



REPUBLIC OF KENYA



**Maina t/a All and Sundry Services v Nyawa (Appeal E082 of 2024)
[2024] KEELRC 13435 (KLR) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13435 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E082 OF 2024
M MBARŪ, J
DECEMBER 17, 2024**

BETWEEN

WANGARI MAINA T/A ALL AND SUNDRY SERVICES APPELLANT

AND

MANGALE NDORO NYAWA RESPONDENT

*(Being an appeal from the judgment of Hon. Noelyne Reuben
delivered on 11 April 2024 in Mombasa CMELRC No.214 of 2020)*

JUDGMENT

1. The appeal arises from the judgment delivered on 11 April 2024 in Mombasa CMELRC No.214 of 2020. The appellant is seeking the judgment be set aside, the updated Statement of Claim dismissed with costs, and the appellant's counterclaim allowed with costs.
1. The background of the appeal is a claim filed by the respondent, Mwangale Ngoro Nyawa before the trial court. His case was that he was employed by the appellant as a cleaner in August 2018 at a wage of Ksh.12,000 per month working from 6.30 pm to 4 pm. On 30 November 2019, the supervisor, Dalmas directed him not to report to work. No reasons were given for the sudden termination of employment or payment of terminal dues. He claimed the following:
 - a. Notice pay Ksh.12,000;
 - b. 2 months leave Ksh.24,000;
 - c. Severance pay Ksh.3,600;
 - d. 12 months compensation Ksh.144,000;
 - e. Certificate of service;



- f. Costs of the suit.
2. In response, the appellant filed a response and counterclaim on the basis that the respondent was employed on a one-month contract from 1st to 31 July 2019 for intermittent cleaning duties. Employment ceased on 31 July 2019 but he colluded with his supervisor, Ngala Magongo Mwanyiro to remain on the payroll from 1st August to 30 November 2019. The supervisor, Dalmas Kengare notified the proprietor on 30 November 2019 of this collusion since employment had ceased on 31 July 2019. No termination notice was necessary. The claims for notice pay, severance pay and leave pay are not due. The suit filed is incompetent since it was contrary to Rule 10(7) as summons were served late.
 3. In a counterclaim, the appellant's case was that following a term contract with the respondent, his employment ceased on 31 July 2019 but he colluded with his supervisor and continued working without notice to the appellant. He worked until 30 November 2019 and was paid wages amounting to ksh.48, 000 and statutory payments of Ksh.1, 600 to NHIF and Ksh.800 to NSSF which should be refunded in a counterclaim.
 4. The trial court heard the parties and in the judgment held that there was an unfair termination of employment and that the claimant [respondent] was awarded general damages for the unfair termination of Ksh.300, 000 plus the costs of the suit and interest.
 5. Aggrieved by the judgment, the appellant filed this appeal on the following grounds;
 1. The award of general damages to the respondent for unfair termination of Ksh.300, 000, costs and interests.
 - a. The learned magistrate erred in law and fact in failing to dismiss the Amended Statement of Claim pursuant to Rule 22 of the Employment and Labour Relations Court (Procedure) Rules, 2016.
 - b. The learned magistrate erred in law and fact in failing to find that the respondent's staff contract extension dated 1 June 2019 (document number 3) was a forgery.
 - c. The learned magistrate erred in law and fact in failing to find that the respondent was a perjured suitor.
 - d. The learned magistrate erred in law and fact by introducing a legitimate expectation of renewal of contract which had not been pleaded.
 - e. The learned magistrate erred in law and fact by awarding the respondent Ksh.300,000.00 in general damages per incurium Section 49(1)(3) of the [Employment Act](#),
 - f. The learned magistrate erred in law and fact in failing to determine the appellant's counterclaim.
 - g. The judgment and decree in the circumstances of the case were such that a manifest travesty of justice occurred therein.
 6. Both parties attended and agreed to address the appeal by way of written submissions.
 7. The appellant submitted that the respondent's case was premised on a purported contract extension dated 1 June 2019, but the document was a forgery. The appellant discharged its duty under Section 10(7) of the [Employment Act](#) to disprove the alleged contract. The respondent failed to produce his witness, Ngala Magongo Mwanyiro, to discharge his burden of proof that such a contract extension



- existed. The trial court needed to address the case that the contract produced was a forgery. Under Rule 22 of the Employment and Labour Relations Court (Procedure) Rules, 2016 (Court Rules), the trial court should have dismissed the respondent's claim.
8. There was no legitimate expectation that the respondent's contract would be renewed. There was no evidence of any express promise to restore the employment contract, as alleged. In the case of *Teresa Carlo Omondi v Transparency International Kenya* [2017] eKLR, the court held that the burden of proof on alleged legitimate expectation was on the employee. In the case of *Bernard Wanjohi Muriuki v Kirinyaga Water and Sanitation Company Limited & another* [2012] eKLR, the court held that a fixed-term contract has a start and end date. Hence, the Supreme Court defines a legitimate expectation in the *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* [2014] eKLR to include any instance which would give rise to a promise that a matter would be fulfilled. In this case, the respondent failed to produce any evidence of any promise that his contract would be renewed.
 9. The award of Ksh.300, 000 in general damages went contrary to the principles under Section 49(1)(3) of the *Employment Act*. The discretion to be applied must be based on the law and applied judicially as held in *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR. Upon the termination of employment, the award of general damages must be based on pleaded injury and violation of the law. Under Section 49 of the *Employment Act*, compensation should be assessed upon a finding that there is unfair termination of employment which is not the case for the respondent.
 10. The trial court failed to address the appellant's counterclaim as required under the principles in the case of *Kenya Commercial Bank Limited v James Karanja* [1981] eKLR. A counterclaim is a fresh suit and the defendant instituting it becomes the plaintiff. The appeal should be allowed with costs.
 11. The respondent submitted that under Rule 22 of the Court Rules, the court is allowed to determine a matter through pleadings. The appeal that the respondent failed to attend court on 4 September 2023 warranted dismissal of the Amended claim, but upon seeking adjournment, the appellant did not oppose. Under Rule 21 of the Court Rules, the court exercised its discretion and granted leave to adopt the amended claim, witness statement and documents. The alleged forgery of the contract dated 1 June 2019 through a letter addressed to Augustine Oyugi Otieno, but this was later cancelled and addressed to the respondent. These allegations were not pleaded in the Amended Response, and no evidence was provided that the matter was reported to the police to address the alleged forgery.
 12. The appellant accused the respondent of forging the contract dated 1 June 2019. The contract indicates that it was initially issued to Augustine Oyugi Otieno but later cancelled and addressed to the respondent. Under Sections 107 and 108 of the *Evidence Act*, he who alleges must prove the forgery. The validity of the employment contract extension was not the center of the respondent's case but there was an unfair termination of employment. Despite a clear contract past 31 July 2019 he continued to work for 4 months and received his salary and statutory deductions until November 2019.
 13. On the claim that the respondent was a perjured suitor, sections 107 and 108 of the *Evidence Act*, the respondent is simply an aggrieved party following his summary dismissal. The appellant has no reasonable defence and unjustly accuses the respondent of being a perjured suitor. The respondent had a legitimate expectation that his contract had been extended through renewal by legitimate expectation as defined in the case of *Transparency International Kenya v Teresa Carlo Omondi Civil Appeal No.81 of 2018*. The initial contract ended on 31 July 2019, and the respondent continued working until November 2019 under the same terms and conditions. There were no valid reasons for terminating his employment by summary dismissal, and he was justified in seeking the remedies as held in *Kenfreight (E.A) Limited v Benson K. Munguti* [2016] eKLR. The appeal should be dismissed with costs.



Determination

14. This being a first appeal, this Court is not bound necessarily to accept the findings of fact by the trial court. the duty is to review, reconsider the evidence, evaluate it and draw its conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect as held in the case of *Selle and Another v Associated Motor Boat Company Limited and others* [1968] EA 123.
15. The main issues for determination arise from whether the award of general damages of Ksh.300,000 is proper, whether the trial court should have dismissed the amended claim under Rule 22 of the Employment and Labour Relations Court (Procedure) Rules, 2016, and whether there was a legitimate expectation of renewal of the employment contract.
16. The facts as outlined above are not contested, save that the parties were bound under a written contract of employment from 1 to 31 July 2019. The contract ended on its terms, but the appellant's case is that the respondent, through collusion with another employee, was retained on the payroll until 30 November 2019, and hence, he should refund the wages paid together with statutory payments and costs. These were claimed under the counterclaim.
17. After the employment contract lapsed on 31 July 2019, the respondent continued to offer his labours to the appellant. The alleged collusion with another employee was not discussed during the hearing. What the appellant did with this information is not clear. The fact of the matter is that the respondent continued serving and was paid his wage.
18. The appellant also alleged that the letter renewing the contract dated 1 June 2019 was a forgery. This, too, was not investigated. It was not addressed whether the matter was reported to the police for investigation.
19. What is not contested is that the respondent remained serving the appellant and was paid his wages. The employee who stays on the shop floor, whether on a term contract, casual or on any other form of employment, is protected. Without a written contract, the appellant remained at his job and was paid a monthly wage of ksh.12, 000 and hence, under Section 37 of the *Employment Act*, his rights in employment were protected. The alleged collusion with another employee should have been addressed procedurally and by giving him the benefit to state his case under Section 41 and 44 of the *Employment Act*.
20. For work done, the respondent was entitled to his wages under Section 18(4) of the *Employment Act*. Whatever reasons resulted in the termination of employment, for work done, the due wage is due;
 - (4) Where an employee is summarily dismissed for lawful cause, the employee shall, on dismissal, be paid all moneys, allowances and benefits due to him up to the date of his dismissal.
21. The case of refunding the paid wages and statutory payments should not arise.
22. In terminating the respondent's employment over alleged collusion with another employer, the respondent protected in law he was entitled to notice, reasons and payment of any due terminal dues. However, the trial court awarded general damages. In the case of *Kenya Ports Authority v Munyao & 4 others* [2023] KESC 112 (KLR), the Supreme Court of Kenya emphasized that upon the finding that there is unfair termination of employment, the remedies under Section 49 of the *Employment Act*



Act should not be conflated with the power of the court to make awards under Section 12 of the Employment and Labour Relations Court Act;

Whereas the Employment Act is expressive of the rights under Article 41, we find that damages under Article 41's head ought to be specifically pleaded and proved as a constitutional provision. Any other constitutional provisions that would have been infringed can equally be canvassed, alongside, and under this head. This is different and distinguishable from the provisions under section 49, as read in section 50 of the Employment Act, which are limited to the provisions under the Employment Act. The wording of the Employment Act under section 49 only relates to an instance where an employee has been terminated. This court determined in *Kenfreight (E.A) Limited v Benson K. Nguti* (supra) that section 49 of the Employment Act is applicable upon the finding that a person has been unlawfully terminated.

23. In *Kenfreight (EA) Limited v Benson K Nguti* SC Pet No 37 of 2018 [2019] eKLR, the Supreme Court explained the applicability of the provisions of section 49;

What, then, should the correct award of damages be based on? Having keenly perused the provisions of section 49 of the Employment Act, we do not doubt that once a trial court finds a termination of employment as wrongful or unfair, it is only left with one question to determine: what is the appropriate remedy? The Act provides several remedies for unlawful or wrongful termination under Section 49. It is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided. To us, it does not matter how the termination was done, provided the same was challenged in a court of law, and where a court found the same to be unfair or wrongful, section 49 applies. ...

24. Compensation is under Sections 45 and 49 of the Employment Act, and an award of general damages is under Section 12 of the Employment and Labour Relations Court Act. The two are not synonymous, and each should be made with stated reasons.
25. In this case, upon the trial court's finding that there was an unfair termination of employment, the applicable remedies were under Section 49 of the Employment Act relating to compensation. There is no claim premised under the constitution, breach of the law, or particulars of violations of the Bill of Rights to apply the remedies under Section 12 of the Employment and Labour Relations Court Act. The award of general damages is not given a constitutional and legal foundation. To this extent, the appeal is with merit.
26. Whether the amended claim should have been dismissed under Rule 22 of the Employment and Labour Relations Court (Procedure) Rules, 2016, the appellant's case is that the trial court needed to address the case that the contract produced was a forgery. Under Rule 22, the trial court should have dismissed the respondent's claim. The fact that the respondent failed to attend court on 4 September 2023 warranted the dismissal of the amended claim, but upon seeking adjournment, the appellant did not oppose.
27. The provisions of Rule 22 of the Court Rules provide that the court is regulated in its proceedings where one party is absent. In this case, the record shows that under Rule 21 of the Court Rules, the court exercised its discretion and granted leave to adopt the amended claim, witness statement, and documents. Regarding the adopted documents, the contract dated 1 June 2019 through a letter addressed to Augustine Oyugi Otieno, which was later cancelled and addressed to the respondent, was an issue.



- 28. As outlined above, the appellant should have procedurally addressed the alleged collusion between the respondent and the other employee and applied due process as regards the respondent. The counter to this is the respondent offering his labours to the appellant after his term contract lapsed on 31 July 2019. Whatever was paid post this date was for work done and is protected under Section 18(4) of the Employment Act. The alleged collusion was not addressed; for his labours, he was paid.
- 29. The application of Rule 22 of the Court Rules did not affect the amended claim.
- 30. This also addresses the question of whether the counterclaim was addressed or not. The payments claimed for a refund were adequately paid to the respondent. This is not recoverable, and there is no case that he did not offer his labour. The collision with another employee is criminal conduct and should have been administratively addressed, as well as the criminal conduct.
- 31. The general award of general damages is not given a justification. The appeal succeeds on this limb.
- 32. What is clear to this court is that the respondent was entitled to notice pay at one month at ksh.12, 000. On the finding that the due process in terminating employment was not procedural, compensation is due. The respondent worked for 5 months, one month under a fixed-term contract and the rest under unwritten terms. An award of one month's compensation well compensates him all at ksh.12, 000. On the claim for leave, under Section 28 of the Act, each month or leave prorated allows for four leave days. At a Ksh.12, 000 wage amounts to Ksh.1, 600 in leave pay. The total due is Ksh.25, 600.
- 33. Accordingly, the judgment in Mombasa MCELRC No.214 of 2020 and the award of Ksh. 300, 000 in general damages are hereby reviewed. This affects the costs and interests awarded thereof, which are set aside, save for the award of Ksh.25, 600 to be paid within 45 days, after which the same shall accrue costs and interests.

DELIVERED IN OPEN COURT AT MOMBASA THIS 17 DAY OF DECEMBER 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

