



**East Africa Sea Food Limited v Mwazito (Appeal E013 of 2020)  
[2023] KEELRC 1257 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1257 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E013 OF 2020  
M MBARÚ, J  
APRIL 20, 2023**

**BETWEEN**

**EAST AFRICA SEA FOOD LIMITED ..... APPELLANT**

**AND**

**MIKAIL HAMISI MWAZITO ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. M Nabibya Principal Magistrate delivered on 26th November, 2020 in Mombasa ELRC/SRMCC No.181 of 2019)*

**JUDGMENT**

1. The appeal herein follows judgment in Mombasa SRMCC No 181 of 2019 delivered on November 26, 2019. The appellant, aggrieved by the judgment has 15 grounds of appeal which can be summarised as follows; that the learned trial magistrate erred in law and in fact on account of failing to consider the submissions of the appellant and hence made an erroneous finding that there was unfair and unlawful termination of employment and that the appellant had an obligation to issue a one-month notice in an employment contract that lapsed on its term. The appellant faulted the trial magistrate on the grounds that there was failure to consider that there was a fixed term contract which expired on August 31, 2018 and based on the principles of stare decisis it would have been apparent that notice before the contract lapsed was not due. This was contrary to the evidence produced as held in *Estrange v F Graucob Ltd* (1934) 2 KB 394.
3. The appeal is also on the grounds that the trial magistrate made an award of 3 months' salary in compensation in a matter that employment terminated on account of effluxion of time and hence the award was erroneous and the judgment should be set aside and or the court should re-evaluate the evidence and submissions and make findings by allowing the appeal with costs.

Both parties attended and filed written submissions.



4. The appellant submitted that there was no unlawful termination of employment as alleged by the respondent since the contract of service expired on its terms on August 31, 2018. The respondent had been employed as a driver by the appellant on contract running from September 1, 2017 to August 31, 2018. The respondent claimed that he had a legitimate expectation of renewal of his contract and that failure by the appellant to issue him with notice amounted to unfair termination of his employment. Section 10(3) (c) of the *Employment Act*, 2007 (the Act) contemplates where parties are governed under a fixed term contract, there was a start and end date with no expectation for renewal as held in *Margaret A Ochieng v National Water and Pipeline Corporation* [2014] eKLR. There was no requirement to renew the fixed term contract upon expiry of its term.
5. In the case of *Teresa Carlo Omondi v Transparency International – Kenya* [2017] eKLR, the court held that there is no law in Kenya on the principle of legitimate expectation in renewal of fixed term contract. Courts have therefore held that a fixed term contract ends on its terms. In *Rajab Barasa & 4 Others v Kenya Meat Commission* [2016] eKLR the court held that that where there was no express, clear and unambiguous promise given by the employer on renewal of a fixed term contract, there is no expectation created to justify a claim for compensation upon termination of contact.
6. The appellant submitted that the trial court failed to consider the evidence in its totality and therefore arrived at a wrong finding and the appeal should be allowed by setting aside the judgment with costs.
7. The respondent submitted that in his Memorandum of Claim before the lower court, his claim was that he was employed by the appellant on contracts. These contracts were running in the following phases;
  - a Febraury 1, 2016 to July 31, 2016;
  - b September 1, 2017 to February 28, 2017;
  - c March 1, 2017 to August 31, 2017; and
  - d September 1, 2017 to August 31, 2018.
8. All these contracts were renewed for the same position. The last salary paid was Ksh. 21,500 and hence the respondent had a legitimate expectation on the renewal of his employment contract which the appellant failed to do leading to unfair termination of employment.
9. The respondent submitted that the appellant called its witness, Tobias Bob Amwai who testified that indeed he had been on various contracts and the last ending on August 31, 2018 but was not renewed or notice issued. This admission confirmed there was unfair termination of employment.
10. The respondent also submitted that he was issued with probationary contracts of 3 months contrary to Section 37 of the Act which prohibits issuance of probationary contracts for continuous work of more than a month or for work not expected to be completed for more than a month and for these reasons, he was protected under the law. The appellant was in breach of the law for keeping the respondent under probationary contracts for 3 months resulting in unfair labour practices. The non-renewal of the employment contract resulted in unfair dismissal from employment and the trial court correctly analysed the matter and made a correct award which should be upheld.
11. The respondent relied on the case of Civil Appeal No 125 of 2011 *Oshwal Academy (Nairobi) & another v Indu Vishwanath* [2015] eKLR where the court held that in terminating a fixed term contract, the employer should issue notice or pay in lieu thereof and also give reasons for non-renewal. Failure to do so would result in unfair termination of employment and hence justify the award of damages as held in the case of *Kenya Union of Commercial Food and Allied Works v Meru North*



*Farmers Sacco Limited* [2013] eKLR and for these reasons, the trial court correctly analysed the claim and made a correct award and the appeal should be dismissed with costs.

## Determination

12. This being a first appeal, the court is allowed to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123 and in *Peters v Sunday Post Limited* [1958] EA.
13. The appellant has faulted the trial court for awarding the respondent notice pay and compensation following a claim of unfair termination of employment due to the non-renewal of contract that expired on its terms. The respondent on the other hand asserts that he was on several term contracts and had a legitimate expectation that there would be renewal of his employment contract or termination upon notice which the appellant failed to do and the findings by the trial magistrate that there was unfair termination of employment were therefore correct and the decision should be upheld.
14. Whether to issue a fixed term contract or not is regulated under the provisions of Section 10(3) (c) of the Act. An employer is allowed the prerogative to employ an employee under a fixed term contract with a start and end date. the self-executing contract is lawful and valid in employment and labour relations. The Court of Appeal in Civil Appeal No. 18 of 2018 *Transparency International Kenya v Teresa Carlo Omondi* [2023] eKLR held that a fixed-term employment contract does not create a legitimate expectation of renewal. Further, the non-renewal of fixed-term employment does not amount to unfair termination of employment warranting compensation. Section 10(3) (c) of the Act then lifts the obligation on an employer to explain reasons for termination of employment in fixed-term contract as the same lapse by effluxion of time without creating a right of legitimate expectation of renewal.
15. In the case of *Margaret A Ochieng v National Water Conservation & Pipeline Corporation* [2014] eKLR the court while dealing with the question of whether there is automatic need for notice of renewal of a fixed-term contract held that;

Automatic renewal [of a fixed-term contract] would undermine the very purpose of the fixed-term contract, and then revert to indeterminate contracts of employment..... Courts have upheld the principle that fixed-term contracts carry no expectancy of renewal, in a catena of judicial authorities..... The Court is persuaded that 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 ...
16. In this case, the respondent being the employee testified before the trial court that he was at all material times under fixed term contract, each with a start and end date and the last ending on August 31, 2018. The court reading of the last contract, it had no provisions for automatic renewal or requirement for notice since it had a start and an end date. It was self-executing on its terms and conditions.
17. The findings by the trial court that the appellant had a legal duty to issue notice before termination of contract is far removed from the intentions of the parties to the employment relationship based on the written terms and conditions of the fixed-term contract ending on August 31, 2018. A finding that notice was required and failure to issue such notice resulted in unfair termination of employment is without a legal foundation.



18. To this extent the appeal must succeed. Further, the award of compensation for breach of contract on the findings that there was unfair termination of employment being based on an erroneous foundation cannot stand. such is not justified.
19. The respondent submitted that he was placed under probationary contracts of 3 months contrary to Section 37 of the Act and hence he should be construed to be a full time employee of the appellant. The gist and purpose of parties being regulated under a written contract of employment is that, the terms and conditions regulating such relationship and employment are agreed upon. Whether the employment is clustered under an erroneous title of being probationary or full term but the term is fixed in time and duration, as set out above, Section 10(3) (c) of the Act allow such an employment contract to issue and is lawful and cannot be re-written by the court mean otherwise. In *Amatsi Water Services Company v Francis Shire Chachi* [2018] eKLR the court held that a fixed term contract will terminate on the sunset date unless extended in terms stated in the contract. A fixed-term contract cannot automatically be converted to full time employment or under the provisions of Section 37 of the Act on the grounds that it has been renewed severally and it became the practice and hence a legitimate expectation was created that renewal would be automatic. Each fixed-term contract starts and ends on its terms and unless it is renewed, there is no expectation that employment would continue as held in *Keen Kleeners Limited v Kenya Plantation and Agricultural workers' Union* (Civil Appeal 101 of 2019) [2021] eKLR.
20. Upon consideration of the entire record of the trial Court, the appeal is with merit and is therefore allowed. The foundation of the judgment and award of the trial court is in error and is hereby set aside in its entirety. Each party shall bear own costs of the appeal and of the trial court.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 20<sup>TH</sup> DAY OF APRIL, 2023.**

**M MBARÚ**

**JUDGE**

**In the presence of:**

**Court Assistant: Japhet Muthaine**

..... and .....

