



Cyprian v Kenya Forestry Research Institute (Employment and Labour Relations Cause E269 of 2021) [2024] KEELRC 2453 (KLR) (4 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2453 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E269 OF 2021**

AN MWAURE, J

OCTOBER 4, 2024

BETWEEN

HUMPHREY GAYA CYPRIAN CLAIMANT

AND

KENYA FORESTRY RESEARCH INSTITUTE RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Memorandum of Claim dated March 31, 2021.

Claimant's Case

2. The Claimant avers that he was employed by the Respondent as a Project Officer, Water Towers Project on a 2-year renewable contract dated 17/10/2016 effective from 24/10/2016. His gross monthly salary was Kshs 102,900.
3. The Claimant avers that he worked diligently without any record of indiscipline until 26/6/2018 when the Respondent suspended his contract effective 1/8/2018 on grounds of partial suspension of the Water Towers Programme activities.
4. The Claimant avers that his contract remained suspended until 7/1/2021 when the Respondent sent him an email asking him to clear from work. Within the period of suspension and receipt of the email, the Respondent kept promising it would lift the suspension.
5. The Claimant avers that the suspension of his contract was unlawful and unfair as it did not provide for suspension and therefore the Respondent cannot purport to suspend him.



6. The Claimant avers that his contract was renewed by operation of law on 24/10/2018 and he was not privy to any engagement between the Respondent and the European Union regarding the suspension of his contract.
7. It's the Claimant's case that he stayed out of work for 27 months between suspension of his contract and receipt of the email; he demands for payment of his salary for this period as he had legitimate expectation the Respondent will lift the unlawful suspension in good time.
8. The Claimant avers that during the period of his employment he was neither allowed to proceed on leave nor paid in lieu thereof. He was entitled to 30 working days leave within each period of 12 months which he now claims.
9. The Claimant avers that he was entitled to gratuity at the rate of 31% of his basic salary earned through the period of his contract which he was not paid.
10. The Claimant avers that he was involved in the preparation of status reports for the 3rd year of the project he was employed to manage which preparation took 15 days, however, he was not paid his travel and accommodation allowance which he claims. And neither was he issued a certificate of service.

Respondent's Case

11. In opposition to the claim, the Respondent filed its Amended Statement of Defence dated 28th September 2023.
12. The Respondent avers that the Claimant was engaged on a 2-year contract from 26/10/2016 to 28/10/2018. He was appointed as the Project Manager, Water Towers Project at a fixed salary of Kshs 69,590 per month, house allowance of Kshs 25,000, commuter allowance of Kshs 6,000 and medical allowance of Kshs 1,500.
13. It's the Respondent's case that the Claimant worked for the entire contract period and was paid all his dues until 23/10/2018 including gratuity of Kshs 321,018 paid on 6/9/2018.
14. The Respondent avers that the contract was not renewed as the Kenya Water Towers Project was suspended vide a letter dated 17/1/2018 by the Head of the European Union Delegation to Kenya addressed to the Cabinet Secretary, Ministry of Environment and Natural Resources and copied to the Respondent's Director.
15. The Respondent avers that the project was closed vide a letter dated 18/11/2020 and by virtue of suspension and closure of the project, the Claimant's services and others contracted to facilitate the project were not tenable.

Evidence in Court

16. The Claimant (CW1) adopted his witness statement dated 31/8/2021 and documents annexed therein as his evidence in chief and exhibits 1-8.
17. During cross examination, CW1 testified that his contract was to end on 22/10/2018, however it was not renewed or terminated.
18. CW1 testified that he was paid gratuity.
19. CW1 testified that he was not paid for the entire contract period as he was terminated before it ended. Neither did he go for any leave as the engagement did not allow for him to go on leave.



20. CW1 testified that his contract was suspended before it lapsed and he continued to give reports to KEFRI until 2019. They were called to clear in 2021.

Respondent's case

21. The Respondent's witness, Philip Kichana (RW1) stated he is the Respondent's Corporation Secretary. He produced his witness statement dated 29/9/2023 as his evidence in chief and bundle of documents dated 11/1/2024 as his exhibits 1-6.
22. During cross examination, RW1 testified that the contract was between the Respondent and Claimant but was funded by the European Union, however, it did not state that it was subject to the funding of the European Union.
23. RW1 testified that the Respondent did not issue any notice of redundancy but it should have happened.
24. RW1 testified that the Claimant should have been paid per diem for making the report in 2019.
25. RW1 testified that the Claimant was not paid gratuity after August 2018 and neither did he apply for leave although it was available to him.

Claimant's Submissions

26. The Claimant submitted that the law does not provide for suspension of a contract of service. If anything, where an employer has to suspend an employee as part of disciplinary process, the contract of service or the employers' human resource policy should have provided for such action.
27. The Claimant submitted that the Respondent did not indicate that his emoluments would be paid from funds issued to it by the European Union neither was his contract conditioned to any contract between the Respondent and the European Union or at all. The contract of service issued to the Claimant does not indicate that it would be subservient to any contract between the Respondent and any third party thereof including but not limited to the European Union.
28. It is the Claimant's submission that his contract was renewed by operation of the law on 24/10/2018 and 24/10/2020 for a period of 2 years. This was demonstrated by the Respondent's principal investigator instructing him to prepare an interim report which he duly accepted on 19/11/2019.
29. By instructing the Claimant to prepare the year 3 reports and accepting them as demonstrated in the Claimant's exhibits, this is demonstration of continued employment relationship.
30. The Claimant submitted that the circumstances of his termination as presented by the Respondent points to termination on account of redundancy. Under section 40 of the *Employment Act*, the Respondent was under an obligation to issue the Claimant with mandatory months' notice of intention to terminate employment which should state the reason and extent of the redundancy.

Respondent's Submissions

31. The Respondent submitted that it engaged the Claimant on a 2-year contract from 24/10.2016 to 23/10/2018 to implement the grant contract No. FED/2015/360-270 it entered with the European Union to implement action titled a Kenya Water Towers Protection and Climate Change Mitigation.
32. It is the Respondent's submission that the Claimant worked for the entire contract period and was paid all dues until 23/10/2018. He was paid gratuity of Ksh. 321,018 on 6/9/2018. The contract terms were fixed terms and the Claimant entered into voluntarily, therefore, the termination was not unfair and unlawful.



33. The Respondent submitted that the programme was suspended vide a letter dated 17/1/2018 from the European Union addressed to the Cabinet Secretary, Ministry of Environment & Natural Resources and copied to the Director of the Respondent. It was subsequently closed vide a letter dated 18/11/2020 from Dr. Chris Kiptoo, Principal Secretary, Ministry of Environment & Natural Resources and copied to the Director of the Respondent. By virtue of suspension and closure of the project respectively, the Claimant's services and others who had been contracted were no longer tenable.
34. It's the Respondent's submissions that the Claimant's claim to not have any knowledge of the rules and regulations governing the water project is merely ignorance from the Claimant that is inexcusable before this court.
35. The Respondent submitted that since the Claimant's employment for fixed term period, it cannot be renewed automatically. The Claimant was aware that his time with the organization was coming to an end and a notice of termination was not required. Further, the Claimant's exhibits of email conversation with Mr. Paul Ongugo does not indicate renewal as Mr. Paul Ongugo is a mere employee just like the Claimant.
36. It's the Claimant's submissions that the Claimant during cross-examination affirmed that his contract was not renewed. Section 7,8,9 and 10 of the *Employment Act* provides fixed term contracts end at the date it is indicated to end. It would be wrong to impute any longer period outside the express agreement set out in the fixed term contract.
37. The Respondent's submissions are that the Claimant was not declared redundant and that he was also not terminated before the contract ended. The Claimant's contract came to an automatic end by effluxion of time and no issue of redundancy arose.

Analysis and Determination

38. Having considered the pleadings, affidavits, evidence in court and submissions, the issues for determination are:
 - a. Whether the termination of the Claimant's contract was lawful and fair.
 - b. Whether the Claimant is entitled to the reliefs sought.
39. On the first issue, it is the Claimant's case that his contract was renewed by operation of the law for a period of 2 years on October 24, 2018.
40. However, the Respondent submitted that since the Claimant's employment for fixed term period, it cannot be renewed automatically. The Claimant was aware that his time with the organization was coming to an end and a notice of termination was not required. Further, the Claimant's exhibits of email conversation with Mr. Paul Ongugo does not indicate renewal as he is a mere employee as the Claimant.
41. In *Rajab Barasa & 4 others v Kenya Meat Commission* [2016] eKLR, the court observed that: -

“The *Employment Act* has given great emphasis to a contract of service as with it parties have the freedom to agree on the terms and condition to regulate their relationship. Indeed where an employment contract of service exists, the Court can only give meaning to its terms and conditions noting that under section 10 of the *Employment Act*, parties to a written contract of employment are required to put into writing the terms and conditions that govern their



employment relations. Therefore, this Court in the case of Chacha Mwita versus KEMRI & Others, Cause No.1901 of 2013 held that;

... fixed term employment contract is, for example, entered into for a period of six months with a contractual stipulation that the contract will automatically terminate on the expiry date, the fixed term employment contract will naturally terminate on such expiry date, and the termination thereof will not (necessarily) constitute a dismissal, as the termination thereof has not been occasioned by an act of the employer. In other words, the proximate cause of the termination of employment is not an act by the employer. There is a definite start and a definite end. Thus, the contract terminates automatically when the termination date arrives; otherwise, it is no longer a fixed term contract.

Where the intention of the parties is to have the contract for a fixed term, upon expiry, either party can opt out or invite the other to a new contract as the previous one has ended. The relationship must be renewed under a new contract. Otherwise, there would be no need for a fixed term contract. This is not a departure from the *Employment Act* as the law recognises the freedom of the parties to enter into fixed term contract, seasonal contracts or in some cases piece-work contract. Where the intention of the parties is to rely on any other document in terms of how the employment relationship is to be governed, such must be set out under the written or fixed terms contract. To hold otherwise would be to defeat the very purpose of such a contract. Indeed this was the court's view in the case both parties herein have relied upon, Margaret A Achieng versus National Water Conservation Corporation the rationale being that the purpose of a fixed-term contract is not to renewable it automatically. Such a contract (fixed-term) does not carry the expectation for renewal. The exceptions to this general rule are few and limited based on each case and its circumstances where strictly an employer should not act in a manner so as to avoid a legal obligations.”

42. Further, Lady Justice M. Mbaru in Benson Maiyo v Agricultural Finance Co-operation [2019] eKLR held as follows in respect to fixed contracts:-

“The rationale is that the claimant's employment was regulated differently and under his fixed term contracts. Such fixed term contracts are legitimate mode of employment.

In Fatuma Abdi versus Kenya School of Monetary Studies [2017] eKLR the court held that;

... a fixed term contract of employment is a lawful mode of employment with a start and end date. In this case the Claimant made application for renewal of each contract and a new contract was issued for a fixed term. There was no time the Claimant worked without a written contract or went beyond any such

written contract so as to create the expectation that even where a written contract was not issued, it would be renewed for another term.

In Margaret A. Ochieng versus National Water Conservation and Pipeline Corporation [2014] eKLR, the court held that an employee on fixed term contract should not expect an automatic renewal. The flip side is that a fixed term contract is not inimical to renewal. Ultimately, the Court will consider the legitimacy of the employee's expectation based on the unique circumstances of each case.

In this regard, where the claimant was retained on fixed terms and he confirmed payment of his due wages as agreed and for the duration of 3 days' work each week, there was no expectation created that he became a full time employee. Even where the claimant may have remained within the premises of the respondent and became available for allocation of



various duties, for the entire duration of his casual employment from the year 2011 to 2016, he was constantly paid a wage amounting to 3 days worked for each week. Such offering of self did not change the fixed term contracts between the parties.”

43. In view of the foregoing, the Claimant was engaged by the Respondent on a fixed term contract which automatically expired by effluxion of time on 24/10/2018. Although he was not privy to any engagement between the Respondent and the European Union regarding the suspension of his contract, he was clearly aware of the terms of his employment contract and that the same was fixed with or without any renewal of the sponsors. Indeed the fixed term contracts do not require any party to serve notice to terminate the same or notice of renewal of the same unless it is specifically provided in the contract. The court therefore holds that the Claimant was not unlawfully terminated as he was on a fixed term contract which expired by affluxion of time. Even if he wrote reports for the Respondent upon expiry of the contract this was not a confirmation of a renewal of his term.

44. The Claimant has prayed for various remedies. The court finds the Claimant was paid his dues including gratuity. What is not clear is whether he was paid salary for August 2019 to October 23, 2019 when his contract was due to expire. The court will mention the matter on October 22, 2024 for the Respondents to provide evidence if the Claimant was paid his salary upto the date of the expiration of his contract.

Otherwise there is evidence that Claimant was paid his gratuity at Kshs 321,018/= less 136,579/= PAYE.

45. The court otherwise orders each party to meet their respective costs of this suit.

46. Claimant is also to be issued with the certificate of service within 30 days hereof.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 4TH DAY OF OCTOBER, 2024.

ANNA NGIBUINI MWAURE

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 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.

ANNA NGIBUINI MWAURE

JUDGE

