



**Ecocleaners Limited v Wandera (Appeal E027 of 2022)  
[2023] KEELRC 1258 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1258 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E027 OF 2022**

**M MBARÚ, J  
APRIL 27, 2023**

**BETWEEN**

**ECOCLEANERS LIMITED ..... APPELLANT**

**AND**

**COLLINS WAFULA WANDERA ..... RESPONDENT**

*(Being an appeal against the judgment of the Principal Magistrate, Hon. M. L. Nabibya delivered on 2nd December, 2021 in Mombasa CMELRC No.1041 of 2021)*

**JUDGMENT**

1. The background to this appeal is claim filed by the respondent in Mombasa CMELRC No 1041 of 2021 on the grounds that on April 10, 2016 he was employed by the appellant as a cleaner but on January 25, 2019 he was issued with letter dated January 18, 2019 from Multiple ICD Kenya limited terminating his employment on account of reduced work and that the client, Multiple Kenya Limited had terminated its contract with the respondent. the respondent then outlined his claims for one months' notice pay, overtime pay, compensation for unfair termination of employment and severance pay.
2. Before the trial court, the appellant's case was that there was termination of employment upon notice and for good cause due to reduced work after a client had terminated a contract with the appellant resulting in a redundancy, the matter was reported to the labour office and the respondent complied with the provisions of Section 40 of the *Employment Act*, 2007 (the Act). the respondent had been working for 8 hours per day and was paid full dues at Ksh 15,609 and all terminal dues were paid.
3. The trial court heard the parties and judgment held that there was unfair termination of employment contrary to Section 40 of the *Act*, the notice to terminate employment was too short, there was unfair termination of employment and compensation due for 4 months and for the two years worked severance pay was awarded.



4. Aggrieved by the judgment, the appellant has faulted the trial court on the grounds that the totality of the evidence and written submissions were not considered and the finding that there was unfair termination of employment was without any factual or legal basis and the judgment should be set aside. Both parties attended and agreed to file written submissions.
5. The appellant submitted that the respondent was under fixed term contract of 3 months from December 27, 2018 to January 18, 2019 where the appellant had a working contract with MICD which was terminated and the respondent was informed of the same and issued with notice terminating his employment as well as other employees serving under the same contract. The appellant held two meetings with the respondent on 11<sup>th</sup> and January 18, 2019 on the intended termination of employment and notice issued on January 18, 2019 with a copy to the labour officer. It was therefore erroneous for the trial court to make a finding that there was unfair termination of employment without notice and that the respondent should be compensated and paid severance pay. The term contracts of 3 months on their own could not form the basis of continued employment to justify the award service pay as held in *Barclays Bank of Kenya Limited v Evans Ondusa Onzre* [2015] eKLR. Under Section 45(5) of the Act the court must address itself as to whether there was a just and fair reason leading to termination of employment and where such reason is not challenged as being a redundancy, compensation or service pay is not due and the judgment of the trial court should be set aside with costs.
6. In response, the respondent submitted that he was issued with a termination notice on January 25, 2019 that was dated January 18, 2019 which was less the statutory period under the provisions of Section 40 of the Act which requires a 30 days' notice and without the adherence to the statutory provisions, this resulted in unfair termination of employment as held in *Margaret Mumbi Mwago v Intrabealth International* [2017] eKLR. The appellant failed to give a criteria relied upon in termination of employment leading to lapse in due process as held in *Rodney Eshiwani Onyango v Eldoret Mattresses & another* [2017] eKLR and the judgment of the trial court should be affirmed and the appeal dismissed with costs.
7. I have considered the grounds of appeal and submissions of the parties and the central issue for determination is whether the Honourable Magistrate erred in law in evaluating the evidence on record and hence made the awards outlined in the judgment delivered on December 2, 2021. This being a first appeal, the court is required to look at the evidence and evaluate it and reach own conclusions.
8. As outlined above, the respondent as the employee was the claimant before the trial court and his case was that he was employed by the respondent under a 3 months fixed term contract running from December 27, 2018 to March 27, 2019 but on January 25, 2019 he was issued with letter dated January 18, 2019 terminating his employment with effect from February 18, 2019 on the grounds that there was reduced work after the ICD had terminated its contract with the appellant.
9. It is therefore not contested that the respondent was on a fixed term contract, starting and ending on its own terms. It is also not challenged that indeed there was reduced work and leading to application of Section 40 of the Act and termination of employment on account of redundancy.
10. First, a fixed term contract ending on its terms carry no expectation of renewal as held in the case of *Transparency International Kenya v Teresa Carlo Omondi* [2023] eKLR where the Court of Appeal held that a fixed-term employment contract does not create a legitimate expectation of renewal. It starts and ends on its own terms. The claim that severance pay was due to the respondent for a period of 2 years worked with the appellant in view of the admitted fixed term contract is without foundation and to award and assess severance pay on this basis is contrary to the provisions of Section 40(1)(g) which requires that an employee be paid a severance pay for each completed year of service;



- (g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.
11. Each fixed term contract ending on its term, cumulatively cannot be applied to claim under Section 40(1)(g) the evidence on record at paragraph (3) of the Memorandum of Claim is that the respondent was employed by the appellant on August 10, 2016 but the respondent produced the last employment contract dated December 26, 2018 and which is not challenged. The employment subsisting before such contract issued cannot be surmised and impliedly applied to award severance pay without the trial court analysing the same.
12. Secondly, the fact of reduced work is not challenged. The respondent was invited to a meeting on 11th and January 18, 2019 and was later issued with a notice terminating his employment on January 25, 2019 which was dated January 18, 2019. The trial court correctly assessed the fact of the notice being below the legal threshold of 30 days save, the reasons leading to termination of employment are not contested and the respondent was made aware of such matter on two occasions on 11<sup>th</sup> and January 18, 2018 before notice to terminate his employment issued.
13. Under the provisions of Section 45(2)(b)(ii) of the Act, where employment is terminated on the grounds of operational requirements of the employer, such is not unfair termination of employment;
- (2) A termination of employment by an employer is unfair if the employer fails to prove— (a) that the reason for the termination is valid;
- (b) that the reason for the termination is a fair reason—
- (i) related to the employee's conduct, capacity or compatibility; or
- (ii) based on the operational requirements of the employer; and
14. In addressing a similar matter, the Court of Appeal in the case of Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR held that;
- ... redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As section 43(2) provides, the test of what is a fair reason is subjective. The phrase "based on operational requirements of the employer" must be construed in the context of the statutory definition of redundancy. What the phrase means, in my view, is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.
15. The appellant issued notice to the respondent terminating his employment after two meetings to inform him about the shop floor situation and the termination of contract by Multiple ICD Kenya Limited. At the time the written notice issued on January 25, 2019 the respondent was well aware of such matter. The issued notice is dated January 18, 2019 and copied to the Labour Officer as required under Section 40 of the Act and as affirmed by the Court of Appeal in the case of Africa Nazarene University v David Mutevu & 103 others [2017] eKLR that where the labour officer was notified as to the extent of the redundancy by the employer, such notice was sufficient pursuant to Section 40(1) of the Act.



16. Similarly, in this case, the appellant cannot be faulted to having issued the Labour Officer with notice on January 18, 2019 the same date the respondent was issued with notice.
17. Save for the lapse in issuing the respondent with sufficient notice and which is correctly addressed by the trial court, the findings that there was unlawful termination of employment and severance pay is due is without a legal foundation and to this extent the appeal is allowed.
18. Accordingly, judgment in Mombasa CMELRC No 1041 of 2019 delivered on December 2, 2021 is hereby set aside save for the award of notice pay assessed at Ksh 8,000. Each party shall bear own costs

**DELIVERED IN OPEN COURT AT MOMBASA THIS 27TH DAY OF APRIL, 2023.**

**M. MBARU**

**JUDGE**

**In the presence of:**

Court Assistant: Japhet Muthaine

..... and .....

