



**Musembi v Kings Developers Ltd (Cause 1274 of 2017)
[2023] KEELRC 868 (KLR) (6 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 868 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1274 OF 2017
AN MWAURE, J
APRIL 6, 2023**

BETWEEN

BENJAMIN MULEI MUSEMBI CLAIMANT

AND

KINGS DEVELOPERS LTD RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim dated the 5th of July 2017 on the July 6, 2017 claiming unlawful and unfair termination as well as terminal dues and benefits.

Claimant's Case

2. He avers that he was employed on the June 14, 2015 as a casual worker. He says that he was dismissed because he filed a suit against the respondent for damages for injuries he suffered while in the course of his duty. He was earning ksh 14,865 at the time of termination.
3. The claimant says that his termination was without any valid reason, the respondent did not give the claimant the termination notice as provided for in the Employment Act, the respondent denied the claimant his lawful leave days contrary to the Employment Act and the respondent terminated the claimant without following the procedure laid down in the Employment Act, 2007.
4. The claimant is aggrieved by the respondent's conduct and claims a sum of Ksh 315,993 comprising of:
 - a. One month salary in lieu of termination notice Ksh 14,865.00
 - b. House allowance for 24 months 15% of the basic pay 53,514.00
 - c. Unpaid 19 days from 1/6/2017 to 19/6/ Ksh 9,414/
 - d. Leave days for 2 years ksh 20,811.00



- e. PAYE not remitted Ksh 7,344.00
 - f. NSSF not remitted Ksh 4,800
 - g. NHIF not remitted Ksh 12,000
 - h. Service pay Ksh 14,865.00
 - i. 12 months' salary compensation Kshs 178,380.00
5. The claimant prays for the following remedies;
- a. A declaration that the claimant's termination/dismissal was illegal and unlawful.
 - b. An order for the respondent's to pay the claimant ksh 315,993.0
 - c. Interest on (b) above at court rates
 - d. Costs of the claim

Respondent's Case

6. The respondent by the statement of defence filed on the September 3, 2019 avers that during the period when the claimant claims to have been unfairly terminated, he did not have an employer- employee relationship with the respondent and therefore the claim herein is in the respondent's view void ab initio and is directed to the wrong entity and /or should fail at the first instance. The respondent is a total stranger to these proceedings.
7. The claimant has not provided any evidence that establishes an employer-employee relationship between the claimant and the respondent at the time of the said alleged unfair termination. If the claimant was indeed validly employed, then such employment was not with the respondent

Claimant's Evidence

Claimant's evidence in court

8. The claimant, Benjamin Mulei Musembi gave sworn testimony and said that he was employed on 14/6/2015 and used to work at the respondent's woodwork as machine operator. He adopted the witness statement dated 5/7/2017 as his evidence in chief. He also produced documents in the list of documents dated 5/7/2017 as exhibits.
9. On cross- examination he said that he was employed in the year 2015 but has no letter of appointment. He was given contract in the year 2016 by the respondent which is in court. That he was terminated in 2017 as he had taken the respondent to court and case is still ongoing to date. He further said that he was being paid ksh 14,500/=. In his letter of appointment it shows his salary was ksh 10,400/= which are the two documents he got from his employer.
10. On re-examination he said that he was employed in 2015 and did not get a contract. Company was to give him contract. He was given contract in 2016 which he signed and which has 5 pages and he signed pg 3. He did not sign all the pages. That his contract showed ksh 14,500 but do not know why the one in court showed Ksh 10,400/= and as per payslip he was earning the ksh 14,500/= and at termination he was earning ksh 14,500/=.



Respondent's Evidence

11. Respondent's witness Sharon Wakio gave sworn testimony and said that the claimant was known to her. She adopted the witness statement dated the 28/8/2019 as her evidence in chief and documents as contained in the list as exhibits in the case.
12. She testified that the claimant was employed on 1/3/2016 to December 31, 2016 and was issued with an employment contract. The above contract was never renewed. That as per her records the claimant was not terminated in 2017 because he filed a case against them. She further told court that the payslip produced in court was not from their office as they normally sign and stamp their payslips.
13. On cross examination she said that she was employed by the respondent in February 2016. She said that she was not aware of activities before the year 2016 and is not aware if the claimant was employed in 2015 and did not have records of employees before 2015 in court. She also said that she did not have records of leave taken by claimant or house allowance. That the contract in court is for 10 months. Period in figures is 3 months and claimant's last day was October 31, 2016. The payslip no 1 shows employer was King's Developer and is dated 28/2/2017 and does not show payment of leave days and house allowance. The payslips are kept by the respondent and they do not have the claimant's payslips for the period he worked for them.

Claimant's Submissions

14. The claimant relied on the case of [*Registered Trustees of the Presbyterian Church of East Africa and Another versus Ruth Gathoni Ngotho- Kariuki*](#) 2017 eKLR where the court said that although fixed term contracts terminate on expiry of the fixed term and are not renewable except as agreed between the parties, in exceptional cases, the court may infer renewal of such contracts from the conduct of the parties.
15. The claimant submits that although the contract of March 1, 2016 between the parties lapsed on the January 2017, the parties by their conduct renewed the contract. This conduct is evidenced in the acquiescence by the respondent to the claimant's presence at work for 5 months. The respondent allowed the claimant to remain at its premises and continued to assign him work during this period thereby raising a legitimate expectation in the claimant that his contract would be renewed. The respondent paid the claimant salary for 5 months which conduct implied renewal of contract of service between the parties.
16. The claimant submits that section 43 and 47 (5) of the [*Employment Act*](#), 2007 states that the burden of proving unfair termination rests on the employee while the burden of justifying the grounds of termination rests on the employer.
17. The claimant was terminated from his employment on or about June 19, 2017 without being given an opportunity to defend himself as required by the law. That there was indeed an employer employee relationship as required by the law and the claimant ought to have been subjected to the provisions of section 41 and 43 of the [*Employment Act*](#) 2007 which entails proper notice, valid reasons for termination and being accorded a hearing. He further relied on the case of [*Sandra M Waswa vs Global Campaign for Free Expression*](#) 2022 eKLR where the court held that 'be that as it may, the claimant was in employment for more than nine months after lapse of the contract. She was therefore on a month on month open ended contract and was entitled to be subjected to the provisions of section 41 and 43 of the [*Employment Act*](#) which provides for fair hearing and valid reasons for termination of contract. The respondent failed to prove all the requirements premised in section 45 of the [*Employment Act*](#).



The claimant submits that the payslips were issued by the respondent and they have failed to adduce alternative payslips to counter the same.

Respondent's Submissions

18. The respondent relied on, inter alia, the case of *Kenya Plantation and Agricultural Workers Union versus Keen Kleeners Limited* Cause No 163 of 2013 for the proposition that fixed term contracts between the respondent and its employees had created a relationship that expired and when the employees refused to renew their contracts, the employment relationship ceased.
19. The respondent also relied on the case of the *Registered Trustees De La Salle Christian Brothers T/A St Mary's Boys' Secondary School vs DM Baini* 2017 eKLR and the *Registered Trustees of the Presbyterian Church of East Africa and Another vs Ruth Gathoni Ngotho Kariuki* 2017 eKLR where the court stated that 'bearing the foregoing in mind, we note that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry. Accordingly, any claim based after expiry of the respondent's contract ought not to have been maintained. This is in relation to the salary for the months of April up to May 5, 2010. Similarly, since the respondent's contract came to an end by effluxion of time, any claim for wrongful termination could not be maintained.
20. That similarly in this case, before this honourable court it was the respondent's averments and witness testimony that the claimant and the respondent were bound by a fixed term contract whose contents the claimant wholly understood. The said fixed term contract dated the March 1, 2016 was produced as an exhibit in the respondent's list of documents. The said employment contract had a start date of March 1, 2016 and an end date of December 31, 2016 being a period of exactly 10 months as was contemplated.
21. The respondent argued that having demonstrated that an allegation of unlawful and unfair termination cannot arise from a fixed term contract and bearing in mind that pursuant to the *Employment Act*, the remedies sought by the claimant can only be awarded where a termination is held to be unlawful/unfair, it would follow that the prayers sought by the claimant cannot be awarded in the instant case, this honourable court should strike the claim with costs to the respondent.
22. The respondent further says that it has on more than once verbally communicated to the claimant that his dues are available for collection from the respondent's from the respondent's office and the claimant has blatantly refused to collect his pending dues. The respondent does not have the legal obligation or the right to compel the claimant to avail himself and collect his final dues.

Issues for Determination

- a. Whether the claimant's engagement with the respondent ended when the period in the contract of employment elapsed
 - b. Whether the claimant's termination of employment was unlawful?
 - c. What was the claimant's basic salary at the time of termination of employment contract
 - d. Whether the claimant is entitled to the prayers sought.
23. The claimant in the witness statement adopted as evidence in the case and the evidence in chief says that he was employed by the respondent on 14/6/2015 as a machine operator. The respondent according to him terminated the employment in the year 2017 after receiving summons in a civil suit, Nairobi CMCC No 3604 of 2017. This is also what appears in the memorandum of claim. At the cross examination, he admits that he was given a contract of employment in the year 2016 for 10 months and was to get another contract or be terminated.



24. Unfortunately for the claimant in this case, the only evidence given to demonstrate that he was working for the respondent after the expiry of the fixed contract is one unsigned document said to be the payslip from the respondent. The respondent denied that the payslip originated from them. Taking into account this and the initial reluctance of the claimant to be forthcoming on how he was employed by the respondent, the court finds on a balance of probability that the claimant was never employed by the respondent beyond 10 months' period stated in the contract.
25. The court is guided on the Court of Appeal decision in *Registered Trustees of the Presbyterian Church of East Africa & Another vs Ruth Gathoni Ngotho* 2017 eKLR for the proposition that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry of the contract and fixed contracts expire at the affluxion of time.
26. The claimant has no proof whatsoever beyond the expiry of the ten months (10) contract from March 1, 2016 to December 31, 2016 even though the contract a 31st March 2016 albeit erroneously. The employee is expected to at least present some proof like payment of the salaries bank statements and or any other communication from the employer.
27. The claimant claims he was terminated for filing a civil suit against the respondent due to an injury he received on January 14, 2017. He has not again provided any proof of the injury or the suit filed against the respondent.
28. Regrettably all the claimant has as evidence are mere allegations with no proof or terms of evidence documentary or otherwise.
29. Even if the respondent is mandated to keep documents of their employees as provided in section 74 of the *employment Act* nevertheless the employee cannot come to court with nothing and expect the employer to provide his evidence. The respondent is firm that he had no contractual obligation with the claimant beyond the 10 months contract. They were therefore not in a position to provide any documents to prove an employment relationship.
30. The courts have held time and again that fixed contracts are not terminated but they expire by affluxion of time. In the case No 949 of 2017 *Ronald Ongori Gwaro vs M/S Sturoplast Ltd* the court held that the relationship between the employer and employee was for a specific period. It therefore expired by affluxion of time.
31. The court findings is that the claimant has not proved he had an employment relationship beyond the 10 months and therefore there is no proof that his employment was unfairly or wrongfully terminated. The employment relationship terminated by the affluxion of time.
32. That being the court's finding the court holds the claimant is not entitled to the prayers he had made. His case is therefore dismissed and each party is ordered to pay their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 6TH DAY OF APRIL 2023.

ANNA NGIBUINI MWAURE

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments



and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

