



**Chwanya v Trees for the Future Inc (Cause E054 of 2022)
[2024] KEELRC 1465 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1465 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E054 OF 2022
CN BAARI, J
JUNE 13, 2024**

BETWEEN

ISAIAH CHELLUGET CHWANYA CLAIMANT

AND

TREES FOR THE FUTURE INC RESPONDENT

JUDGMENT

1. The Claimant herein, lodged this claim against the Respondent vide a Memorandum of Claim dated 23rd December, 2022, seeking the following reliefs: -
 - i. A declaration that he was constructively dismissed.
 - ii. A declaration that his termination was unfair and unlawful
 - iii. A total of Kshs 2,878,000/= comprising of one months' salary in lieu of notice, 12 months' compensation, leave days, holidays and weekends, unpaid salary, salary for the remainder of the contract and local travel allowance.
 - iv. Costs of the suit.
 - v. Interest on (iii) and (iv) above at the prevailing court rates.
 - vi. Certificate of service.
2. The Respondent entered appearance together with a Statement of Response dated 1st February, 2023, wherein, it refuted the Claimant's assertions and averred that the Claimant's contract ended by effluxion of time.
3. The matter proceeded for hearing on 16th October, 2023 and 15th November, 2023, when the Claimant and one Gedion Osoi testified in support of his case and two witnesses; Pius Odawo and Daniel Gutu testified on the Respondent's behalf.



4. Both parties filed their written submissions.

The Claimant's Case

5. It is the Claimant's case that he was employed as a driver on a two-year fixed term contract dated 13th October, 2021 at a salary of Kshs 65,000/=. He contends that he was promoted to the position of Senior Driver Safety and Security Officer on 21st September, 2022 at a salary of Kshs 87,000/=.
6. The Claimant avers that he faithfully carried out his duties until 4th October, 2022 when he was unlawfully forced to go on indefinite leave. It is his case that the Respondent thereafter unlawfully terminated his employment on the pretext that his contract ended by effluxion of time.
7. He avers that on 4th October, 2022 he was called to the office and his phone was confiscated after which he was matched out. It is his assertion that he received salary from September to November, 2022 while on administrative leave and salary for January, 2023.
8. It is the Claimant's further case that the Respondent withheld some of his salary by paying him a monthly salary of Kshs 60,000 instead of the agreed Kshs 65,000.
9. On cross-examination, the Claimant avers that he signed a 12 months' contract with the Respondent on 13th October, 2021, and that the date of signing was the contract's commencement date. It is his position that the contract did not provide for payment for the unexpired term.
10. It is his further case that he filed a letter of promotion from the position of driver to that of senior driver safety and security, issued to him by CW2 one Gedion Osoi. He states further that he was not aware if the said Gedion Osoi had authority to promote the Respondent's employee.
11. It is the Claimant's assertion that the letter of promotion referred to above, indicated that his salary had been increased to Kshs 87,000/-. He states that he did not have a pay slip as prove that his salary was increased to Kshs 87,000/-.
12. The Claimant further confirmed on cross-exam that he was aware that he was not supposed to transact the Respondent's business while on administrative leave. He states that he was terminated as a result of the audit conducted by the Respondent while he was on administrative leave and that he had not been supplied with the audit report.
13. The Claimant further told court that he received a letter indicating that his contract would not be renewed upon its expiry in November, 2022. He confirmed that the letter did not refer to the audit as the reason for the non-renewal.
14. CW2 told court that he executed and sealed the Claimant's contract and that he did not sign the 12 months contract produced in evidence by the Respondent. He states further that he did issue the Claimant's letter of promotion with the authority of the Respondent.
15. It is the evidence of CW2 on cross-exam that his contract did not provide promotion of staff as part of his job description, but that he did so through the mandate of the Respondent's global Director Human Resources. He confirmed that he did not produce the email to the Global Director HR in respect of the promotion.
16. CW2 further cast aspersions on the documents produced by the Respondent and the report by the forensic document examiner
17. CW2 denied counter-signing a 12 months contract said to have been issued to the Claimant, and instead allege that the signature appearing on the contract and said to be his, was actually forged. He



further told court that he did not conduct a forensic examination of the signature as to confirm his allegation of forgery.

18. Again, on cross-examination, CW2 confirmed that he was aware that contracts issued to the Respondent's employees were for a one-year term owing to shortage of funding.
19. It is the Claimant's assertion that the Respondent's actions aforesaid, amount to unfair labour practices, constructive dismissal and unfair termination.

The Respondent's Case

20. The Respondent's case is that Claimant was employed on a 1-year fixed term contract on a salary of Kshs 60,000/=, with a possibility of Kshs 5000/= increase based on performance. The Respondent avers that the Claimant's salary was raised to Kshs 64,980/= after cost adjustment review in January 2022.
21. The Respondent states that it never promoted the Claimant and that the position of Senior Driver Safety and Security Officer did not exist within its ranks. Additionally, the Respondent contends that it did not approve a salary increment for the Claimant.
22. The Respondent's further case is that it was mutually agreed after consultative meetings to place the Claimant and other employees on administrative leave from 4th October, 2022. It contends that the Claimant attended the meetings and voluntarily agreed to being placed on administrative leave.
23. The Respondent affirms that the Claimant's contract lapsed by effluxion of time hence, he was not entitled to the remedies sought. The Respondent additionally reiterates that the Claimant's 2-year contract is a forgery as they only issue 1-year contracts.
24. It is the Respondent's position that the genuine contract in respect of the Claimant's employment is that signed 15th November, 2021 and which carries a one year term and not the one produced by the Claimant.
25. It is RW1's evidence that he prepared the Claimant's contract in collaboration with the Senior Director, and that he signed on the contract together with the Claimant. It is his case that the salary attached to the contract was Kshs 60,000 and which was later adjusted to Kshs 64, 890/-
26. It is RW1's case that the letter of promotion produced in evidence by the Claimant is a work of forgery as position of senior driver does not exist in the Respondent's establishment.
27. He avers that the Claimant's employment ended when his contract came to an end and that he was notified of the non-renewal of his contract.
28. RW2, the document examiner told court that upon considering prints, formatting, fonts, wording, print alignment, spacing and design, he is of the opinion that the contracts produced in evidence did not come from the same source and that he had produced his opinion in evidence before this court.
29. The Respondent states that the Claimant's case is supported by forged documents and should be dismissed.

The Claimant's Submissions

30. The Claimant submits that he has discharged his burden under Sections 43, 45 and 47 of the Employment Act as to *prima facie* evidence of wrongful termination. He relies on the case of Peter Otabong Ekisa v County Government of Busia [2017]eKLR, where the court in reference to Section



47(5) of the [Employment Act](#) held that the burden of disproving *prima facie* dismissal lay on the employee.

31. He submits that his two-year contract was valid as the Respondent had not proven it was a forgery. He urges the court to take into consideration the fact that the Respondent's contract was not sealed. Additionally, he contends that the document examiner's report did not impugn the authenticity of his contract, but only doubted its source.
32. The Claimant asserts that taking into consideration the facts of the case and Sections 43, 45 and 47, he had proven unfair dismissal. To this end he asserts that the Respondent had not provided him with details of the accusations against him, allowed him to be accompanied by a representative of his choice and served him with a termination notice.
33. On his entitlement to the remedies sought, the Claimant submits that the remedies should be awarded as prayed. He contends that he is entitled to damages for unfair termination and pay in lieu of notice on the basis of his 2-year contract. He equally submits that he is entitled to salary arrears, holidays and weekends worked, leave days, travel allowances and salary for the remainder of the contract period.
34. The Claimant finally urges this court to exercise its discretion in his favour and award him the costs of the suit. He placed reliance in *Republic v Rosemary Wairimu Munene and Ihururu Dairy Farmers Co-operative Society Ltd*, where the court was of the opinion that costs were not for penalizing the losing party, but for compensating a successful litigant.

The Respondent's Submissions

35. On its part, the Respondent submits that the particulars of constructive dismissal have not been pleaded. It stresses that the Claimant has not met the threshold for constructive dismissal enunciated in the cases of [Milton M Isanya v Aga Khan Hospital Kisumu](#) (2017) eKLR and [Coca Cola East Africa v Maria Kagai Ligaga](#) (2015) eKLR. where the common thread was that an employee must resign due to frustrations by the employer.
36. Additionally, the Respondent submits that a party cannot plead both constructive dismissal and unlawful dismissal in the same suit.
37. It is the Respondent's submission that the 2-year contract produced by the Claimant was forged. This the Respondent avers is evinced by the lack of response to the letter of non-renewal of contract. It affirms that the Contract was a forgery intended to mislead the court and calculated at unjust enrichment.
38. The Respondent equally cites the Claimant's signing of the offer letter, the forensic examiner's report and the fact that it does not have the so called 2-year contract in its records. It contends that the forensic report showed that the 2-year contract did not emanate from them.
39. In response to the Claimant's alleged promotion, the Respondent submits that none ever took place. It contends that there was staff realignment in which the Claimant's salary was increased by Kshs 3,090/= which was effected in the months of September, October and November, 2022.
40. In respect of the probative value of CW2 Gedion Osoi, the Respondent was of the contrary opinion. It submits that he was untrustworthy having filed a suit based on forged documents. In support of this contention the Respondent relied on the case of *Kenya Engineering Workers Union v Narcol Aluminium Rolling Mills Limited* (2015) eKLR where the court dismissed claims founded on forgery.
41. On whether the Claimant was treated as an employee beyond the contract period, the Respondent avers that nothing could be farther from the truth. It relies on [Registered Trustees of the Presbyterian](#)



Church of East Africa v Ruth Gathoni Ngotho Kariuki [2017] eKLR where the court held that it was the function of the court to enforce a contract as is without making additions or implying terms.

42. In concluding his submissions, the Respondent avers that the Claimant is not entitled to the remedies sought. It asserts that the Claimant's contract ended by effluxion of time, hence invalidating the prayers for pay in lieu of notice and damages for unlawful termination.
43. Additionally, the Respondent contends that there was no legal basis for 2 years leave pay as the leave days for the year under contract were accounted for in the payslips. As for the holidays, weekends and local travel allowances, the Respondent submits that they were unsupported by any evidence or were not envisaged under Section 49 of the *Employment Act*.
44. The Respondent submits that salary for the remainder of contract does not arise as the contract ended by effluxion of time. In any case, the Respondent asserts that there was no such provision in the contract. It cites the case of *Alphonse Maghanga Mwachanya v Operation 680 Limited* [2013] eKLR where the court held that in a fixed term contract compensation for the remainder of the term has to be contractually agreed.
45. The Respondent finally submits that it issued the claimant with a Certificate of Service as evinced by the Claimant's own documents.

Analysis and Determination

46. Upon careful analysis of the pleadings, the witnesses testimonies and submissions by both parties, the issues that present for determination are: -
 - i. Whether the Claimant was constructively dismissed.
 - ii. Whether the Claimant's contract lapsed by effluxion of time.
 - iii. Whether the Claimant's suspension and subsequent non-renewal of contract was justified.
 - iv. Whether the Claimant is entitled to the remedies sought

Whether the Claimant was constructively dismissed

47. The Claimant's first prayer under his pleadings, is a declaration that he was constructively dismissed. It is however appalling that he never led any evidence in support this assertion.
48. In the case of *CMC Aviation Ltd. v Cruisair Ltd. (No 1)* [1978] KLR 103; [1976-80] 1 KLR 835 Madan J (as he then was) stated thus on proof averments in a party's pleading: -

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”

49. In the evidence presented by the Claimant, there is no prove that he resigned as a result of a hostile work environment created by the Respondent/employer or at all. (See the case of *Coca Cola East & Central Africa Limited v Maria Kagai Lugaga* (2015) eKLR).



50. Guided by the foregoing authority and given that the Claimant seem to have lost interest in this prayer, coupled with the absence of evidence in support of constructive dismissal, the prayer for a declaration that the Claimant was constructively dismissed is dead on arrival. It fails.

Whether the Claimant's contract lapsed by effluxion of time

51. The Claimant asserts that he was on a two-year contract which was terminated after one year of service. The Respondent on its parts asserts that the Claimant was on a one-year fixed term contract.
52. The Claimant has produced a contract commencing on 13th October 2021 for a period of 2 years. On its part, the Respondent has produced a contract commencing on 15th November, 2021 for a period of 1 year. The question that arises therefore, is which of the two contracts is genuine.
53. The Respondent denies ever issuing the Claimant or any other employee a contract of more than one year. It termed a contract carrying a two-year term produced by the Claimant in evidence, a work of forgery and non-authentic.
54. In testimony, RW1 testified that he is the one in charge of human resource at the Respondent's company, and is responsible for preparation of contracts. He stated that he prepared, signed and had custody of the Claimant's contract signed on 15th November, 2021 and that he doubted the authenticity of the 2-year contract produced in evidence by the Claimant as he did not prepare the same.
55. RW2 Daniel Gutu, a forensic document examiner on his part testified that the 2-year contract originated from a different source going by its print, font, and design amongst other differences. Additionally, the Respondent has provided a number of contracts in support of its contention that it only offers 1-year contracts to all her employees.
56. Having looked at the contracts, it is unconscionable how the Claimant would be offered a two-year contract when company's policy is to issue one-year contracts. CW2, who is a former Country Director of the Respondent, told the court on cross-examination that the Respondent issued one-year contracts to its employees owing to shortage of funding.
57. In the wake of claims of forgery, the Claimant has not in any way controverted the evidence of the forensic document examiner.
58. For the foregoing reasons, the court is convinced that the Claimant has not proven that he was on a two-year contract, and thus proceed to uphold the Respondent's position that the Claimant was on a 12 months'/1 year contract.
59. It is the Respondent's further case that the Claimant's contract ended by effluxion of time, being that the same was not renewed when it lapsed in November, 2022. The Claimant was issued a letter dated 7th November, 2022, which he admitted receipt of, informing him of the Respondent's decision not to renew his contract.
60. The general rule is that a fixed term contract carries no expectation for renewal. It is however settled that a fixed term contracts with a renewal clause may create expectancy of renewal on the part of the employee based on previous contract renewals.
61. This court notes that this was the first contract the Claimant had with the Respondent, and therefore the issue of legitimate expectation does not arise.



62. I thus conclude by holding that the Claimant was not dismissed, but his contract lapsed by effluxion of time.

Whether the Claimant is entitled to the remedies sought

Compensation for unfair termination

63. The Claimant seeks 12 months' salary for unfair termination. This court having found that the Claimant was not terminated, renders the claim for compensation untenable. It fails and is dismissed.

Pay in lieu of notice

64. The Claimant was issued with non-renewal notice on the 7th of November, 2022, informing him that his contract will not be extended past the 30th of November, 2022. The payslips produced by the Respondent show that he was paid his salary up to November, 2022.

65. He is therefore not entitled to any award under this head.

Unpaid salary for the remainder of the contract period.

66. The Claimant did not prove that his contract was valid for two years. Even so, Section 49 of the [Employment Act](#) does not envisage such a relief premised on the fact that there is no guarantee that an employee will serve their full contract term. This claim is declined.

Salary Arrears

67. The Claimant sought payment of Kshs 5,000/= for each month he served between 21st September, 2021 and 21st September, 2022. It was his contention that he was paid Kshs 60,000/= per month instead of Kshs 65,000/= stipulated in the contract.

68. On its part the Respondent avers that the Claimants offer letter carried a monthly salary of Kshs 60,000/= with a possibility of Kshs 5,000/- increase based on performance.

69. The Respondent's further assertion is that the Claimant's salary was increased to Kshs 64,980/- after a cost adjustment review.

70. I have had occasion to look at the contract of service produced by the Respondent. It provides for a gross salary of Kshs 65,000/=.

71. The payslips provided by the Respondent show that the Claimant was paid a gross salary of Kshs 60,000/= from November 2021 to August 2022. From September 2022 to November 2022 the Claimant was paid Kshs 64,890/=.

72. It is not clear why the Respondent would depart from their own contract. For the above reasons this Court finds that the Claimant is entitled to salary arrears of Kshs 50,330/=.

Local Travel allowance

73. The Claimant has sought for Kshs 9,000/= under this head. He has however not laid any evidentiary basis for it. It is not clear whether the same was an entitlement under the contract and no particulars have been provided in support of this prayer. The same thus fails.



Leave allowance, holidays and weekends from September 2021 to September 2022

74. The Claimant has not provided evidence of how much he is owed on account of leave. He has also not provided any evidence of having worked on weekends and during public holidays.
75. In view of the foregoing this court finds this prayers unmerited.
76. On the whole, the Claimant's claim partially succeeds in the following terms.
- a. A declaration that the Claimant's termination is not unfair.
 - b. Payment of Salary arrears of Kshs 50,330/-
 - c. Each party shall bear their own costs of the suit.
77. Orders accordingly.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 13TH DAY OF JUNE, 2024.

C. N. BAARI

JUDGE

Appearance:

Ms. Mukoya h/b for Mr. Otieno for the Claimant

Ms. Kasioka h/b for Mr. Gachaga for the Respondent

Ms. Anjeline Wanjofu - C/A

