



Ondora v Makori & 6 others (Being sued as the registered officials/leaders of the Seventh-Day Adventist Church, East Kenya Union Conference (E.K.U.C), Home Health Education Service) (Employment and Labour Relations Cause 346 of 2017) [2024] KEELRC 2068 (KLR) (31 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 2068 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 346 OF 2017**

**K OCHARO, J
JULY 31, 2024**

BETWEEN

PETER OMWENGA ONDORA CLAIMANT

AND

PR. SAMUEL MAKORI 1ST RESPONDENT

PR. ALFRED MARUNDU 2ND RESPONDENT

PR. NEHEMIAH MAIYO 3RD RESPONDENT

KEPHA MORURI 4TH RESPONDENT

YUNITA ADHIAMBO 5TH RESPONDENT

STEPHEN NYAWADE 6TH RESPONDENT

HOME HEALTH EDUCATION SERVICE 7TH RESPONDENT

BEING SUED AS THE REGISTERED OFFICIALS/LEADERS OF THE SEVENTH-DAY ADVENTIST CHURCH, EAST KENYA UNION CONFERENCE (E.K.U.C), HOME HEALTH EDUCATION SERVICE

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 17th February 2017, the Claimant seeks: -
 - a. The principal sum of Kshs 519,888/- as more particularized and set out in paragraph 20 of the memorandum.



- b. Interest at court rates on (a) above.
- c. Costs of the suit.
2. The Memorandum of Claim was accompanied by the Claimant's; Witness Statement dated 17th February 2017; and documents filed under a List of Documents dated 17th February 2017.
3. In response to the Claimant's Memorandum of Claim, the Respondents filed a Memorandum of Defence dated 17th March 2017 and counterclaim, contemporaneously with; documents under a List of Documents dated 17th March 2017; and a Witness Statement by 4th Respondent dated 17th March 2017. They also filed an additional witness statement by Masumbuo Mpathe Ziro dated 14th June 2017, and a further bundle of documents.
4. The Claimant filed a Response to the Memorandum of Defence dated 24th April 2017.

Claimant's case

5. It is the Claimant's case that he first came into the employment of the 7th Respondent in June 2009 under a contract of employment that was renewable annually. It was so renewable on the first day of every year. He worked for the 7th Respondent in various capacities under this arrangement for 8 years. He last served the Respondent under that contract he entered into with the Respondent on 1st January 2016, which was to run for 12 months from 1st January 2016 to 31st December 2016 at a monthly salary of Kshs 30,240/-. He was employed as a Book Depository Assistant.
6. Despite working diligently for the 7th Respondent, the fact that he did not receive a single warning letter or notice to show cause during his employment is a testament to this. However, to his surprise, on 22nd December 2016, it dawned on him that his salary for December 2016 had not been paid. On 4th January 2017, he visited the 7th Respondent's offices to inquire why the non-remittance, only to be informed by the 6th Respondent that his salary had been withheld because a stock loss had been discovered at the Kisii Depot where he had served as an Assistant Depot Manager.
7. This prompted him to seek assistance from the 4th Respondent's offices, who promised to get back to him on the issue once it had been deliberated on. On 5th January 2017, he received a call from the 4th Respondent who informed him that the 7th Respondent would neither renew his contract nor pay his salary for December 2016 due to the stock loss at the Kisii Depot.
8. The Claimant contends that he was unaware of such stock loss and the Respondents did not inform him of the loss during his employment. He was also not in charge of the Kisii Depot when the alleged loss occurred.
9. The Claimant complains that his dismissal from employment was carried out in his absence in December 2016; and was effected maliciously and without complying with the provisions of the Employment Act 2007. In particular, he was not given notice of the intended termination, was not given a fair hearing, and there was no justification for terminating his employment. The Respondent's action of terminating his employment unfairly has caused him to suffer mental anguish, and torture and compromised his station in life, as the sole breadwinner for his family. He has been unable to pay for his son's school fees and his wife's medical expenses for High Blood Pressure. The Claimant contends that he has never received his terminal dues to date.
10. Concerning the alleged loss of the stock and cash shortfalls at the Kisii Depot, the Claimant states that any shortfall must have occurred before his transfer to the station. He didn't cause any stock loss during



his tenure. Notably, at the time of his transfer, an inventory audit was conducted to give a clear record of the stock that was in place when he assumed office.

11. The Claimant confirms that he affixed his signature to the report prepared following the inventory audit of 25th November 2016, but denies that this was an admission of stock loss during his tenure. He only affixed the signature to confirm his presence during the exercise. The Claimant denies receiving the Internal Memo requesting him to make good the shortfall within 2 weeks.

Respondent's case

12. It is the Respondents' case that the Claimant was employed by the 7th Respondent as a Book Depository Assistant based at its Kisii Depot. They explain that the duties assigned to Book Depository Assistants include distributing books and receiving payments via vouchers or bank slips from the Assistant Publishing Directors (APDs), to account for the complete transactions. As per the 7th Respondent's policy, Book Depository Assistants such as the Claimant, could not receive cash. Book Depository Assistants, such as the Claimant, performed their duties subject to inventory audits and progress checks by Managers. While the Claimant was initially stationed at the Adventist Book Centre headquarters in Nairobi, he was transferred to Kisii in January 2016 as permitted by his contract.
13. The Respondents state that on 25th November 2016, the Respondent's Treasurer and the 4th Respondent, travelled to the depot to conduct an inventory audit and check on progress at the depot. In the course of the audit and progress check which was carried out in the Claimant's presence, they discovered that Kshs 153,993.49 worth of stock was missing. They sought an explanation from the Claimant but none was forthcoming. They therefore compiled a report on the shortage in the Claimant's presence and caused him to sign the same.
14. Subsequently, the matter was reported to the Administrative Committee (ADCOM). The committee considered the matter and resolved that the 4th Respondent should send the Claimant a letter requiring him to make good the shortage of the stock and bank any monies received in cash within 2 weeks. As a result, an Internal Memo dated 30th November 2016 was issued to the Claimant.
15. Unfortunately, the Claimant failed to make good the shortage and bank the monies received in cash. Further, the Respondents received complaints from clients who had paid money to the Claimant, which had not been banked.
16. The Respondents contend that the 7th Respondent rightly exercised its right not to renew the Claimant's contract from January 2017. It was not under any obligation to issue a notice to the effect that it didn't intend to. In any event, he was informed of the 7th Respondent's decision when he attended the 7th Respondent's offices. He was also advised that the stock shortfall, of Kshs 76,996.75, would be deducted from his salary and terminal dues, namely his bonus and gratuity. The other half was to be borne by the Manager in charge of the Kisii Depot who failed to report the Claimant's unscrupulous activities.
17. Consequently, the Kshs 76,996.75 was recovered from the Claimant as follows: Kshs 30,240/- from his December 2016 salary, Kshs 30,240/- from his bonus, Kshs 36,288/- from the yearly gratuity, leaving a balance of Kshs 12,388.75 unsettled, the amount which is the subject of the counter-claim.
18. The Respondents conclude that the Claimant had a history of taking money from Assistant Publishing Directors (APDs) and failing to remit the same to the 7th Respondent. He had shortfalls of both cash and stock at his previous station. As the Claimant failed to exercise due diligence and honesty in the course of his duties, the 7th Respondent could not renew his contract.



19. The Respondents deny that the Claimant's services were terminated, rather his contract expired on 31st December 2016 and was not renewed. His terminal dues namely his yearly gratuity, bonus and salary for December 2016 will be payable once the Claimant clears with the 7th Respondent of all liabilities. He is therefore not entitled to the remedies sought.
20. The Respondents' witness, Mr. Masumbuo Mpathe Ziro, who was the Manager, of Kisii Depot, testified that stocktaking was done at the beginning of the Claimant's tenure at the station, on 19th January 2016 and both affixed their signatures to the documents. Further, he noted a stock loss of about Kshs 36,000/- in June 2016. He pointed out the matter to the Claimant and two other staff under him in a meeting with them. By this point, he had received complaints from two literature evangelists that they had given cash to the Claimant for books but had not been issued with receipts which they needed to submit to the headquarters for end-of-month payment. It was against the Organization's practice for the Claimant to deal with literature evangelists. The Claimant apologized for taking money from literature evangelists and undertook to refund the money. Again, on 9th November 2016, after taking stock he noted a stock loss of over Kshs 100,000/-.
21. The Claimant insisted that there was no shortage forcing another stock-taking exercise to be carried out on 10th November 2016. While preparing weekly reports for sales carried out for the week, the Manager discovered that Kshs 37,000/- had not been accounted for. The Claimant admitted that he had borrowed Kshs 37,000/ from the depot due to financial constraints. He refunded this amount in November 2016. Flowing from the Claimant's improper actions, the witness was forced to pay half of the stock shortage amount.

Claimant's Submissions

22. In his submissions dated 7th September 2023, the Claimant submits that the material contract was dated 23rd March 2016 and hence should have expired on 23rd March 2017. Instead the same was terminated earlier on 22nd December 2016 without notice on the allegation that he was liable for missing book stock at the Kisii Depot.
23. He submits that the Respondent admitted that the Claimant was entitled to terminal benefits broken down as follows: December 2016 salary at Kshs 30,240/-; travel allowance at Kshs 30,000/-; yearly gratuity at Kshs 36,288/-; and yearly bonus at Kshs 30,240/-. Having made deductions from his terminal benefits, Kshs 76,996.73. the counterclaim was unnecessary, therefore.
24. It is submitted that the Respondents had a burden of proving that they had valid reasons to terminate his employment and that fair procedure was followed before the termination. To buttress this point reliance is placed on the case of *Kenfreight E.A. Limited v Benson K. Nguti* Civil Appeal No. 31 of 2015. Seeing as the allegations of theft against the Claimant were not proved, and neither was there a hearing nor any disciplinary proceedings prior to his termination, the Claimant's termination from employment was unfair. He states that the letter dated 30th December 2016 is an afterthought and that the Respondent has not produced any records to show that he worked until 30th December 2016.
25. It is further submitted that the deduction of his terminal dues was unlawful. It had the effect of a unilateral change of the terms and conditions of employment, which amounted to an unfair labour practice. To support this submission, reliance is placed on the cases of *Kenya Plantation and Agricultural Workers Union v James Finlay (K) Limited* and *James Angawa Atande & 10 others v Judicial Service Commission* Petition 32 of 2016.



Respondent's Submissions

26. In their brief submissions dated 29th September 2023, the Respondents submit, that the Claimant was employed under a fixed term contract effective 1st January 2016 to 31st December 2016 per Clause 3 thereof. The date of execution of the contract, namely 23rd March 2016, did not change this fact. The contract therefore lapsed by effluxion of time. It was not terminated as alleged.

Issues for Determination

27. I have reviewed the parties' pleadings, oral and documentary evidence, and their respective submissions. The issues for determination are as follows: -
- a. Whether the Claimant's employment was unfairly terminated.
 - b. Whether the Claimant is entitled to the remedies sought in his Memorandum of Claim.

Whether the Claimant's employment was unfairly terminated

28. It is not in dispute that the Claimant was employed on one year term contracts, the final and material one being that of 2016. Clause 3 thereof reads:

“This contract shall be for a period of 12 months from January 1ST 2016 beginning and ending December 31ST 2013 (sic)”

29. Clause 18 thereof reads:

“Both the employer and the employee are bound by all the articles of this agreement Dated At Nairobi this 1st day of January 2016.”

30. This Court notes that the contract indicates the expiry date as 31ST December 2013, instead of 31ST December 2016. I consider this as a typographical error. A holistic interpretation of the contract and a critical analysis of the pleadings and the evidence adduced by both parties reveal that the correct end date was 31st December 2016. The contract expressly provides for an expiry date of 31st December 2016. In my view, therefore, the execution date of the contract isn't relevant in determining the end date.
31. It is the Claimant's case that he was unfairly terminated from employment without notice; while the Respondents are emphatic that the Claimant's contract came to an end by effluxion of time. I have already held that the Claimant was employed on a fixed-term contract. The Claimant's assertion is unfounded, therefore.
32. It is now established that fixed-term contracts lapse automatically at the appointed time. No Notice of Termination is required to be given to an employee under such a contract, before the lapse date. Where the contract is not being terminated before the appointed date on the grounds set out under Section 41 of the *Employment Act* but is coming to a determination on the appointed date, the requirement of procedural fairness, and therefore the applicability of Section 41 of the Act cannot be relevant. In the case of *Amatsi Water Services Company Limited v Francis Shire Chachi* [2018] eKLR, the Court of Appeal stated that: -

“In the case of *National Water Conservation & Pipeline Corporation v Jayne Kanini Mwanza, Civil Appeal No. 178 of 2014* (UR), this Court stated as follows:



"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 the contract. A court cannot rewrite the terms of a contract freely entered into between the parties...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) case (supra) when it decided as follows:-

"Termination of fixed term contracts has received judicial consideration by the Industrial Court. In *Bernard Wanjohi Muriuki v Kirinyaga Water And Sanitation Company Limited & Another* [2012] eKLR, Rika, J, held as follows:-

"In the view of the Court, there is no obligation on the part of an employer to give reasons to an employee why a fixed-term contract of employment should not be renewed. To require an employer to give reasons why the contract should not be renewed, is the same thing as demanding from an employer to give reasons why, a potential employee should not be employed. The only reason that should be given is that the term has come to an end, and no more. ... Reasons, beyond effluxion of time, are not necessary in termination of fixed-term contracts unless there is a clause in the contract, calling for additional justification for the termination."

33. The Court also stated 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 (Pty) Ltd v CCMA & Others* (2006) 27 ILJ 1041 (LC) at 1044 par 6."

34. The Claimant's claim having been predicated on an alleged unfair termination must fail by reason of the foregoing premises. It is hereby dismissed.

Whether the Claimant should be awarded the terminal dues sought in his Memorandum of Claim.

35. Having held as I have hereinabove that the Claimant's employment was not terminated by the Respondents, but came to an end by effluxion of time, those reliefs sought upon the premise of the alleged unfair termination, cannot be availed to the Claimant as a consequence. The compensatory award under section 49[1][c] and notice pay, are unmerited.

36. Concerning the prayer for travel allowance, I note that the Claimant's contract of employment did not make provision for travel allowance. Although Clause 5 of the contract provided for a consolidated salary of Kshs 30,240/-, which included all allowances, the Claimant's pay slip for June 2016 – September 2016 indicates that he was paid a further commuter allowance of Kshs 2,500/- that month. The Claimant's evidence on the commuter allowance is uncontroverted. However, this Court can only award him this allowance for December 2016. I cannot see any basis for the Claimant's claim for twelve months' commuter allowance.

37. The Respondents admit that the Claimant was entitled to gratuity and yearly bonus. I grant the same. The gratuity shall be computed at 10% of his yearly salary, per Clause 6 of his contract.

38. The *Employment Act* heavily protects the employee's salary and wages, providing for the manner of payment of the same, prohibiting generally deduction of the same by employer but limitedly allowing the deductions in certain situations, and controlling the employer's discretion to pay the same from



whatever point it desired. Section 19(1) (d) allows an employer to deduct from an employee's wages or salary, an amount equal to the amount of any shortage of money arising through the negligence or dishonesty of the employee whose contract of service provides specifically or his being entrusted with the receipt, custody and payment of money, as long as the deductions do not exceed two-thirds of the employee's monthly wages.

39. I have carefully considered the material placed before me on the stock shortfall amounting to Kshs 153, 993.49, and hold that on a balance of probabilities, the Respondent's proved that arose from the Claimant's and his Manager's dishonesty. The Respondents placed before this Court a Stock Taking Report as at 19th January 2016, duly executed by the Claimant showing the stock that was at the depot when he began working in Kisii, thereby controverting his claim that there was no stock taking at the commencement of his work at the station.
40. Despite claiming that he was not aware of the shortfall, I am persuaded that the Claimant was present during the inventory audit of 25th November 2016 and duly appended his signature to the Report produced by the Respondent. The report clearly reads "Difference Excess (Shortage) (153,993.49)". I am not convinced that the Claimant executed the document only for the purposes of confirming that he was present when audit was being undertaken. It was also an acknowledgment of the contents thereof.
41. The Respondents decision apportion liability between the Manager and the Claimant was justified. The deduction of the half of the shortfall amounts, Kshs 76,996.75 from the Claimant's terminal benefit too. However, it is imperative to point out that having opted to deduct the sums as authorized under the provision foretasted, there was not necessity therefore, for the counterclaim. The counterclaim is dismissed.
42. It is trite law that per Section 51 of the Employment Act 2007, the Claimant should be issued with a Certificate of Service.
43. In the upshot, judgment is hereby entered for the Claimant in the following terms: -
 - a. The Claimant be paid the following:
 - i. Salary for December 2016 Kshs 30,240/-
 - ii. Commuter Allowance Dec 2016 Kshs 2,500/-
 - iii. Yearly gratuity
(Kshs 30,240/-x12x10%) Kshs 36,288/-
 - iv. Yearly bonus Kshs 30,240/-
Total Kshs 99,268/-
Less Kshs 76,996.75/-
Total Kshs 22,271.25/-
 - 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 31st DAY OF JULY, 2024.

OCHARO KEBIRA



JUDGE

In the presence of:

No Appearance for the Claimant

Ms. Gitonga for 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

