He stated that the Claimant was employed by the Respondent on a two-year contract for gross pay, which at the time of the subject termination had been increased to Kshs. 70,000 /-. This monthly pay was inclusive of house allowance.
17. The Claimant's employment was not terminated unlawfully as alleged by the Claimant, it ended by effluxion of time. The email communication between the Claimant and Respondent's officers is a testament that she was aware that her contract was fixed in nature and had an end date.
18. The Witness stated that the Claimant was a member of the Respondent's Provident fund and that the Respondent remitted the National Social Security Fund dues. Therefore, her claim for terminal dues is unfounded.
19. The Claimant never worked on Saturdays and at no time did she work overtime. Her claim for overtime worked cannot be availed to her, therefore.
20. The witness stated that while on maternity leave, the Claimant informed the Respondent that she had a medical emergency and requested a loan of KShs. 200, 000. The loan was advanced to her. At the time of separation, she was indebted to the Respondent in the sum of KShs. 135,000.
21. During the hearing of the Respondent's case on 16th March 2023, RW1 Briana Ochieng', testified on behalf of the Respondent.

Claimant's Submissions

22. It was submitted that beyond the appointment letter dated 12th March 2015, she was not given any written contract of employment. Therefore, the Claimant served under no written contract after the effluxion of the five months mentioned in the letter of appointment. The Respondent's attempt to put reliance on email correspondences as a basis for its argument that there existed a contract of two years, makes little sense as even the evidence around the email, by the Respondent leaves several questions unanswered.
23. The Claimant that Section 43 (1) of the *Employment Act* 2007 imposes an obligation on an employer to prove the reasons for the termination. It is not enough for the employer to state the reason for the termination, it must be demonstrated further that the reason[s] was fair and valid. Further, it isn't difficult to conclude that from the various email correspondences between the Claimant and the Director [RW1], the Claimant's employment was terminated because of voicing her concerns through emails, like the lack of a contract of employment and the frustrations she was facing at the workplace. Instead of addressing the concerns, the Respondent's Director asked her to stay home. It should be concluded that there was no valid and fair reason for the termination.
24. It was further submitted that the Claimant's employment was terminated without adherence to the laid down mandatory procedure under Section 41 of the *Employment Act*. The Respondent didn't; issue her with any notice to show cause, clearly setting out accusations against her; allow her to defend herself before a disciplinary panel; and allow her to be accompanied by an employee of her choice for the hearing. In the absence of adherence, the conclusion should be, that there was no procedural



fairness. To buttress this submission, reliance was placed on the case of *Fredrick Odongo Owegi v CFC Life Assurance Limited* [2014] eKLR.

25. On the reliefs sought, the Claimant contends that she is entitled to one month's salary as her employment was terminated without issuance of the notice contemplated under the provision of Section 35 (1) (c) of the *Act*. Further, was not paid her salary for March 2017. Payment of the same should be made.
26. The Claimant submitted that Section 31 of the *Employment Act* mandates the employer to provide reasonable accommodation for their employee[s], or in the alternative pay reasonable house allowance. Her evidence that she was not either accommodated by the Respondent or paid a house allowance finds support in the Respondent's witness's evidence when he stated that the Respondent never pays its employees, a house allowance. The Respondent did not adhere to this provision. Her Contract of service didn't provide for a consolidated as alleged by the Respondent. To support her point that house allowance is a right for an employee and an obligation on the part of the employer to fulfil, the Claimant cited the similar case of *Milkah Khakayi Kulati v Sandstorm (Africa) Limited* [2014] eKLR.
27. The Claimant defines overtime as any period worked over the regular 8 hours. Her evidence that she worked for 9 hours every day was not disputed. The Respondent didn't place forth any evidence to show that she was compensated for the overtime worked. To fortify this submission, she placed reliance on the case of *Abigael Jepkosgei Yator & Another v China Hanan International Co. Ltd* [2018] eKLR.
28. Finally, it was submitted that having established that the termination of her employment was unfair, she should be availed the compensatory relief contemplated under Section 49 (1) (c) of the *Act*, twelve months' gross salary.

Respondent's Submissions

29. The Respondent submitted that the Claimant was employed on an initial term of two months as can be garnered from the Letter of Appointment dated 12th March 2015. Once the initial term ended, she was issued with a two-year contract. Although the contract could not be traced by the Respondent to be presented before this Court, its existence can be inferred from the conduct of parties, through their email correspondence tendered as evidence before this Court.
30. The Respondent urged the Court to note that on 14th March 2017 through her email address to its Managing Director, the Claimant expressed that she thought her contract was for three years, protested the Respondent's suggestion that it was for two years, but finally admitted that it was for 2 years and accepted that had an end date, 12th March 2017. In the same email, she stated that she was open to contract renewal.
31. On 20th March 2017, at 16.06, the Claimant again wrote to two other employees, Ken and Max, informing them that her contract had ended until she re-applied or opted not to. It is clear, therefore, that the Claimant was aware that she was under a fixed-term contract.
32. In conclusion, the Respondent submitted that the Claimant's contract came to termination by effluxion of time, and as such her claim for unfair termination is not sustainable. To buttress the decision in *Registered Trustees of Presbyterian Church of East Africa v Ruth Gathomi Ngotho* [2017] eKLR, was cited.
33. On the reliefs sought, the Respondent submitted that the termination having occurred as a result of effluxion of time, the Claimant was not entitled to notice or pay in lieu of notice. They rely on the case of *Stephen M. Kitheka v Kevita International Limited* [2018] eKLR to support this submission.



Further, for the same reason, the compensatory relief of twelve months' gross pay cannot be awarded to her.

34. About its counterclaim, the Respondent submitted that the Claimant admitted to owing the Respondent Kshs. 135,000/- during her testimony. In paragraph 12 of the Statement of Claim, the Claimant seeks to offset this amount from the reliefs sought. The Counterclaim should be allowed.

Issues for Determination

35. I have carefully considered the parties' pleadings, oral and documentary evidence, and submissions. The issues emerge for determination: -
- a. What was the nature of the Claimant's employment with the Respondent at the time of separation?
 - b. Whether the Claimant's employment was unfairly terminated.
 - c. Whether the Claimant is entitled to the remedies sought in her Statement of Claim.

Of the nature of the Claimant's employment.

36. It was common cause that the Claimant first came into the employment of the Respondent under a letter of appointment dated 12th March 2015 for a term of 2 months, subject to extension for 3 months. Simple arithmetic will show that the contract expired on 11th June 2015. It is also not in dispute that the Respondent retained the services of the Claimant beyond this date. However, there is a great controversy as to whether there was a written contract, post the date. The Respondent insisted that there was a written 2-year contract, while the Claimant took the position that there was none. The Respondent asserted that the contract was misplaced.
37. The issue being as controversial as it is, the onus is on this to interrogate whether there is any material before it from which it can be discerned that post-11th June 2015, the parties intended to have a fixed term contract, and that indeed the Claimant served under a fixed term contract for two years, or whether the contract became a month to month one as a result of any written contract.
38. There is no dispute that the Claimant did on the 14th March 2017 at 12.14 pm write an email to the Respondent's Managing Director. The email led in part:

“How the contract changed to 2 years I do not know because some time ago I kept asking for a contract and you told me to draft for myself, I asked period and it was mentioned 3 years so going on maternity leave and finding it written 2 years just shocked me, but I accepted. In fact, 2 years were to end on 12th March.”

Later in the email, she states: “I am open to contract renewal as well as termination of contract. The decision lies in your docket”.

39. Another email sent by the Claimant on 20th March 2017 at 16.06 reads:

“Dear Ken and Max,

I shall not be coming in tomorrow. My contract has ended until I re-apply to renew or opt not to. I am grateful; to you and Max for working together.”

40. I have carefully considered the above emails, undoubtedly, before the Claimant went on maternity leave there was a discussion and consensus that their employer-employee relationship was being guided



by a fixed-term contract. While the Claimant appears initially unsure of the length of the period, she later agrees that it was two years. Her indication that she was open to a renewal of the contract; the mention in the email on the end date; and the contents of the latter email to her colleagues, crowned it all. She knew the contract period was two years with an end date, of 12th March 2017.

41. Having found as I have, I find no difficulty in concluding that after the lapse of the two-month contract, the Claimant continued to serve the Respondent under a fixed-term contract of two years which ended on 12th March 2017.

Whether the Claimant's employment was unfairly terminated.

42. It is trite law that where it has been found that a contract of service terminated by effluxion of time, a claim for wrongful dismissal or unfair termination cannot be sustained. The statutory aspects of procedural fairness and substantive justification cannot be summoned to the stage. The Claimant's claim for unfair termination meets its fall here.

Whether the Claimant should be reliefs sought.

43. Despite the finding hereinabove, I am enjoined to consider the reliefs sought by the Claimant as I note that some of them are independent of the claim for unfair termination. Those connected with the claim must fall as the substratum is no longer. Therefore, the compensatory relief under Section 49 [1] [c] of the *Act*, and notice pay, automatically fail.
44. The Claimant contended that she was not paid her salary for March 2015, and sought that the Respondent be compelled to pay. I note that she worked up to 12th March 2017. Further, the Respondent hasn't demonstrated that it paid her salary for the days worked in that month. As a result, I find that she is entitled to a salary for the twelve days worked.
45. No doubt, the letter of appointment dated 12th March 2015 did not stipulate that the Claimant's salary was consolidated, thus inclusive of house allowance. The Respondent didn't tender any documentary evidence to support its assertion that the salary paid to the Claimant encompassed house allowance. Section 31 of the *Employment Act*, bestows a right on the employee to be given reasonable accommodation or reasonable house allowance by his or her employer. It follows, that the employer bears a legal duty to either accommodate the employee or pay him or her house allowance. As the Respondent failed to rebut the Claimant's position, I come to an inescapable conclusion that the Claimant was not paid house allowance throughout the time she was in the service of the Respondent.
46. Regulation 4 of the *Regulation of Wages (General) Order* 1982 provides that an employee not provided with free accommodation by their employer shall be paid a housing allowance of 15% of their basic wage. I will hereunder use this formula to award the Claimant house allowance.
47. I have considered the claim for overtime pay. The same is anchored on the Claimant's assertion that she worked for 9 hours for 5 days a week from 7.30 am to 5.30 pm every day, therefore, working an extra hour daily. The parties didn't place any document before this Court from which it can be discerned that the Claimant worked for the many hours alleged. In the absence of this, I resort to the *Regulation of Wages (General) Order* 1982 which provides for normal working hours, to resolve this controversy. Regulation 5(1) provides normal working hours to be 52 per week spread over 6 days. Under Regulation 6 (1), overtime shall be payable for time worked over the normal hours of work. A quick arithmetic will show that the Claimant only worked 45 hours a week. Her claim for overtime is therefore denied.



48. It is trite law that per Section 51 of the *Employment Act* 2007, the Claimant should be issued with a Certificate of Service.
49. Finally, I allow the Respondent's counterclaim for Kshs. 135,000/- being the amount outstanding of the loan that was advanced to her. The liability was not denied by the Claimant but admitted. The amount shall be offset from the award that I shall make hereunder for the Claimant.
50. In the upshot, judgment is hereby entered for the Claimant in the following terms: -
- a. The Claimant be paid house allowance
 - I. (15% x 70,000/- x 24 months) Kshs. 252,000/-
Kshs. 135,000/- outstanding loan
Total Kshs. 117,000/-
 - b. The Claimant be issued with a Certificate of Service within 30 days of this Judgment.
 - c. Interest on (a) above at Court rates from the date of judgment until payment in full.
 - d. Each party to bear their own costs.

READ, DELIVERED AND SIGNED THIS 28th DAY OF JUNE, 2024.

OCHARO, KEBIRA.

JUDGE

In the presence of:

Mr. Onenga for the Claimant

Mr. Kinyanjui for the Respondent

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 15th March 2020 and subsequent directions of 21st 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 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.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

