



**Mkomani Butchery v Salimu (Appeal E046 of 2023)
[2024] KEELRC 2405 (KLR) (1 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2405 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E046 OF 2023
M MBARŪ, J
OCTOBER 1, 2024**

BETWEEN

MKOMANI BUTCHERY APPELLANT

AND

PENGO OMARI SALIMU RESPONDENT

*(Being an appeal from the judgment of D. O. Mbeja delivered
on 8 May 2023 in Mombasa CM ELRC No.265 of 2021)*

JUDGMENT

1. The appeal arises from the judgment delivered on 8 May 2023 in Mombasa CM ELRC No.265 of 2021. The appellant is seeking that the judgment of the trial court be set aside and replaced with an order dismissing the claim with costs.
2. The background to the appeal is a claim filed by the respondent on the basis that in March 2016 he was employed by the appellant as a driver at a wage of Ksh.19, 200 per month. He worked until 11 January 2021 when he was issued with notice of summary dismissal. His case was that there were no valid reasons given and was not allowed the opportunity to make his representations. He claimed that he would report to work from 7 am to 6.45 pm on a shift of 12 hours without payment for the 4 hours of overtime. No annual leave was allocated and he remained at work during public holidays. He claimed the following terminal dues;
 - a. Notice pay Ksh.19,200;
 - b. Leave pay for 5 years Ksh.77,538.47;
 - c. Overtime worked Ksh.863,991;
 - d. Public holidays Ksh.81,230.77;



- e. House allowance for 5 years ksh.172,800;
 - f. 12 months compensation Ksh.230,400;
 - g. Costs of the suit.
3. In reply, the appellant denied the claim and that if there was any employment relationship as claimed, it was regulated on terms agreed to by the parties and the respondent left his employment upon expiry of his contract. He had contracted COVID-19 which he knew but never revealed to the appellant hence infecting the wife of the proprietor of the appellant who subsequently succumbed to the infection and died. The appellant sent money to the respondent to take the COVID test. His working hours were as per his contract and the claims made are not justified and should be dismissed with costs.
 4. In the judgment of the trial court, there was a finding that the claims made were justified and allowed as claimed.
 5. Aggrieved, the appellant filed this appeal because the learned magistrate erred in law and fact in the finding that there was an unfair termination of employment whereas employment terminated fairly. The finding that the respondent was employed on a fixed-term contract as provided under Section 10(3) (e) of the *Employment Act* was in error. On this basis, the finding that the fixed-term contract expired with time was erroneous. It was contrary to the facts presented before the trial court. The fact that the contract lapsed should have applied to dismiss the claim made with costs.
 6. Both parties attended and agreed to address the appeal by way of written submissions.
 7. The appellant submitted that the terms of employment between the appellant and the respondent were under a fixed-term contract. In evidence before the trial court, the appellant submitted a contract dated 3 July 2019 for 3 months, effective 3 July 2019 to 2 October 2019. There are subsequent contracts of 3 months each, the last dated 26 October 2020 effective 26 October 2020 to 25 January 2021. There was no termination of employment as alleged, the employment contract expired on its terms. The evidence is that employment was terminated through summary dismissal without any notice in this regard. The respondent testified to the fact that he was under a fixed-term contract of employment. The finding that there was unfair termination of employment was in error.
 8. The appellant submitted that under Section 47(5) of the *Employment Act*, the employee has the burden of proof regarding termination of employment to allow the employer to justify the reasons thereof. In this case, without the respondent discharging his legal duty, there was no proper basis to find the appellant liable. In the case of *Daniel Mueke v Bhogals Auto World* [2014] eKLR the court held that where the employee fails to discharge his burden of proof, there is no matter for the employer to address. In the case of *Ayub Kombe Ziro v Umoja Rubber Products Ltd* [2022] eKLR the court held that there was no evidence tendered to demonstrate that the respondent terminated the appellant unfairly. In the case of *Kenya Union of Commercial Food and Allied Workers v Fralet Agencies* [2023] eKLR the court held that there was no proof of termination of employment. The evidence that the employer had remitted the NSSF statement was insufficient proof of employment.
 9. The appellant submitted that the claims made and awarded by the trial court are not justified and should be set aside. Having been on a fixed-term contract, the employee cannot turn around and claim notice of pay and compensation over the alleged unfair termination of employment.
 10. The respondent submitted that the trial court properly analyzed the evidence before it and made a finding that there was an unfair termination of employment. In the case of *Kenfreight (EA) Limited v Benson K Nguti* [2019] eKLR the Supreme Court held that under the provisions of Section 49 of the



Employment Act, where there are no valid and justified reasons leading to termination of employment, the court can award the remedies thereof.

11. The awards were properly assessed and the appeal should be dismissed with costs.

Determination

12. A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its independent judgment on whether or not to allow the appeal. A first appellate court is required to subject the entire record to fresh and exhaustive evaluation and make conclusions about it, bearing in mind that it did not have the opportunity to see and hear the witnesses first-hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd. & others*.
13. The respondent's case before the trial court was that on 11 January 2021, he was summarily dismissed from his employment. He had no notice of summary dismissal.
14. In response, the appellant's case was the parties were regulated under written contracts of employment and the employment relationship terminated through expiry of the contract. The appellant filed several contracts, each for 3 months and the last contract covered the period of 26 October 2020 to 25 January 2021. The wage payable was Ksh.24, 000 per month and under it, the respondent was entitled to 6 days of annual leave.
15. In the judgment of the trial court, there was a finding that the appellant had defended the claim and submitted work records but the provisions of Section 41 of the Employment Act required the employee to be issued with notice before termination of employment and upon such notice to be invited to a hearing. That these rights were not secured for the respondent leading to unfair termination of employment.
16. However, where the employee is under a fixed-term contract of employment, the parties have agreed on a start and end date. The fixed-term contract is self-enforcing. No notice or reasons are required to be issued at the end of each contract. That is the requirement under Section 10(3) (e) of the Employment Act. In the case of *Sandra M. Waswa v Article 19: Global Campaign for Free Expression* [2022] eKLR and *Masiga & 15 others v Menengai Farmers Limited* (Civil Appeal E069 of 2021) [2022] KEELRC 4140 (KLR) court held that;

Where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end;

Equally, the employer has the prerogative to issue seasonal/piece-work contracts based on the need, reason, purpose, time and type of work to be performed in terms of section 18 of the Employment Act, 2007. In this regard, where an employee is under a seasonal and or piece-work contract, the consideration and wage due is paid under the proportion to the amount of work which has been performed, upon completion of the work, or a daily rate or as agreed in terms of section 18(1)(b) of the Act;

17. in the case of *Apex Steel Limited v Dominic Mutuamuendo* [2020] eKLR 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 *Jobstone 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.

18. The Court of Appeal in the case of *Amatsi Water Services Company Limited v Francis Shire Chachi* [2018] eKLR held 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.
19. In this case, the respondent's case is that on 11 January 2021, he was dismissed. His contract ended on 25 January 2021, he can only claim the wages due for the 14 days not served under the fixed-term contract and nothing more. His wage at the time was ksh.24, 000 per month. For 14 days, he is entitled to 12,000.
20. The respondent had also claimed terminal dues. These claims should have been analyzed vis-a-vis the fixed-term contracts submitted in response and under Section 10(6) and (7) of the *Employment Act*. These provisions are to allow the court to have a perspective of the employment relationship between the parties. The legal duty to file records thus addressed by the appellant, they were able to demonstrate that the respondent was under a fixed-term contract at all material times in his employment. For the end of employment before the due date on 25 January 2021, the only relief is payment to the end of such contract.
21. Under each contract, the respondent was allowed 6 leave days for every 3 months. This is commensurate with Section 28 of the *Employment Act*.
22. On the question of overtime claims, the appellant filed work records including time sheets. There is no record of overtime worked. These worksheets demonstrate the days at work and the time allocated to each employee on the shop floor.
23. On the claim for working during public holidays, the respondent did not particularize how these days arose. The Minister does publish each public holiday and the general claim cannot apply. Even where this was not the case, from the worksheet, the following can be discerned by the court;
24. In January 2021, the respondent attended court for 24 days. This is at variance with the evidence submitted that he worked for 11 days only. However, it is at par with the fixed-term contract.
25. In July 2020 the respondent worked for 24 days. He was absent on 2nd July 2020.
26. In January 2020 the respondent worked for 25 days and was absent for a day.
27. Cumulatively, without the particulars of the subject public holidays under reference, an analysis of what is due would not be possible.
28. On the claim for a house allowance, the claimant was employed as a driver. The wage paid was ksh.24, 000 per month inclusive of 15% housing allowance. Your gross pay will be subject to statutory deductions like NSSF, NHIF or other applicable tax levied by the government.
29. A driver working in Mombasa from July 2019 had a minimum wage of Ksh.17, 561 basic wage. The 15% due for house allowance translates to ksh.2, 634.15 per month with a total gross wage of ksh.20, 195.15.
30. On the wage paid at Ksh.24, 000, the respondent was well compensated for his labour.
31. Indeed, as analyzed above, the parties being regulated under a fixed term contract, no notice or reasons were required upon the expiry of the contract. The compensation awarded is not justified.



32. Accordingly, the appeal herein is with merit and is allowed as prayed. The judgment in Mombasa CM ELRC No.265 of 2021 is hereby set aside save for the award of Ksh.12, 000 in unpaid wages. Each party bears its costs.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 1ST DAY OF OCTOBER 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

