



REPUBLIC OF KENYA



KENYA LAW
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**Changoek v Redshark Limited (Cause 76 of 2018)
[2023] KEELRC 67 (KLR) (24 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 67 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 76 OF 2018
HS WASILWA, J
JANUARY 24, 2023**

BETWEEN

RICHARD KIPYEGON CHANGOEK CLAIMANT

AND

REDSHARK LIMITED RESPONDENT

JUDGMENT

1. The Claimant, instituted this claim vide a memorandum of claim dated January 17, 2018, alleging to have been unfairly terminated and seeking compensation for the unfair termination. He sought the following reliefs; -
 - i. A declaration that the termination was unlawful, untimely and illegal.
 - ii. An order that the Claimant be paid his dues and benefits being;
 - a. Severance pay of Kshs 21,105.
 - b. One month salary in lieu of notice of Kshs 12,070.
 - c. Compensation for loss of earnings of Kshs 144,840.
 - d. Holiday pay of Kshs 14,070.
 - e. Leave pay of Kshs 29,547.
 - f. Weekend pay of Kshs 67,536.
 - iii. Costs of the claim and interest.
2. The Respondent entered appearance on the April 4, 2018 and filed a response to claim on April 24, 2018, denying the entire claim and alleging that the Claimant resigned on the date his contract expired,



therefore the exit from Respondent's employment was voluntary and not as a result of termination as pleaded.

Claimant's case.

3. The Claimant avers that he was employed by the Respondent on April 23, 2014 as a casual labourer on a contract that was renewed from time to time. He served in the said position until his termination in November, 2017, while earning Kshs 12,070.
4. The circumstances leading to the termination is that sometimes in the month of November, 2017, the Claimant was verbally dismissed from service on the pretext of expired contract and allegation that the Respondent was scaling down its business,
5. It is averred that the contract of employment provides for one-month notice before termination, which was ignored by the Respondent. Also that he was not paid in lieu of the said notice.
6. The Claimant alleged that he was underpaid for the 3 ½ years he worked for the Respondent.
7. During hearing, the Claimant testified that he was employed on April 24, 2014 as a security guard and worked either on day or night duty. He stated that he was employed on contract that was renewed from time to time. He maintained that he never resigned from employment and reiterated that he was fired by the Respondent. He denied receiving any overtime pay and urged the Court to grant him overtime pay.
8. Upon cross-examination, the witness testified that he was not given a termination notice. He maintained that he was underpaid because he was to be paid not less than Kshs 12,000 but that sometimes he earned Kshs 10,799 and his last pay was Kshs 7,790. He affirmed that he signed the last contract that run from August 24, 2017 to November 11, 2017. He stated that he was terminated sometimes in November, 2017 before the contract ended.
9. Upon further cross examination, he testified that he was paid overtime of Kshs 1822 in February, 2017 and in September, 2017 he was paid overtime of Kshs 2137, however that there are times that he was not paid the said overtime but that those payslips got lost. He denied authoring the letter of resignation.

Respondent's case.

10. The Respondent in its defence denied unfairly terminating the Claimant's services and averred that the Claimant's contract came to an end on November 1, 2017 by effluxion of time. Furthermore, that the contract could not be renewed because the Claimant wrote a resignation letter dated November 11, 2017 indicating disinterest in the renewal of the contract of employment.
11. It is averred that the Claimant was paid in accordance with the Agricultural Industry Wage orders subsisting at the time and at no point was he underpaid as alleged.
12. On the reliefs sought, the Respondent with regard to severance pay stated that the same is not warranted as the Claimant was not declared redundant, neither is he entitled to the other reliefs as he was not unfairly terminated as pleaded. On overtime, weekend and public Holiday pay, the Respondent stated that the Claimant was paid overtime worked as indicated in his payslips.
13. During hearing, Martha Nyambura Gitonga, the Respondent's Human Resource and Administration manager testified as RW1 and adopted her witness statement dated April 4, 2019 and produced the document filed on April 29, 2018 and further list dated May 5, 2021 as the Respondent's exhibits.



14. Upon cross examination, the witness testified that they did not give the Claimant one week notice of termination because he was not terminated. She stated that she was the one that responded to the resignation letter. She then maintained that the Claimant resigned from its employment.
15. On re-examination, she testified that the Claimant resigned within the time which the contract was coming to an end, therefore the termination was not unfair as alleged, and the Claimant is not deserving of the orders sought. Further that they paid him in accordance to wage scales and upon working overtime he was paid for the same.

Claimant's submissions.

16. The Claimant submitted on three agreed issues being; whether the termination was fair, whether the Claimant is entitled to the reliefs sought and who should pay costs of the suit.
17. On the first issue, it was submitted that the cause for termination is two-faced, on one end the Respondent alleged that the Claimant resigned and on the other hand alleged that the contract had come to an end by effluxion on time. It was argued that the allegation by the Respondent that the Claimant had resigned from employment was not true because the letter is disowned by the Claimant and is not even signed. Secondly, that if the contract expired by effluxion of time then there was no need for the Respondent to respond to the alleged resignation letter. It was argued also that the Claimant worked for the Respondent past the date of the contract as he normally did creating expectations that he would be retained from employment as he normally was. In this they relied on the case of *Oshwal Academy (Nairobi) & Another v Indu Vishwanath [2015] eKLR* where the Court of Appeal held that.

“However, the Industrial Court which has since been renamed as the Employment and Labour Relations Court held that the appellant had engaged in unfair labour practice through sporadic and inconsistent use of contracts and changing terms willfully and unilaterally to the detriment of the Respondent. The trial Court found that the appellants had terminated the employment under a disguised redundancy and the Respondent had a legitimate expectation of continuity from the conduct of the parties in the course of the employment relationship.”

18. Accordingly, that since the Claimant was engaged beyond the contractual period, the Respondent created legitimate expectation that the Claimant could be retained in employment only to be fired on allegation of expired contract.
19. It was argued that the termination was not preceded by notice or followed by due disciplinary procedure as provided for under the *Employment Act*. It is submitted that the Respondent did not give any reason for the termination, neither was he subjected to disciplinary hearing as such the entire termination was unfair. In this, he relied on the case of *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR*.
20. It was further argued that disciplinary process is mandatory regardless of the circumstances that led to the said termination. In this he relied on the case of Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited (*Supra*) which held that;

“Section 41 of the *Employment Act* is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative. The situation is dire where such an employee is terminated after such a flawed process of hearing as such termination is ultimately unfair. The union must be involved at



the hearing before an employee is terminated as the union is there to regulate employer and employee relations and to ensure that their member employees get a fair chance to advance their defence with representation by the union.”

21. On the reliefs sought, the Claimant maintained that he was unfairly terminated and urged this Court to grant the prayers in the claim as prayed.

Respondent’s submissions.

22. The Respondent on the other hand submitted on four issues; whether the contract of the Claimant self-terminated by effluxion of time, whether the Claimant resigned, whether the reliefs sought should issue and who should pay costs of this suit.
23. On the first issue, it was submitted that the last contract of employment exhibited by the Claimant is the contract of employment dated August 28, 2017 which was running up to November 11, 2017. It was argued that the Claimant worked up until the said November 11, 2017 and therefore that the contract came to an end by effluxion of time. To support this argument, they relied on the case of [*Amatsi Water Services Company Limited v Francis Shire Chachi*\[2018\] eKLR](#) where the Court held that;

“The main bone of contention, in our view, is whether the contract was prematurely terminated or it ended by effluxion of time... In the case of [*National Water Conservation & Pipeline Corporation v Jayne Kanini Mwanza*](#), Civil Appeal No 178 of 2014 (UR), this Court stated as follows:”The general principle, as we understand it, is that a fixed term contract will terminate on the sun set date unless it is extended in terms stated in the contract. A Court cannot rewrite the terms of a contract freely entered into between the parties. Once there is a written contract, the Court will seek to give meaning to such contract giving ordinary meaning to its terms in determining any issue that may arise. The principle has been considered by several Judges of the Industrial Court (now the Employment and Labour Relations Court) and they are generally in agreement.”

24. It also relied on the case of [*Bernard Wanjobi Muriuki v Kirinyaga Water And Sanitation Company Limited & Another* \[2012\] eKLR](#), Rika J, held as follows:-

“In the view of the Court, there is no obligation on the part of an employer to give reasons to an employee why a fixed-term contract of employment should not be renewed. To require an employer to give reasons why the contract should not be renewed, is the same thing as demanding from an employer to give reasons why, a potential employee should not be employed. The only reason that should be given is that the term has come to an end, and no more. ... Reasons, beyond effluxion of time, are not necessary in termination of fixed-term contracts, unless there is a clause in the contract, calling for additional justification for the termination.”

The Court also stated thus:

“A general principle 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.”



25. On the second issue, the Respondent submitted that at the time the contract came to an end, the Claimant issued a resignation letter, indicating that he is no longer willing to work for the Respondent. It was argued that with or without the resignation letter, the contract had come to an end by effluxion of time as such the termination was not unfair as pleaded by the Claimant. In any case that the Claimant has not discharged the burden placed on him to demonstrate how the alleged termination was carried out to ascertain the claim for unfair termination as provided for under section 47(5) of the Employment Act. To support this argument, the Respondent relied on the case of Margaret A Ochieng v National Water conservation and Pipeline Corporation [2014] eKLR where the Court held that ;-

“The Court is persuaded the Claim has no merit. The fixed-term contract had its own in-built termination notice, in that the date of termination was advised to the Claimant on execution of the three-year contract in December 2008. She knew termination would be upon the lapse of the three years in 2011. The Respondent has no obligation to pay her notice pay as there was no premature termination of the fixed- term contract.”

26. On the reliefs sought, the Respondent submitted with regard to notice pay that the Claimant’s contract came to an end by effluxion of time as such is not entitled to notice pay or compensation. On leave, weekend and holiday pay, the Respondent maintained that the Claimant was paid leave as evidenced by pay slips for February, 2017, May, 2017 and August, 2017. Similarly that holidays and weekends were paid as overtime pay indicated as OT1 & OT2 which appear in payslips of October, 2016, April, 2017 and October, 2017. On severance pay, it was submitted that the Claimant was not declared redundant and therefore the said pay is not warranted.

27. In conclusion, the Respondent submitted that the termination came as a result of expired contract and thus the entire claim should be dismissed with costs.

28. I have examined all evidence and submissions of the parties herein. The Claimant contends that he was unfairly terminated by the Respondent after they failed to renew his contract.

29. The Respondents on their part aver that the Claimants contract expired by affluxion of time and that the Claimant resigned from employment *vide* a letter of November 11, 2017.

30. The Claimant denied authoring the resignation letter exhibited by the Respondent. The said letter was also unsigned and its authenticity cannot be ascertained.

31. As concern the contract of employment expiring, the said contract has not been exhibited. It is therefore not clear what the contract if any provided for and when it expired if at all.

32. The Claimant having denied resigning from employment and there being no proof of any contract which may have expired, I find that the Claimant was terminated as the process of termination is not based on any fair hearing or valid reasons.

33. The Claimant also averred that he was underpaid during the time of employment. He exhibited his payslips which show how he was paid salary. The Claimant has however not exhibited any evidence of the underpayment based on the existing wages orders. Indeed he who pleads must prove and it is not enough for the Claimant just to state he was underpaid without demonstrating on what ground he bases his assertion.

34. Given my finding above, I however find that the Claimant is entitled to the following remedies;-

1. 1 Months salary in lieu of notice = 12,070/=
2. 8 months salary as compensation for the unfair termination



= 8 x 12,070 = 96,560/=

TOTAL = 108,630/=

Less statutory deductions

3. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this Judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 24TH DAY OF JANUARY, 2023.

HON LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for parties

Court Assistant – Fred

