



**Kinyua v Smollan Kenya Limited (Cause E172 of 2021)  
[2024] KEELRC 2510 (KLR) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2510 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E172 OF 2021  
K OCHARO, J  
OCTOBER 18, 2024**

**BETWEEN**

**ROBERT KINYUA ..... CLAIMANT**

**AND**

**SMOLLAN KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. Via the Statement of Claim dated 10<sup>th</sup> February 2021 the Claimant prayed for judgment against the Respondent for;
  - a) Payment of 1 month's salary in lieu of notice amounting to Kshs. 32,234/=.
  - b) Payment of gratuity for 3 years at the rate of 21 days for each year worked amounting to Kshs. 67,691.4/=.
  - c) Payment of general damages for unfair and unlawful non-renewal of employment contract due to his disability amounting to the equivalent of 12 month's salary amounting to Kshs. 386,808/=.
  - d) Exemplary damages for discrimination on account of disability.
  - e) Payment of damages for violation of the claimant's constitutional rights.
  - f) General damages for pain and suffering.
  - g) Future medical expenses.
  - h) Payment of the claimant's medical expenses and fixing metal plate of Kshs.175,000/=
  - i) Compensation of group life insurance cover.
  - j) Cost of the suit.



- k) Interest on (a), (b), (c), (d) and (e) hereinabove.
2. The Respondent replied to the Statement of Claim via the Respondent's Reply to Statement of Claim dated 15<sup>th</sup> November 2022, where the Respondent stated that the Claimant was its employee, engaged as a field sales representative. It admitted that the Claimant was involved in a road accident while on duty but it denies that the Claimant sustained permanent disability. The Respondent also stated that the Claimant's contract was not renewed due to a reduction in business and not due to his disability.

### **Claimant's case**

3. At the hearing, the Claimant adopted his witness statement herein as his evidence in chief and tendered the documents he filed in this matter as his documentary evidence.
4. The Claimant in his witness statement dated 10<sup>th</sup> February 2021, stated that he was employed by the Respondent as a field sales representative in the year 2017 and his contract was renewable yearly. On 16<sup>th</sup> February 2018 he got involved in a road accident while on duty and sustained a permanent disability. His employment was terminated in the year 2020. The termination was unlawful, unfair and unconstitutional as it was due to his disability and was not paid his dues.
5. The Claimant contends that he suffered the following injuries:Compound fractures of the right fibula and tibiaOpen fracture right leg, tibia and fibula, hip.
6. He stated further that up to date he is still struggling with the effects and trauma of the injuries and he is yet to go for corrective surgery and the removal of the k-nails once fully healed. Further, the Respondent refused/failed and or neglected to meet his medical bills.
7. Additionally, the Claimant asserted that the Respondent's actions violated his rights as enshrined in the following Articles of *the Constitution*; Article 27(4)(5), 28, 29(d) and (f), 41, 47, and 50.
8. The Claimant further stated that he earned a salary of Kshs. 28,234 inclusive of house allowance and transport. Further, a monthly incentive of Kshs. 4,000 based on the achievement of his set parameters.
9. The Claimant also stated that it was the Respondent's policy that an employee is entitled to a gratuity of 21 days' salary for every year worked.
10. Cross-examined by Counsel for the Respondent, the Claimant testified that the accident occurred in 2018. After the accident, he resumed duty in September 2018. He continued serving the Respondent until the termination of his employment.
11. He further stated that after the accident, the Respondent issued him with forms to fill out for the Workman Injury Benefits claim.
12. Through its letter dated 12<sup>th</sup> August 2020, the Respondent's insurer indicated that according to the Doctor's report, he didn't suffer a permanent disability, as a result, no compensation was available for him.
13. He further stated that according to his contract of employment, the Respondent provided him with a medical cover.
14. He further testified that through its letter dated 5<sup>th</sup> May 2020, the Respondent informed the sales team that due to the impact of COVID-19, it was not able to sustain some of the functions of the Sales Team.
15. Through the letter dated 12<sup>th</sup> May 2020, the Respondent sent him on annual leave, due to the COVID-19 situation. He signed a consent to proceed on leave.



16. The Claimant further testified that through its letter dated 27<sup>th</sup> July 2020, the Respondent informed him that it was not going to extend his contract.
17. Cross-examined on the relief sought of gratuity, he answered that his contract of employment didn't provide for gratuity.
18. The Claimant testified that, the initial assessment on his injuries reflected a 10% disability. However, the assessment by the Director of Occupation and Health services, indicated that he did suffer any disability and therefore he wasn't entitled to compensation. He has challenged this assessment under this matter.
19. The bank statement tendered as evidence in this matter by him, shows that the salary for January was paid into his account, in the sum of KShs. 27,000.
20. He alleged that the Respondent coerced him into signing documents when he was unwell. He had to sign them for the sake of retaining his employment.
21. In his evidence under re-examination, the Claimant stated that the letter from the Respondent's insurer is erroneous. As at the time of testifying he still had plates on his bones. He couldn't run or do heavy work. The Doctor who attended to him first, was able to note a 10% disability. It is surprising that the Respondent's insurer's Doctor, concluded that he suffered zero disability.
22. The contract of 15<sup>th</sup> July 2019, provided for termination by notice or payment in lieu.
23. He contended that he only signed leave forms for the leave taken for the periods 29<sup>th</sup> January -4<sup>th</sup> February 2020 and 6<sup>th</sup> May -30<sup>th</sup> May 2020. He never took any annual leave.

### **Respondent's case**

SUBDIVISION - The Respondent's witness Caroline Lusuli stated that;

24. The Respondent engaged the Claimant in the position of Field Sales Representative. The Claimant was first employed on 21st August 2017 under a 7-month signed contract which ended on 4th April 2018. He was later issued a 3-month signed contract that ended on 30th June 2018. Thereafter, the Claimant signed yearly contracts with the Respondent running from 1st July, 2018 to 30th June, 2019 and 1st July, 2019 to 30th June, 2020.
25. As of May 2020, his monthly salary was Kshs. 28,234.00/= inclusive of transport and house allowance. Additionally, the Claimant was also entitled to get a monthly incentive of up to Kshs 3,000/= based on the achievement of his set parameters at the end of the month.
26. The Claimant was involved in an accident on or about the 16th February 2018 while on duty. The Respondent sent to the Claimant the necessary WIBA claim forms for him to fill out and to be compensated by insurance based on disability.
27. However, upon assessment by a doctor appointed by the DOSH (Directorate Officer Safety and Health), the Claimant was found not to have any permanent disability and on this basis, the Claimant was only awarded payment of his salary for the months he was on sick leave. Additionally, the Respondent met the Claimant's medical bills as he was under the Respondent's medical cover.
28. The Respondent's contract with the Claimant lawfully came to an end on 30th June, 2020, as per the contract dated 15th July, 2019 signed between the Claimant and the Respondent. The Respondent was unable to renew this contract due to a reduction in business occasioned by the COVID-19 pandemic.



29. The Claimant utilized his leave days before the completion of his contract. He was not entitled to any gratuity by the Respondent as per the contract. Furthermore, the Respondent remitted NSSF payments on behalf of the Claimant.
30. Cross-examined by Counsel for the Claimant, the witness testified that the Respondent offers brand services for its clients. In 2018, entered into a contract with SC Johnsons. It recruited sales staff for them.
31. The witness testified that the in 2018, the Claimant got involved in an accident whilst in the course of his employment. The Hospital discharge summary dated 23. 02. 2018 shows that he had tibia plating. His medical bills were either paid by NHIF or under his medical cover.
32. The letter dated 27<sup>th</sup> July 2020 was so erroneously dated in the stead of 27<sup>th</sup> June 2020. However, a keen look at the entire content of the letter, shows the intention of the letter.
33. Logically looking at it, the letter wasn't even necessary. The date for lapse of the contract was already appointed. There wasn't any need for a termination notice.
34. The Claimant wasn't paid a salary for June 2020, because in that month he didn't work. For the month of May, he was paid net, KShs. 14, 290.
35. The Claimant never raised any claim that his medical cover wasn't assisting him. To her knowledge, the cover took care of his bills when he was in Hospital. The Claimant didn't at any time bring it to the attention of the Respondent that he had purchased drugs out of his own account or claim a reimbursement on any such expenditure.
36. The Claimant utilized all his leave days. If he hadn't, he couldn't have executed the document dated 5<sup>th</sup> May 2020.

### **Respondent's submissions**

37. Via the submissions dated 4<sup>th</sup> December, 2023, the Respondent raised the following issues for determination;
  1. Whether the Claimant was unlawfully terminated.
  2. Whether the Claimant is entitled to the reliefs sought.
  3. Who should bear costs of this suit.Issue 1: Whether the Claimant was Unlawfully Terminated for Disability
38. The Respondent submitted that the Respondent renewed the Claimant's contract for the year 2019-2020, ten (10) months after the said accident, after he had recovered from his injuries. Consequently, the Claimant worked for the Respondent for the whole year of 2019- June 2020. Ms. Lusuli testified that had the Claimant been terminated on account of his accident or alleged disability, the Respondent could not have renewed his contract through 2019.
39. Further, Ms. Lusuli also gave evidence that the Respondent's contract with the Claimant lawfully came to an end on 30th June 2020 as per the contract dated 15<sup>th</sup> July, 2019. The Respondent was unable to renew the Claimants contract because of the hardships and reduction in business occasioned by the COVID 19 pandemic.



40. The Respondent stated that in the Respondent's further list of documents dated 30th January 2023 is an email relating to the SC J dated Tuesday, 5th May 2020. It reads as follows;

“Further to our conversation on the drop of sales due to Covid-19, we as SCJ are unable to sustain some functions of the sales team with immediate changes.”

41. The contract between the Claimant and the Respondent dated 15th July 2019 came to an end on 10th June 2020. Consequently, the Respondent was under no obligation to renew the Claimant's contract and more so because of financial hardship as opposed to discrimination. To bolster this, the Respondent relied on the case of *Margaret A. Ochieng v Nairobi Water Conservation and Pipeline Corporation* [2014] eKLR.

## **Issue 2: Whether the Claimant is entitled to the reliefs sought.**

42. The Respondent submitted that the Claimant having been on a fixed-term contract with an ascertained date of expiry, is not entitled to notice of termination. To buttress this, the Respondent relied on the case of *Stephen M. Kitheka v Kevita International Limited* [2018] eKLR.

43. On the issue of gratuity, the Respondent relied on Section 35(6) of the *Employment Act* 2007 which states that this is not payable for employees who are members of NSSF for which the Claimant was. Further, the Claimant's contract did not provide for gratuity.

44. The Respondent further submitted that the Claimant's prayers (c) and (d) for payment of general damages for unfair and unlawful non-renewal and exemplary damages for discrimination both on account of disability lack merit as his contract was a fixed term contract which lawfully came to an end on 10th June 2020. The Claimant failed to prove the issue of discrimination based on disability and did not avail a doctor to prove the issue of disability.

45. Conversely, the Respondent provided a letter from the insurance doctor confirming that the Claimant was assessed and found not to have any disability. The Respondent relied on the case of *Joseph Mutune Makau V Directline Assurance Company Limited* [2022] eKLR.

46. The Respondent further submitted that the Claimant did not provide any evidence to prove that his constitutional rights were violated and is therefore not entitled to any payment for this.

47. For prayers (f) and (g), general damages for pain and suffering, and future medical expenses, the Respondent submitted that these claims should be brought against the Driver who caused the accident that the Claimant was involved in. Further, the Claimant did not provide any evidence to support the issue of future medical expenses.

48. For the claim of payment of the claimant's medical expenses and fixing metal plates, the Respondent submitted that the Claimant produced a document (Kenol Hospital) but there was no receipt produced to support this claim.

49. For compensation of group life insurance cover. The Respondent submitted that its witness Ms. Lusuli testified and maintained her stand during cross-examination that the medical cover catered for all the Claimant's expenses during his recovery. During cross-examination, the Claimant confirmed that he never wrote any letter complaining or asking that the Respondent has failed to take care of his medical expenses.

50. Further, in cross-examination, Ms Lusuli referred the Honourable Court to the last page of the document (Kenol Hospital; Final Invoice) that shows that NHIF paid Kshs. 80,000/= and the rest was catered for by the medical cover.



51. The Respondent also noted that the Claimant produced receipts of Kshs. 3,200/=, 1,100/=, 2,400/= and 2,400/= to which its witness noted that these receipts had never been produced before and that she only saw them in Court. Additionally, the receipt for Kshs. 175,000/= was never produced to support this claim.
52. Lastly, regarding the costs of the suit, the Respondent submitted that the Claimant has failed to prove his claim and the Respondent should be awarded costs of the suit.

### **Issues for determination**

1. Whether the termination of the employment of the Claimant was wrongful, unfair, and unlawful in the circumstances.
2. Is the claimant entitled to the relief sought?

### **Whether the termination of the employment of the Claimant was unfair, and unlawful in the circumstances.**

53. There isn't a dispute that the Claimant last served the Respondent under that fixed-term contract of employment dated 15<sup>th</sup> July 2019. Under Clause 2, it provides;

“Period of Contract

You will be required to commence employment with effect from 1<sup>st</sup> July 2019. You will be contracted for a period of 12 months, from that date. Therefore, the Contract will finish on 30<sup>th</sup> June 2020.”

No doubt, the lifetime of the contract was unambiguously spelt out. There was a lapse date expressly appointed.

54. The Claimant doesn't deny that the contract was terminated at its appointed time. It is and has been this Court's position that where a fixed term contract has come to an end by effluxion of time, an employee can only assail the termination by way of a suit, based on breach of legitimate expectation, which he or she must establish by establishing those specific conditions that the law has recognised as demonstratable before any claim based on the doctrine of legitimate expectation succeeds.
55. The Claimant did not assert that he had a legitimate expectation that the contract could be renewed. He didn't put forth any evidence from which it can be deduced that there was the basis for an expectation that the contract could be extended after expiry and that there was proof of the required conditions.
56. The Claimant asserted that the contract was not extended because of his disability, and therefore as a result of being discriminated against. I have keenly considered the material placed before this Court, I am unconvinced that the Claimant other than making general allegations, indeed did prove that the termination was influenced by his “disability”. In my view, it doesn't make sense that an employer who had extended his contract almost one and half years after the accident, for a further year, failed to re-extend the contract discriminatorily on account of his alleged disability.
57. Further, in a case where an employee is alleging discrimination on account of disability, the vital point that he must first prove is that he had a disability before he gets to demonstrate that he was discriminated against on account of the disability. I have carefully considered the material placed before this Court, and do not hesitate to conclude that the evidence by the Claimant on this point was wanting.



58. In the upshot, I conclude that the Claimant's employment came to an end by effluxion of time. It wasn't terminated by the Respondent on account of his disability as he alleged. Further, his assertion that he was discriminated against wasn't proven.

**Is the Claimant entitled to the reliefs Sought?**

59. The Claimant sought one month's salary in lieu of notice. Having found that he was on a fixed-term contract and that the contract came to an end by effluxion of time, the relief sought under this head cannot be available for him. The law requires payment of salary in lieu of notice in situations where a contract of employment was terminable notice, but such notice wasn't issued. In my view, unless the employer contemplates terminating an employee's employment before the appointed date of lapse, there can be no basis for requiring the employer to issue a termination notice. See *Stephen M. Kitheka v Kevita International Limited* [2018] eKLR.

60. He further claimed gratuity at the rate of 21 days' salary for each year worked. I carefully considered the Claimant's contract of employment presented before this Court, it didn't provide for gratuity. Gratuity is a contractual benefit, not a statutory benefit. In the absence of any provision for gratuity in the contract, I find no justification to award the relief as sought.

61. The compensatory relief contemplated under section 49[1][c] of the *Employment Act* is awardable under a proven claim for unfair termination of employment or wrongful dismissal. Having found as I have hereinabove that the Respondent didn't terminate the Claimant's employment unfairly or unlawfully as alleged, I decline to award the compensation sought.

62. The Claimant further sought for Exemplary damages for discrimination on account of disability. Having found that he didn't prove that he had a disability and that the termination of his employment was on account of disability, and therefore a discriminatory act by the Respondent, I decline to award the remedy.

63. He claimed for future medical expenses. This Court declines this claim on two grounds; there was no evidence placed before the court to show that he could be compelled to go for further medical attention for the alleged injuries sustained in the accident; and a claim for future medical expenses is in character a special damage claim, which must be specifically pleaded and proved. The Claimant didn't plead and prove this claim as such.

64. I find the prayer for Compensation for group life insurance cover without merit. The group insurance cover is in my view a contractual benefit. It can only be available to an employee where the contract between him and his or her employer speaks to it, and during the subsistence of the contract, not unless the contract provides otherwise. The contract between the Claimant and the Respondent lapsed, resulting in the end of the relationship interse. I see no basis on which I can grant this relief.

65. The Claim for Kenya shillings 175, 000 for the alleged incurred medical expenses by the Claimant, in my view, should be declined and I hereby decline the same, on the ground that the same being a special damage claim sought, was not specifically proved as required by law. An invoice raised, cannot be equated to a receipt issued in acknowledgement of receipt of paid sums[s]. Further, the documents presented before this Court, buttress the Respondent's position, that the Claimant's medical bill was settled by the Respondent's Insurers or NSSF.

66. In the upshot, I find no merit in the Claimant's case. It is hereby dismissed, with no order as to costs.

**READ, SIGNED AND DELIVERED THIS 18TH DAY OF OCTOBER, 2024.**

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**OCHARO KEBIRA**

**JUDGE**

In the presence of;

Miss Kimotho for the Claimant

Miss Mwangi For the 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

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**OCHARO KEBIRA**

**JUDGE**

**10ELRC CAUSE NO. E172 OF 2021 - JUDGMENT**

