



**Nyakweba v Metsec Cables Limited (Cause 549 of 2018)  
[2024] KEELRC 1624 (KLR) (24 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1624 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 549 OF 2018  
K OCHARO, J  
JUNE 24, 2024**

**BETWEEN  
CORNELIUS BOGOMBA NYAKWEBA ..... CLAIMANT  
AND  
METSEC CABLES LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. Contending that at all material times he was an employee of the Respondent but who was constructively dismissed from his employment, the Claimant sued the Respondent herein, and sought for a declaration that the constructive dismissal was unfair; terminal dues and compensatory damages. This he did through his memorandum of claim dated 16<sup>th</sup> April, 2018.
2. The Respondent resisted the claim through a memorandum of response, contending that the Claimant had deliberately misclassified the nature of the employment relationship that was between him and the it. Further, the Claimant is not entitled to the reliefs sought.
3. The matter was heard on merit, with the Claimant testifying as the sole witness in support of this case and the Respondent presenting one witness to testify on its behalf in defence against the Claimant’s case.

**The Claimant’s Case**

4. It was the Claimant’s case that he first came into the employment of the Respondent under a letter of appointment dated 6<sup>th</sup> June, 2011, as a Machine Assistant – Binding. His employment took effect on the 1<sup>st</sup> June 2011.



5. The Claimant asserted that he diligently worked for the Respondent up to until 2<sup>nd</sup> January 2018, when he was constructively dismissed. At separation, he was earning a monthly salary of KShs.21,090.00.
6. He stated that on the 2<sup>nd</sup> January 2018, he reported to his place of work as usual, ready for the days work, when the Human Resources Manager, Miss Alice Mutitu instructed him to leave the company's premises, informing him that the Respondent's workload had decreased as a result of the electioneering period. Thus there was need to lay him off. On the 3<sup>rd</sup> January, 2018, when he reported to work, he was not allowed into the Respondent's premises.
7. The Claimant contended that the decision to dismiss him was unfair and unlawful for the reasons that; he was dismissed for unknown reasons; he was not issued with adequate notice as required by law; and due process was not adhered to.
8. By reason of the premises, he is entitled to;
  - i. Basic salary for the month of January 2018, KShs.21,095.00.
  - ii. One month's salary in lieu of notice, Kshs.21,095.00.
  - iii. Payment in lieu of untaken and unpaid leave for 6 years, Kshs.97,360.00.
  - iv. Loss of income earnings of 18 years, Kshs.4,556,520.00.
  - v. Damages for illegal and unfair dismissal from employment calculated at 12 month's gross salary, Kshs.253,140.00.
9. Cross-examined, the Claimant testified that the Human Resource Manager terminated his employment verbally.
10. Referred to the letter of employment he has presented before this court as evidence, the Claimant admitted that the letter clearly indicates that his contract of service was a fixed term contract running from 1<sup>st</sup> July 2011 to 30<sup>th</sup> October 2012.
11. Upon the termination, he signed a declaration of release and discharge form. He was duly paid the sums (terminal dues) that were put forth therein.
12. In his evidence under re-examination, the Claimant testified that though the letter of appointment indicated that the contract was fixed term in nature, he continued to work beyond the appointed date of effluxion.

### **The Respondent's case**

13. The Respondent presented Ms. Alice Mutitu, the Human Resource Manager to testify on its behalf. The witness adopted her witness statement dated 16<sup>th</sup> July, 2018 as her evidence in chief.
14. The witness stated that the Claimant was engaged by the Respondent on fixed term contracts that were issued subject to availability of work. One of such contract was issued for a period of seven (7) months on 6<sup>th</sup> June 2011, and another one on 3<sup>rd</sup> July 2013 for a period of one year.
15. The witness further stated that there were two (2) other contracts that were issued to the Claimant covering the periods July to October 2017 as well as November and December 2017.
16. The fixed term contracts clearly indicated that in the absence of their renewal by parties thereto, the contract(s) could be deemed terminated.



17. The contract having automatically terminated by effluxion of time, the issue of unfair termination cannot arise. Additionally, the remedy of notice pay cannot be availed to him.
18. After the contract came to termination, the Claimant was paid agreed terminal dues, KShs.9,948.000.00. The Claimant signed a declaration of release and discharge, acknowledging that the agreed sum had been paid. As a result, this claim has no basis in law.
19. According to the witness, the Respondent did not breach the provisions of the Employment Act, principles of natural justice and or basic tenets of good labour practices, as claimed by the Claimant.
20. The totality of the circumstances of this matter taken into account, no doubt, the Claimant's claim is an abuse of the court process, vexatious and is merely calculated at unjustly enriching the Claimant.
21. Cross-examined by Counsel for the Claimant, the witness testified that upon expiry of the 2<sup>nd</sup> contract on 30<sup>th</sup> October 2017, he continued working under a contract that had a fixed period of 1<sup>st</sup> November – 30<sup>th</sup> December 2017.
22. The witness further testified that the Claimant's contract expired. There was no requirement therefore that he be accorded a hearing.
23. In her evidence under re-examination, the witness stated that the Claimant served the Respondent under various fixed term contracts at different times. The last one expired on the 31<sup>st</sup> December 2017. The contracts were; first, 1<sup>st</sup> June 2011 to 31<sup>st</sup> December 2011, second, that which expired on 30<sup>th</sup> June 2013, third, 1<sup>st</sup> July to 30<sup>th</sup> October 2017, and forth, 1<sup>st</sup> November 2017 to 31<sup>st</sup> December 2017. Further, after 31<sup>st</sup> December 2017, the Claimant did not report to work.

#### **The Claimant's submissions**

24. The Claimant in his written submissions identified for issues for determination in this matter thus; what was the nature of the Claimant's employment with the Respondent?; whether the Claimant was unlawfully terminated from the Respondent's employment; whether the Claimant is entitled to the remedies sought? And who should bear the costs of this suit?
25. On the 1<sup>st</sup> issue Counsel for the Claimant submitted that the Claimant first came into the employment of the Respondent on 6<sup>th</sup> June 2011, under a fixed term contract of 7 months.
26. From the lapse of the seven (7) month's contract, the Claimant was offered various other contracts ranging for a duration of 2 months to 4 months. Counsel urged the court to note that the contracts were not renewed after the lapse of the previous.
27. Counsel further submitted that the Respondent retained the Claimant in employment after the expiry of his last contract for a period of a month or two before the Claimant was made to sign another contract.
28. That by this, the Respondent created a scenario where the Claimant's employment became permanent and further created legitimate expectation on the renewal of the employment contract.
29. The Claimant's counsel further submitted that the evidence on record by the parties reveals that following the expiration of the contracts, the parties sustained their employer – employee relationship without a formal written agreement. The contract was open-ended in nature, subject termination with prior notice or justifiable reasons, in accordance with legal procedures.



30. Submitting on whether the termination of the Claimant's employment was fair, Counsel submitted that the termination of the Claimant's services was in contravention of the provisions of section 45 of the [Employment Act](#), therefore unfair.
31. The termination of the Claimant's services was unfair for the reason that he was not taken through a disciplinary process as set out in section 41 of the [Employment Act](#), 2007. There is no evidence that the Claimant was issued with a notice prior to the termination. The termination of his employment was therefore procedurally unfair. To buttress this submission, reliance was placed on the case of Francis Mbugua Boro vs. Smartchip Dynamics Ltd (2017) eKLR and David Njoroge Muiru vs. Elsa Limited (2014) eKLR.
32. Having proved that the termination was unfair, the remedies sought should be availed to the Claimant, his Counsel argues.

### **The Respondent's submissions**

33. In his written submissions, Counsel for the Respondent distils four issues for determination, thus; what was the nature of employment between the Claimant and the Respondent?; did the Claimant's termination from employment meet the required legal standards?; is the Claimant entitled to the remedies/reliefs sought?; who is entitled to the costs of the claim?
34. Counsel for the Respondent argued that the pleadings, documents and oral evidence by the parties, show that the Claimant was engaged on fix term contracts that were offered subject to availability of work. The contracts clearly indicated that in the absence of the renewal of the same by parties thereto, the contract would be deemed to be terminated. Section 10(3) of the [Employment Act](#), recognizes fixed term contracts.
35. The last contract issued to the Claimant was dated 25<sup>th</sup> May 2017 and it was intended to run for a period of 2 months starting 1<sup>st</sup> November 2017 to 31<sup>st</sup> December 2017. The specificity in the duration of the contract clearly indicated that the contract was fixed term in character. In absence of a renewal agreement or contrary agreement by the parties, the contract terminated on the expected end date. To buttress this point, Counsel placed reliance on the Court of Appeal Case, [Amatsi Water Services Company Ltd vs. Francis Shire Chachi, Civil Appeal No. 278 of 2016](#) where the court cited the case of [National Water Conservation & Pipeline Corporation vs. Jayne Kanini Mwanza, Civil Appeal No. 178 of 2014](#) (UR).
36. The Claimant did not prove that he had a legitimate expectation that the contract will be extended.
37. On the second issue, Counsel submitted that the last employment contracts validly expired, and in the absence of any communication to the contrary, the Claimant's contract automatically terminated. Consequently, the question of unfair termination does not arise.
38. For a contract of service that terminates by effluxion of time, the employer is not obligated to issue any notice to the employee. To fortify this submission, reliance was placed on the case of [Oshwal Academy \(Nairobi\) & Another vs. Indu Vishwanath, Civil Appeal No. 125 of 2011](#).
39. In [Trocaire vs. Catherine Wambui Karuno, Civil Appeal No. 67 of 2017](#), the court held  
"Once a fixed term contract is at the end, the employer has no obligation to justify termination or other grounds before the lapse of the fixed period."
40. The Claimant has not proven his alleged claim for unfair termination, he is not entitled to any of those reliefs sought. His claim should be dismissed with costs.



## **Analysis and Determination**

41. I have carefully considered the parties' pleadings, evidence and submissions, and the following issues emerge for determination;
- a. What was the nature of the contract of service between the Claimant and the Respondent at the time of separation?
  - b. How did the contract of service come to termination?
  - c. Was the termination of the Claimant's employment unfair.
  - d. Is the Claimant entitled to the reliefs sought.

### **Of the nature of the Claimant's employment at the time of separation**

42. It is not in contest that the parties at the hearing and in their submissions were in agreement that the Claimant became part of the Respondent's Human Capital, on or about the 1<sup>st</sup> of June 2011, under the terms and conditions that were put forth in the contract of employment dated 6<sup>th</sup> June 2011. The contract under Clause 1, provided:

“Date of engagement

You will be employed initially on seven (7) months term contract of employment which commences on 1<sup>st</sup> June 2011 and upon completion of your contract service you may be eligible for renewal of the contract, subject to your demonstration of high integrity, positive attitude and excellent performance.”

43. For all intents and purposes, this contract was a fixed-term contract of employment. It had an express start date and end date.
44. It is important to point out that the material placed by the parties before me reveal that after the termination of the above stated contract, the Claimant served the Respondent under other short term fixed contracts, thus;
- i. Contract of employment dated 3<sup>rd</sup> July 2013, for a period of one year, lapsing on 30<sup>th</sup> June 2014.
  - ii. Contract of employment dated 25<sup>th</sup> May 2017, that offered the Claimant employment for a period of four (4) months lapsing on 30<sup>th</sup> October 2017;
  - iii. Contract of employment for two months that lapsed on 31<sup>st</sup> December 2017.
45. The Claimant initiated the claim herein against the Respondent and filed contemporaneously therewith a witness statement, turned part of his evidence in chief. This court has scrutinized the memorandum of claim and the witness statement, and note that at no point did the Claimant point out that he was first employed under a fixed term contract and thereafter served the Respondent under other fixed term contracts, between the end date of the 1<sup>st</sup> contract and the 2<sup>nd</sup> day of January 2018, which date he alleges to be the date when the Respondent's Human Resources Manager verbally dismissed him.
46. In my view, the Claimant deliberately avoided to mention the fact to enable the mischaracterization of the employment relationship between him and the Respondent. It is at this point that I must state that it is a basic principle that particulars of claim should be so phrased that a defendant may reasonably



and fairly be required to plead thereto. The purpose of pleadings being to define the issues to enable each side come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; and the cause of action or defence must appear clearly from the factual allegations made.

47. It is trite law that every pleading shall contain a clear and concise statement of material facts upon which the pleader relies for his claim, defence or answer to any pleadings, with sufficient particularity to enable the opposite party to reply thereto.
48. In *Trope vs. South Africa Reserve Bank and Another* (1993) ZASCA 54; 1993(3) SA 264 (A) at 273 A-B, the Court stated;

“It is trite that a party has to plead with sufficient clarity and particularity – the material facts upon which he relied for the conclusion of law he wishes the court to draw from the facts. ....It is not sufficient, therefore, to plead a conclusion of law without pleading the material facts giving rise to it .....”.
49. It is only under his evidence under cross-examination that the Claimant admitted that his first contract of employment with the Respondent was a fixed term contract, and that at different times, thereafter, he served the Respondent under other short term fixed contracts. Further, it is only in his evidence under cross-examination and re-examination, and submissions that he raised the aspect of legitimate expectation.
50. In my view, the facts relating to the fixed contracts and the alleged legitimate expectation were material facts that were required to be pleaded if at all the Claimant wanted the court to rely on them to draw the conclusion that his employment was unfairly terminated.
51. The Respondent contended that that the Claimant last offered his services to the Respondent under that contract (fixed term) that ran from 1<sup>st</sup> November 2017 to 31<sup>st</sup> December 2017. The Respondent’s witness testified that the contract was erroneously dated the 25<sup>th</sup> May 2017. Counsel for the Claimant argued that the non-connection between the date of the contract and the contract period, is an indication that the contract was an afterthought, only calibrated for the purposes of this case. I am not persuaded by this argument by counsel. The court notes that the Claimant executed the contract, and that much he admitted under his evidence under cross-examination.
52. The contract had a start and end date. It is abundantly clear that beyond the end date, i.e. 31<sup>st</sup> December 2017, the Claimant did not work further for the Respondent under any form of contract. In my view, this was in line with the parties’ intention as expressed under the contract.
53. By reason of the foregoing premises, I am not persuaded to see it in any other way, the Claimant at separation was serving under a fixed term contract that terminated by effluxion of time on the 31<sup>st</sup> December 2017.
54. The attempt by the Claimant to rely on the unpleaded doctrine of legitimate expectation does not come to the aide of his case. In any event, no evidence was led to establish the same.
55. Upon premise of the hereinabove premises, it is not difficult to state in answer to issue (b) that the termination of the Claimant’s contract of service, was by effluxion of time.

### **Whether the termination of the Claimant’s employment was unfair**

56. It is trite law, and jurisprudence is ample, that where a fixed term contract comes to an end on the appointed date, in accordance with the parties contractual terms, a claim for unfair termination cannot



be sustained, unfair termination of employment being termination of an employee's employment for a reason that is not fair or permissible under statute.

57. In the case of National Water Conservation & Pipeline Corporation vs. Janet Kanini Mwanza, Civil Appeal No. 118 of 2014 (UR), cited in Amatsi Water Services Company Limited vs. Francis Shire Chachi (2018) eKLR, the court held;

“The general principle, as we understand it, is that a fixed term contract will terminate on the sun set date unless it is extended in terms stated in contract. A court cannot rewrite the terms of a contract freely entered into between the parties. Once there is a written contract; the court will seek to give meaning to such contract giving ordinary meaning to its terms in determining any issue that may arise. The principle has been considered by several judges of the Industrial Court (now the employment and labour relations court) and they are generally in agreement. Indeed, this court was in agreement in the Oshwal Academy (Nairobi) .....

58. The Claimant contended that the termination of his employment was unfair as he was not issued with any termination notice. In my view, the clause in a fixed term contract that stipulates the contract period, (and there must be one always), serves as an advance termination notice. Logically, there cannot be any reasonable justification for the insistence of issuance of a termination notice, when the contract has been allowed to run its full course. Issuance of a termination notice can only be relevant and desirable, where either party wants to end the contract before the appointed lapse date.

59. In the case of Benard Wanjohi Muriuki vs. Kirinyaga Water and Sanitation Company Ltd & Another (2012) eKLR, Rika, J held, and I agree thus;

“A general principle that a fixed term contract will continue if not terminated would be a contradiction to the very definition of a fixed term. There is a definite start date and an end date. The contract would logically end automatically without more otherwise it would no longer be a fixed term contract. See the case of SA Rugby (Pt 1) Ltd vs. CUMA & OTHERS (2006) 27 (l) 1041(lc) AT 1044 par 6.”

### **Of the Reliefs sought**

60. Having found that the Claimant's employment came to an end by effluxion of time, and that therefore, the claim for unfair termination is not founded, I cannot find any basis to grant the reliefs sought by the Claimant.

61. In the upshot, I find no merit in the Claimant's case. It is hereby dismissed with costs.

**READ, SIGNED AND DELIVERED THIS 24<sup>TH</sup> DAY OF JUNE, 2024.**

**OCHARO KEBIRA**

**JUDGE**

In the presence of:

Ms. Wagasa for the Respondent

No appearance for Claimant

**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 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**

