



**Mweni v Child Welfare Society of Kenya (Appeal E040 of 2024)
[2024] KEELRC 2301 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2301 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E040 OF 2024
M MBARŪ, J
SEPTEMBER 26, 2024**

BETWEEN

ANNAH MWANIA MWENI APPELLANT

AND

CHILD WELFARE SOCIETY OF KENYA RESPONDENT

*(Being an appeal from the judgment of Hon. Gathogo Sogomo in
Mombasa CMELRC E526 of 2023 delivered on 15 March 2024)*

JUDGMENT

1. The appeal arises from the judgment in Mombasa CMELRC E526 of 2023 delivered on 15 March 2024. The appellant seeking the judgment to be set aside and the claims awarded as prayed with costs.
2. The respondent failed to enter the appearance of filing a response before the trial court. Similarly, in these procedures, the respondent has not attended.
3. The appellant's case before the trial court was that on 18 January 2011, she was employed by the respondent as a caregiver on permanent and pensionable terms. In July 2012, the respondent started issuing her one-year contracts which were renewed consistently until 3 July 2023 when the respondent terminated her employment without giving notice of non-renewal of the contract. On this day, the appellant was called by the manager, Norah Okonda who informed her that her employment had been terminated with immediate effect without notice or reasons. The appellant had continued to offer her employment continuously and had a legitimate expectation that her contract would be renewed. Her salary was Ksh.33,396 per month but on 20 July 2023 the appellant was summoned from the Nairobi office and issued a cheque of Ksh.282, 149 meant to compensate her for untaken leave days, pension and salary for June 2023. The appellant claimed the following dues;
 - a. Notice pay Ksh.33,396;



- b. salary for June 2023 Ksh.33,396;
 - c. Pension contributions 200 x 150 months Ksh.30,000;
 - d. House allowance for 66 months at 15% Ksh.751,410;
 - e. Unpaid leave days for 13 years Ksh.434,148;
 - f. 12 months compensation Ksh.400,752
 - g. Costs.
4. As outlined above, the respondent did not enter an appearance or file a response.
5. In the judgment, the learned magistrate dismissed the claim on the basis that the appellant was on a term contract and did not require notice or reasons for termination. The pay slips submitted had a house allowance provided and the wage paid was above the minimum wage under the Wage Orders. The claim for unpaid salary for June 2023 was covered in the cheque issued for the sum of Ksh.282, 149. The claim for untaken leave days was dismissed on the basis that the appellant had not lodged a claim for untaken leave days while in employment and for pension refunds, that the appellant was registered with NSSF and hence this is not due.
6. Aggrieved, the appellant has six (6) grounds that;
- a. The learned magistrate misdirected himself in law and fact in finding that the appellant was fairly terminated from work in the absence of the show cause letter, notice invitation to the disciplinary meeting and being informed to attend the disciplinary meeting with a witness of choice.
 - b. The learned magistrate misdirected himself in law and fact and applied wrong principles of law in finding that the appellant was fairly dismissed from work without taking into account that the appellant had a legitimate expectation that her contract of employment would be renewed as before she was not served with any notice of non-renewal of his contract of employment.
 - c. The learned magistrate misdirected himself in law and fact and misdirected himself in the application of Section 47(5) of the *Employment Act* in shifting the burden of justifying the grounds for the termination of employment or wrongful dismissal to the appellant instead of the respondent.
 - d. The learned magistrate misdirected himself in law and fact in failing to find that the appellant's dismissal from the employment ought to have been both procedurally and substantively fair under sections 43, 44 and 45 of the *Employment Act*.
 - e. The trial magistrate disregarded the overwhelming evidence tendered by the appellant to prove that she was entitled to terminal dues upon unlawful dismissal from work as enshrined in section 49 of the *Employment Act*.
 - f. The learned magistrate disregarded the submissions made by the appellant.
7. To support the appeal, the appellant filed written submissions that the employment of the appellant is not contested. There is the contract of employment and pay slips for March 2022 and a Certificate of Service issued by the respondent. In the case of *Henry Kinyiha Kamami v Star Brilliant (EPZ) K Limited* [2021] eKLR the court held that the documents issued to the employee by the employer as sufficient proof of employment.



8. In this case, the appellant had a legitimate expectation that her term contract would be renewed by the respondent after working diligently from the year 2012 to 2023. On 3 July 2023, the appellant was called by the manager and her employment was terminated with immediate effect. There was no notice, justification or payment of terminal dues. This unilateral act of terminating employment was unfair and unlawful as held in *Akinyi & 4 others v Kenya Medical Research Institute [KEMRI] & another* [2023] eKLR. An employee who has worked for over 10 years without any record has a legitimate expectation that her employment would continue and her contract renewed as was practice.
9. The appellant submitted that the orders sought in the claim should be issued including compensation for unfair termination of employment, notice pay and unpaid wages for June 2023. The appellant had a monthly deduction of pension due at the end of her employment. She was not paid a house allowance of 15% which is due together with untaken leave days which should be awarded with costs.

Determination

10. Together with the Memorandum of Claim, the appellant filed her contract of employment and Certificate of Service. The contract is dated 1st July 2022 and under clause (3) it was to run for one (1) year ending 30 June 2023.
11. There is the letter of employment is dated 1st June 2016 for one year from 1st June 2016 to 30 June 2017. A similar letter dated 1st July 2019 for a term of one year.
12. The Certificate of Service is dated 1st July 2023 indicating employment commenced on 1st July 2012 to 30th June 2023.
13. The learned magistrate analyzed these facts and held that under Section 47(5) of the *Employment Act*, the burden of proving that a dismissal is unfair is on the employee while the burden of justifying the termination of employment is upon the employer. That the appellant failed to present any tangible evidence that she was on permanent and pensionable employment and hence to discharge the burden placed upon her.
14. Whereas an employer is allowed the latitude to issue a fixed-term contract under the provisions of Section 10(3) of the *Employment Act*, under such fixed-term contract, parties are allowed to agree on the terms and conditions regulating such employment. In the case of *Mbatia v Kirinyaga Water & Sanitation Company (KIRIWASCO)* (Employment and Labour Relations Cause 851 of 2022) [2023] KEELRC the court held that for an employee to claim under the doctrine of legitimate expectation and that the fixed term contract would be renewed, the following elements must be demonstrated;
 - a. There must have been a representation or promise in relation to the issue at hand.
 - b. The representation must have been clear, unambiguous and devoid of relevant qualifications.
 - c. The expectation that is premised on the representation must be reasonable.
 - d. The representation must have been made by the decision-maker.
 - e. The decision-maker must have had the competence and legal backing to make the representation.
15. In the case of *Masiga & 15 others v Menengai Farmers Limited* (Civil Appeal E069 of 2021) [2022] KEELRC the court held that;

... the general principle is that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry. It further relied on *Johnstone Luvisia v Allpack*



Industries Limited [2019] eKLR where this court declined to give a declaration of unfair termination where a fixed term contract had come to an end. Therefore, it submitted that, in this case also, the respondent was not unlawfully dismissed but it is his fixed term contract that lapsed.

16. Taking the above into account, in the absence of the respondent filing any response, the material at hand is as provided by the appellant.

17. Under the contracts of employment, clause (4) addressed Notification and Application. Parties agreed that;

Should you be interested in the renewal of your contract, such contract will solely be determined by the availability of funds with your performance, your conduct, your productivity to this organization, and the prevailing human resource needs. While a detailed CWSK's Child Protection Policy document will be availed to you, please note that the Child Welfare Society of Kenya is a non-smoking and non-alcoholic area.

The fixed-term contract would be renewed on these terms;

The appellant should be interested in the renewal of the contract;Renewal would solely be determined by the availability of funds performance, conduct, productivity;Prevailing human resource needs.

18. Whereas the appellant had a fixed term contract with a start and end date, the respondent had a concomitant duty to renew the employment contract upon a show of interest and a determination of availability of funds, performance, conduct and productivity. Largely, based on human resource needs. This gives the background within which the employment contract would be renewed or terminated.

19. In the case of Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party) [2021] eKLR the court held that whereas the employer has a right to terminate a probationary contract, such should be done within the equal protections for other employees under Section 41 of the Employment Act which requires notice be issued before termination of employment. In this case, before renewal or non-renewal of the term contract, parties agreed to conditions under clause (4) thereof.

20. The respondent has not attended to address the court on these terms and conditions. There is nothing to demonstrate adherence to these conditions.

21. On the claim before the trial court, to require the appellant to go beyond the claim to demonstrate the reasons leading to the non-renewal of the contract under Section 47(5) of the Employment Act was to negate the principles under the law and place an unfair burden on her. Upon the claim, the respondent was absent to demonstrate the procedures gone into before the non-renewal of the contract, there was nothing to justify termination and non-renewal of the contract. The parties had agreed on the modalities to regulate the renewal of the contract hence the appellant had a legitimate expectation that before renewal or non-renewal, an exercise would be gone into by the respondent in establishing the human resources needs, her performance, conduct and availability.

22. In the absence of any material evidence from the respondent to address clause (4) of the contract ending on 30th June 2023, the failure to address the non-renewal of the contract resulted in unfair termination of employment.

The claim for notice pay and compensation is justified.

23. The appellant was earning a wage of Ksh.33, 396 which is due in notice pay.



24. On the finding there was unfair termination of employment, the court takes into account that the appellant was paid the dues that the respondent found justified immediately. This places the respondent in good standing. Compensation is hereby awarded at 3 months all at Ksh.100, 188.
25. On the claim for wage due in June 2023, indeed, in the terminal dues paid through cheque on 20th July 2023, the appellant acknowledged that this included the wage due.
26. On the claim for pension dues deducted at Ksh.200 per month, the appellant submitted the payment statement. The deduction of Ksh.200 relates to NSSF dues. This amount is not due to the employee but to the statutory body.
27. On the claim for house allowance, the payment statement allocated a basic wage of Ksh.33, 396.
28. The claimant was employed as a caregiver. This is not a regulated position. The appellant does not state to have any given qualifications to be placed under any specific Wage Orders. The position of caregiver placed vis-a-vis the General Wage Orders applicable at the time, the wage paid is over and above the minimum as held by the learned magistrate.
29. On unpaid leave, the appellant admitted that the cheque issued to her comprised the untaken leave days. However, there is no breakdown of how much annual leave pay was allocated in the general sum of Ksh.282, 149. The employer must submit work records in terms of Section 10(6) and (7) of the Employment Act. In the absence of such records, in strict adherence to the provisions of Section 28(4) of the Employment Act, the appellant can only claim accrued leave days going back to 18 months. This is 33 days based on the basic wage of Ksh.33, 396 total due is Ksh.36, 735.60.

On these findings, the claim for costs is hereby justified.

30. Accordingly, judgment in Mombasa CMELRC E0526 of 2023 is hereby set aside and judgment entered for the appellant in the following terms;
 - a. Employment terminated unfairly;
 - b. Compensation Ksh.100,188;
 - c. Notice pay Ksh.33,396;
 - d. Leave pay Ksh.36,735.60;
 - e. Costs of the appeal and proceedings before the trial court.

DELIVERED IN OPEN COURT AT MOMBASA THIS 26 DAY OF SEPTEMBER 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

