



**Tarmal Wire Products Limited v Munguti (Appeal E011 of 2024)  
[2024] KEELRC 1559 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1559 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E011 OF 2024  
M MBARÚ, J  
JUNE 13, 2024**

**BETWEEN**

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

**AND**

**JOSHUA NZESI MUNGUTI ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. R. Amwayi delivered  
on 14 February 2024 in Kaloleni EMELRC No. E023 of 2021)*

**JUDGMENT**

The appeal herein arises from the judgment delivered on 14 February 2024 in Kaloleni CMELRC No. E023 of 2021. The appellant is seeking that the judgment be set on two grounds;

1. The learned magistrate erred in law and fact in holding that the claimant [respondent] 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 service pay.
3. The background to this appeal is a claim filed by the respondent before the trial court on the grounds that he was employed as a plumber by the appellant from 4 March 2011 and remained in continuous employment until 9 November 2020. The last wage earned was Ksh.20, 069.32 per month. On 2 November 2020, he fell sick and applied for sick off which was granted. He reported back to work on 9 November 2020 but was informed by Osman Yakubu the manager that his services were no longer required. There was no notice, hearing or a valid reason leading to termination of employment. The respondent had a legitimate expectation to continue working which was unfairly stopped by the appellant. He claimed the following;
  - a. Leave allowances from March 2011 to November 2020 8.5 years Ksh. 119,412.46;

- b. Service pay at 15 days for 8.5 years Ksh. 85,294.61;
  - c. 12 months' compensation Ksh. 240,831.84;
  - d. Certificate of service;
  - e. Costs of the suit.
4. In response, the appellant's case was that in the year 2015, they employed the respondent under various fixed-term contracts the last covering the period of 5 September 2020 to 5 November 2020. Upon expiry of the contract, he was not issued with a new contract and employment naturally ended on 5 November 2020. Upon the expiry of the contract, there was no legitimate expectation for a renewal. The claim for annual leave is not justified since the respondent took all his leave days or encashed and he executed a discharge voucher in this regard. Service pay is not due since he was registered with NSSF. Compensation is not due as the contract expired by effluxion of time. A certificate of service was issued at the end of employment.
5. The learned magistrate in the judgment held that there was an unfair termination of employment since there was no due process required under Section 41 of the *Employment Act*, 2007 (the Act). That there were no statutory payments and hence service pay due. The awards were;
- a. 12 months' compensation Ksh. 229,560; Service pay Ksh. 76,560;
  - c. Certificate of service;
  - d. Costs.
6. Aggrieved, the appellant filed this appeal seeking to set aside the judgment of the trial court with costs. Both parties attended and agreed to address the appeal by way of written submissions.
7. The appellant submitted that the findings by the trial court that there was unfair termination of employment were in error since the respondent was on fixed-term contracts the last ending on 5 November 2020 and was not renewed. In evidence, the respondent admitted that he had a contract and the last day was 5 November 2020. The claim that the respondent had a legitimate expectation for the renewal of his contract had no basis. In the case of *Transparency International Kenya v Teresa Carlo Omondi Civil Appeal No. 81 of 2018* the Court of Appeal held that in the absence of a letter promising renewal of the contract, there was no legitimate expectation that the fixed-term contract would be renewed upon expiry.
8. The appellant submitted that the respondent did not work for 9 extra days as alleged in his evidence. There is no proof of such a matter. The purpose of a fixed-term contract is to allow the employee to know his period of employment and unless there is a renewal of a fixed-term contract, the employer is not bound to give reasons for termination of the contract.
9. The appellant submitted that the findings by the trial court that the respondent was entitled to notice pay is not justified. The respondent was registered with NSSF as evidenced by his registration card and for this reason, the appellant complied with Section 35(5) and (6) of the *Employment Act*, 2007 and hence service pay was wrongly awarded. The finding by the trial court that without payment of statutory due like in the instant case, service pay is due for every full year worked. There is proof of such payment and the respondent admitted to the same facts. The appeal should be allowed with costs.
10. The Respondent submitted that the trial court properly applied the law to the facts in this case when making a finding that the Respondent had a legitimate expectation to have his contract renewed. The issue was properly framed by the trial court as the same came out through the evidence. The

trial magistrate was guided by various authorities to the effect that an employee under a fixed term contract can indeed have a legitimate expectation that the contract would be renewed based on certain conditions being met. in *Teresa Carlo Omondi vs Transparency International Kenya* [2017] eKLR, *Oshwal Academy (Nairobi) & Another vs India Vishwanath* [2015] eKLR where courts upheld that legitimate expectation existed where an employer through the regular practice successively renewed an employee's contract.

11. The respondent submitted that the Respondent had a legitimate expectation to have his contract renewed after serving the appellant uninterrupted for 6 years the fact that the Respondent worked for 4 (four) days past his last date as per his last contract and gave a legitimate expectation that the Respondent's contract would be renewed. the case of *South African Clothing & Textile Workers Union & Another vs CADEMA Industries (Pty) Ltd (C 277/05)* [2008] ZALC where an employee was employed on several fixed term contracts on a continuous and unbroken period of 4 and <sup>1</sup>/<sub>2</sub> years. The court held that the several renewals or extensions over this period without any discussions as to why they were renewed, in addition to the fact that the last renewal was after a plea from the worker and the worker was permitted to continue working for another 7 days after expiry of the contract created a reasonable expectation that the contract would be renewed.
12. The respondent submitted and conceded to the second ground of appeal with regard to the award of service pay.

### **Determination**

13. This is a first appeal. The court is mandated to re-evaluate, re-assess and review the record and make its conclusions but take into account that the trial court had the opportunity to hear witnesses.
14. The twin issues for determination are the finding that there was unfair termination of employment and the award of service pay.
15. The claim by the respondent before the trial court was that on he was employed by the appellant on contract the last contract. On 2 November 2020, he fell sick and was allowed sick leave. However, upon return on 9 November 2020, he was informed that his employment had been terminated.
16. The appellant's case was that the respondent was employed on fixed term contracts the last covering 5 September to 5 November 2020. The contract lapsed on its terms. The appellant filed the various contracts issued to the respondent.
17. Whereas employment under fixed-term contracts is lawful and legitimate, an employee who has taken sick leave and is allowed time off to attend should not suffer termination of employment or non-renewal of contract due to such fact. However, an employee who is lawfully out of work due to illness or sickness, upon resuming duly is required to submit a Medical Certificate under the provisions of Section 30 of the Act.
18. In the case of *Dorothy Njoki Ndung'u v Machakos University College & another* 120171 eKLR the court held that where the employee is sick and requires medical attention, such an employee is entitled to take time off with full pay to seek such medical attention. Such an employee must however produce a certificate of any incapacity/sickness/illness to the employer, which certificate should be signed by a qualified medical practitioner. Such a medical certificate should as of necessity note the nature of illness/sickness that the employee is being treated for or about the privacy of such an employee, the certificate note as appropriate. See *Banking, Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Limited* 120141 eKLR.

- 19. The respondent was well allowed time off due to illness. Upon resuming duty, he did not submit any record of such matter. I have gone through his evidence and written submissions, he does not offer any account for that time.
- 20. Where the claimant was lawfully allowed to be out of work due to illness, and his employment contract lapsed on 5 November 2020 a proper account of such absence would have created a proper and justified reason to seek that the practice and continued renewal of his employment contracts be secured. However, account must be taken that, a fixed-term contract is lawful and valid under Section 10(3) of the Act. This is emphasized in the case of Transparency International Kenya v Teresa Carlo Omondi Civil Appeal No. 81 of 2018 cited by the appellant above.
- 21. In the case of John Nduba v Africa Medical and Research Foundation (Amref Health Africa) (2020) eKLR the court held that a fixed-term contract does not create any legitimate { expectations for renewal. Each contract has a start and end date.
- 22. In this case, the respondent's contract was ending on 5 November 2020 while he had been allowed sick off from 2 November 2020. Without any record of a medical Certificate to urge his case on the reason for absence to enjoy a renewal of the contract as had been the practice, the finding by the trial court that he ought to have been issued with notice and reasons for termination of employment is in error. The trial court relied on the case of Teresa Carlo Omondi v Transparency International Kenya which has since been overturned by the Court of Appeal and this court is bound by the findings thereof.
- 23. Employment terminated lawfully. The award of compensation is not justified With regard to the award of service pay, the respondent conceded to this ground.
- 24. It is imperative to mention that the learned magistrate established that *an employee who has not enjoyed the benefits of statutory deductions and is thus covered under Section 35(5) and (6) of the Employment Act, 2007...* is not entitled to service pay. The duty to remit statutory deductions is on the employer. However, the learned magistrate held that the appellant had not remitted NSSF dues concerning the respondent.
- 25. Despite this analysis, on the record is evidence of the respondent being registered with NSSF. In his evidence, he admitted to this fact. Such taken into account, to award service pay is not justified.
- 26. On costs and interests awarded, the appeal justified, each party to meet its costs.
- 26. Accordingly, the appeal is with merit and is allowed. Judgment in Kaloleni CMELRC No. EO22 of 2021 is hereby set aside. Each party bears its costs.

Delivered in open court at Mombasa this 13 day of June 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and .....