



**Khetia Drapers Ltd v Awour (Appeal E010 of 2023)
[2024] KEELRC 2562 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2562 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E010 OF 2023
JK GAKERI, J
OCTOBER 24, 2024**

BETWEEN

KHETIA DRAPERS LTD APPELLANT

AND

JOSEPH OGWELLA AWOUR RESPONDENT

(Appeal Against the decision of Hon. Ezekiel A. Obina, Principal Magistrate on 17th January, 2023 in CMC ELRC Case No. E52 of 2021.)

JUDGMENT

1. The Appellant, Khetia Drapers Limited has filed this appeal being aggrieved by the decision of Hon. Ezekiel A. Obina, Principal Magistrate on 17th January, 2023 in CMC ELRC Case No. E52 of 2021.
2. The trial Court awarded the Claimant the sum of Kshs.120,747.00 together with costs of the suit and interest till payment in full.
3. By way of background, the Claimant sued the Respondent for various reliefs vide a memorandum of claim filed on 19th March, 2021 alleging that he joined the Respondent on 3rd March, 2016 and served diligently until 16th April, 2020 when he was sent on compulsory leave by word of mouth by the foreman and the Respondent’s Human Resource Manager on inquiry implored him to proceed with the leave without explanation and when he resumed on 8th May, 2020, 12th May, 2020 and 17th May, 2020 he was told the same thing and his salary was withheld.
4. The Claimant alleged that he was constructively dismissed.
5. The Respondent’s case was that the Claimant served on probation for 3 months and was subsequently engaged on a one (1) year contract from 14/3/2017 to 14/3/2018 which was renewed for one (1) year from 21/3/2018 to 21/3/2020 and later from 28/3/2019 to 28/3/200 and for 3 months from 4/4/2020 to 4/7/2020 due to the COVID-19 pandemic and was not renewed.

6. By a judgment delivered on 17th January, 2023, the trial Magistrate awarded the Claimant Kshs.68,064/00 as underpayment and 3 months salary compensation and costs.
7. This is the decision that is the subject matter of the instant appeal.
8. The Appellant assails the trial Court on the premises that it erred in law and fact for awarding compensation yet the Claimant was serving under a fixed term contract, that the Appellant breached the Claimant's right of legitimate expectation.
9. That the trial Court failed to distinguish the facts in *Linda Ndenengo V Open Society Institute No. 1443/2016*.
10. That the Court erred in finding that the Claimant was underpaid as a mechanic yet there was no evidence that he was one and the findings of the Court were against the evidence before it.
11. The Appellant is on the whole challenging the findings of the trial Court vis-a-vis the evidence adduced before it.

Appellant's Submissions

12. On legitimate expectation Counsel submitted that the last contract entered into by the Claimant/ Respondent was non-renewable and the Claimant had no legitimate expectation of its renewal.
13. Reliance was made on the Court of Appeal decision in *Transparency International Kenya V Teresa Omondi [2023] KECA 174 KLR* and *Registered Trustee of the Presbyterian Church of East Africa & Another V Ruth Gathoni Ngotho [2017] eKLR* to urge that a fixed term contract carries no rights, obligations or expectations beyond expiry.
14. On failure to distinguish the facts in *Linda Ndenengo V Open Society (Supra)*, Counsel admitted that in that case the employer had implied its intentions to renew the contract but in the instant case no negotiations had taken place and the Appellant's created no impression that the employment would be renewed.
15. Counsel urged that there was no demonstrable expectation of renewal of the Claimant's fixed term contract.
16. Concerning underpayment, Counsel submitted that there was no evidence to prove that the Respondent was a mechanic and copies of the payroll on record show that he was a General Worker.

Respondent's Submissions

17. On legitimate expectation, Counsel submitted that owing to their previous dealings, the Claimant/ Respondent legitimately expected renewal of the contract. According to Counsel, the repeated renewal created a valid anticipation of renewal and cites *Teresa Carlo Omondi V Transparency International – Kenya [2017] eKLR* to reinforce the submission.
18. Concerning constructive dismissal, Counsel submitted that sending the Respondent on unpaid leave for an undefined period amounted to constructive dismissal as the Appellant had breached the employment contract.
19. Reliance was made on the decision in *Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga [2015] eKLR* where the Court of Appeal explained the concept of constructive dismissal and the guiding principles, to urge that in the circumstances of the case the Respondent was constructively dismissed.

20. As regards to reliefs sought, Counsel submitted that the Respondent was entitled to compensation, Kshs.210,732.00, withheld salary Kshs.210,732.00 and underpayment Kshs.91,000.00, a total of Kshs.530,026.00 with costs.

Analysis

21. The pith and substance of the Appellant's case is that the trial Court's finding and awards were not supported by the evidence adduced before it.
22. This being a first appeal, the Court is enjoined to reconsider and re-evaluate the evidence on record and arrive at its own conclusions bearing in mind that it neither saw nor heard the witnesses and thus make an allowance for the same as held in legions of decisions including *Selle & Another V Associated Motor Boat Co. Ltd* [1968] EA 123.
23. It is common ground that the Respondent was an employee of the Respondent from 2016 initially on probation and subsequently on fixed term contracts until 4th July, 2020 when the last contract lapsed.
24. As to the capacity in which the Respondent was employed, while the Respondent alleged and averred that he was employed as a mechanic. The Respondent denied the allegation.
25. The trial Court on the other hand made no express finding that the Respondent was employed as a mechanic, but found that the Respondent had been under-paid.
26. On cross-examination, the Respondent denied having signed a contract but when confronted with a copy he changed his evidence contending that he did not understand what he was signing and testified that the written contract stated that he was a General Worker. He admitted having applied for renewal of his contract of employment and signed the renewals.
27. In his hand written application letter dated 4th June, 2016 the Respondent applied for a job vacancy of a mechanic and his competences were in speaking English and Kiswahili and no other expertise or experience was provided.
28. Secondly, all the written contracts on record are explicit that the Respondent was employed as a General Worker, a fact he did not contest in his applications for renewal or refuse to sign the contracts or serve under them.
29. Finally, copies of payslips on record reveal that he was serving the Appellant as a General Worker not as a mechanic.
30. Flowing from the foregoing, it is clear that the Respondent was employed and served the Appellant as a General Worker as opposed to a mechanic having accepted the Appellant's offers from 2016 to 2020.
31. As to how the parties separated, while the Claimant alleged that he was constructively dismissed, the Appellant maintained that the Respondent's fixed term contract lapsed and was not renewed.
32. The learned trial Magistrate found that the Respondents contract of employment lapsed and it was not renewed and there was no wrongful dismissal or termination.
33. On cross-examination, the Respondent admitted that after the COVID-19 pandemic hit the Country in early 2020, he applied for and was accorded a 3 months contract but it was not renewed and he left on 24th June, 2020, 10 days before expiry of the contract.

34. Mr. Ernest Obunga, RWI testified that the Respondent's last contract was not renewed and he worked up to June 2020, but could not tell the date, but admitted that the contract was due to expire on 4th July, 2020.
35. That the witness testified that he did not wish the contract renewed and was last paid in May 2020 and the days worked in June 2020 were not paid for.
36. From the evidence, it is unclear as to when the Respondent left employment and how.
37. However, the Respondent's testimony that he was asked to proceed on compulsory leave and was never recalled despite his reporting back at least 3 times was uncontroverted.
38. Having taken leave from March 2020 to April 2020, the Respondent could not have been on leave in May and June, otherwise than with the Appellant's consent. At any rate, it did not deny the Respondent's account on compulsory leave.
39. From the evidence on record, it is discernible that the Appellant separated from the Respondent without informing him that owing to the challenges occasioned by the COVID-19 pandemic or otherwise, it did not require his services, some form of camouflaged redundancy as not even the Appellant's Human Resource Manager Mr. Ernest Obunga could tell when the Respondent left employment and why before his contract lapsed, which is not in contest.
40. He could not explain why the Respondent was not paid for the services rendered in June 2020.
41. From the evidence on record it is clear that the Appellant terminated the Respondents employment under the disguise of a redundancy and thus terminated his employment unfairly as the attendant legal formalities were not complied with.
42. As to whether the Respondent was constructively dismissed from employment the trial Court found that there was none, presumably because it is actualized when an employee leaves the place of work owing to the employer's conduct which constituted a repudiatory breach of the contract of employment as aptly captured by Lord Denning in *Western Excavating ECC Ltd V Sharp* [1978] 2 WLR 344 and explained in detail by the Court of Appeal in *Coca Cola East & Central Africa V Maria Kagai Ligaga* [2015] eKLR.
43. The fact that the Respondent kept on reporting to the workplace in May and June until 24th June, 2020 would appear to suggest that he had not given up on his employment and the Appellant shoulders the blame.
44. The Claimant neither resigned nor indicate that he would not report to work when recalled, something he waited for until his contract of employment lapsed.
45. The Courts is in agreement with the trial Court that the Respondent was not constructively dismissed by the Appellant.
46. In the Court's view, the Appellant laid off the Respondent in a disguised redundancy and now seeks to convince the Court that the Respondent's employment contract ended by reason of effluxion of time, yet RWI could not explain when the Respondent left and why he was no paid until 4th July, 2020.
47. It requires no emphasis that a redundancy conducted otherwise than in accordance with the provisions of Section 40(1) and 45 of the *Employment Act* transitions to an unfair termination of employment.
48. As to whether the Respondent had a valid and legitimate expectation that the contract of employment would be renewed, the Court of Appeal decision in *Transparency International – Kenya V Teresa*

Carlo Omondi (Supra), cited by the Appellant's Counsel is determinative in that although previously the Respondent applied for and obtained renewal of his employment contract in the case of the last contract he did not apply for renewal, but more significantly, the contract of employment had no renewal clause and the Respondent adduced no evidence to show that the Appellant had made an express or implied promise to renew the employment contract or its contract could be construed as such.

49. In Transparency International – Kenya V Teresa Omondi (Supra) the Court of Appeal expressed itself as follows;

“...fixed term contracts carry no expectation of renewal. It cannot be said that the termination was unfair/unlawful if it was at expiry of the contract.

Fixed term contracts have determinable expiry dates.

The Claimant knew of the termination.

It cannot be said that the Claimant was wrongfully dismissed....

The Respondent was under a fixed term contract with a definite commencement date and termination date. There was no ambiguity created to create an expectation of contract renewal by the Appellant's issuance of a fixed term contract. The contract terminated automatically when the termination date arrived...

Concomitantly, the scenario would have been different if there was an indication by act or omission from the Appellant to indicate renewal was forthcoming to what the Respondent's/Appellant that her contract would be renewed and hence rely on the doctrine of legitimate expectation.

In the instant case there was no promise of any sort that was given to the Respondent to justify a claim based on legitimate expectation”.

50. The foregoing sentiments apply on all fours to the circumstances of the instant case for the simple reason that the Appellant neither made a promise nor by conduct suggest that the Respondent's employment contract would be renewed.
51. To the question whether the Respondent had a valid and legitimate expectation that his contract of employment would be renewed and contrary to the findings of the learned trial Magistrate, the Court is satisfied that there was none.
52. Flowing from the foregoing and guided by the sentiments of the Court in Mbogo V Shah & Another [1968] EA and in United India Insurance Co. Ltd V East Africa Underwriters (Kenya) Ltd [1985] EA, where the Court of Appeal explained the circumstances in which it could interfere with the exercise of discretion by the trial Court, the Court is satisfied that in the instant case, the Appellant has made a case for interference with the decision of the learned trial Magistrate as follows;
1. Having found that the Respondent's employment was unfairly terminated by the Appellant after having served for about 7 years with no recorded misconduct or warning letter but neither appealed the termination nor indicate his wish to remain in employment after the contract lapsed, the Court is satisfied that the equivalent of 3 months gross salary is fair, Kshs.44,333.46.
 2. Having found that the Respondent failed to prove that he was employed by the Appellant as a mechanic as opposed to a General Worker as his employment contract and pay slips show, the sum of Kshs.68,064 awarded by the trial Court as underpayment is set aside.

3. Having found that the Respondent failed to demonstrate that he had a valid and legitimate expectation that his employment contract would be renewed after expiry on 4th July, 2020, the three (3) months salary awarded as compensation is hereby set aside.
4. Having found that the Respondent was not paid for the months of June, 2020 having been in employment up to 24th June, 2020, the Respondent is awarded salary for the 24 days worked in June 2020 Kshs.11,822.26.
5. Having found that the Respondent's employment was unfairly terminated the Respondent is awarded one (1) month's salary in lieu of notice Kshs.14,777.82.
6. Consequently, the Judgment of the trial Court is set aside and in its place, the Appellant shall pay the Respondent the sum of Kshs.70,933.54.
7. Parties shall bear their own costs.
8. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 24TH DAY OF OCTOBER, 2024

DR. JACOB GAKERI

JUDGE

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 *Civil 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.

DR. JACOB GAKERI

JUDGE