



**Cheruiyot v Lutheran World Federation (Employment and Labour Relations Cause E036 of 2021) [2023] KEELRC 1370 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1370 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E036 OF 2021**

**DN NDERITU, J**

**MAY 31, 2023**

**BETWEEN**

**ALLAN KIPROTICH CHERUIYOT ..... CLAIMANT**

**AND**

**LUTHERAN WORLD FEDERATION ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. In a Statement of Claim dated June 23, 2021 and filed in court on June 29, 2021 through Raydon Mwangi & Associates the Claimant prays for: -

1. One month gross salary in lieu of notice
2. Refund for illegal deductions of Kshs 50,000/= per month for a period of 9 months based on Section 25(1) of the *Employment Act*, 2007.
3. Cost for internet use.
4. Severance pay.
5. Interest on 1, 2 and 3 at Court rates.
6. Costs of the suit to be borne by the Respondent.

Claims Arrangement

1. Notice - Kshs 154,384.00
2. Deductions - Kshs 450,000.00



3. Severance pay - Kshs 308,768.00
4. Cost of internet - Kshs 27,000.00
- Totals - Kshs 940,152.00

2. Together with the statement of claim was filed a verifying affidavit, statement by the claimant, and a list and a bundle of the listed documents in support of the claim.
3. On November 24, 2021 the Claimant filed a further list of documents and a bundle of the listed documents.
4. On July 23, 2021 the Respondent entered appearance through Nderitu & Partners Advocates and filed a response to the claim. In the said response the Respondent prays that the Claimant's cause be dismissed with costs for want of merits.
5. On August 30, 2021 the Respondent filed a witness statement by Michael Atwiine Nuwagaba (RW1) together with a list and a bundle of the listed documents.
6. This cause came up in open court for hearing on July 21, 2022 when the Claimant (CW1) testified and closed his case. The defence was heard on the same day when RW1 testified and the Respondent's case was closed as well.
7. Counsel for the parties addressed and summed up their respective client's case by way of written submissions. Counsel for the Claimant, Mr Ndichu, filed his written submissions on August 26, 2022 while Counsel for the Respondent, Miss Ndirangu, filed on September 20, 2022.

## **II. The Claimant's Case**

8. The Claimant's case is expressed in the statement of claim, the oral and documentary evidence of the Claimant (CW1) and the written submissions by his Counsel and the same is summarized as hereunder.
9. In his memorandum of claim, the Claimant pleaded that he was at first engaged by the Respondent as a finance officer II based at Nairobi but mainly supporting the Respondent's programme in the Republic of Djibouti.
10. In March, 2018 the finance officer in-charge of the Djibouti programme resigned and the Respondent requested the Claimant to relocate to Djibouti. Although not readily agreeable to relocating, the Claimant pleads, the Respondent convinced him to so relocate on some new terms. Amongst the new terms upon relocation, according to the Claimant, is that his monthly salary of Kshs 154,384/= was enhanced by Kshs 50,000/= per month, payable via payroll, for his being attached to the foreign office. He was also to be paid a daily subsistence allowance of Kshs 2,000/= or equivalent of USD 20\$ for each day that he spent in Djibouti, payable via petty cash voucher. He was paid Kshs 1,000/= for airtime per month.
11. The foregoing terms of employment were reduced into writing vide a contract executed by both parties on July 1, 2018, commencing on this date and running through to September 30, 2018, a period of two months. The contract was renewed on the same terms vide another contract executed on September 26, 2018, which was to run for another two months and expiring on December 31, 2018.
12. On May 28, 2019 both parties executed another contract which was to run retrospectively from January 1, 2019 and expiring on December 31, 2019.



13. Last but not the least, the parties entered into another contract that was executed in March, 2020 running from January 1, 2020 to December 31, 2020. In clause 1.0 of the said contract the parties agreed as follows – 'Your monthly basic salary for this contract has been placed at grade 5 step 44 with a corresponding amount of Kshs 154,384/- with allowance of Kshs 50,000/= and per diem of USD 20\$ paid through petty cash for every day spent in the field outside Kenya where the LWF does not cater for accommodation and meals.'
14. All the above-mentioned contracts were produced as exhibits and relied upon by both parties.
15. In 2020 the Covid 19 pandemic struck and on March 18, 2020 the Claimant travelled to Kenya but could not travel back to Djibouti as the international airspace was generally closed globally. He therefore remained in Kenya and he was directed by the Respondent to work from his home in Kericho County.
16. However, from April onwards the Respondent deducted Kshs 50,000/= from the salary of the Claimant for the remainder of the fixed-term contract until December, 2020.
17. On December 18, 2020 the Claimant received a letter from the Respondent dated December 7, 2020 informing him that his contract would not be renewed upon expiry on December 31, 2020. The Claimant pleads that he was entitled to a 30 days' notice and that the notice that was issued by the Respondent was short and illegal. The Claimant pleads that the said notice amounted to termination through redundancy.
18. The Claimant alleges that he incurred an expense of Kshs 3,000/= per month for internet connection for the nine months that he worked from his home which expense the Respondent failed and or refused to reimburse.
19. He argues that he served the Respondent for a cumulative period of four years and six months and that he had legitimate expectation that his contract would be renewed. He alleges that the failure by the Respondent to renew his contract amounted to a declaration of redundancy without due process. He therefore pleads for severance pay.
20. In his testimony in court the Claimant reiterated the foregoing, claiming that he acceded to the transfer to Djibouti under protest. He stated that for all the time that he remained attached to the foreign office his terms and conditions as per the three fixed-term contracts did not change. He testified that the additional Kshs 50,000/= to his monthly salary was agreed as payable due to the change of work station and to take care of incidental and attendant costs and the inconvenience occasioned. He testified that this is why the same was paid through the payroll unlike the daily subsistence allowance of USD 20\$ which was paid vide petty-cash voucher.
21. He stated that he was entitled to one month's notice in case the contract was not to be renewed, that he had legitimate expectation of the renewal, and that the said notice of non-renewal amounted to unlawful declaration of redundancy. He stated that he verbally sought an explanation on the unlawful deduction from his monthly salary but no explanation or reason was given to him.
22. He adopted his statement filed on record and produced all the filed documents as exhibits.
23. In cross-examination the Claimant admitted that the renewal of the contract was not automatic and that the same depended on availability of funds. He admitted that from May to December, 2020 he was paid monthly airtime allowance of Kshs 3,000/=. He insisted that this allowance did not cater for internet. He insisted that the Kshs 50,000/= pay increment was not pegged on his physical presence in Djibouti and as such the non-payment of the same from April to December, 2020 was completely wrong and unlawful.



24. The submissions by his Counsel shall be considered alongside those by Counsel for the Respondent in the succeeding parts of this judgment.

### **III. The Respondent's Case**

25. The Respondent's case is contained in the response to the claim, the oral and documentary evidence adduced through RW1, and the written submissions by its Counsel as summarized hereunder.
26. RW1 is the financial manager of the Respondent based at Nairobi. His testimony in court was aligned to his filed witness statement on record and the response to the claim.
27. The Respondent relied on the same documents that were produced by the Claimant, especially the periodic fixed-term contracts mentioned in the foregoing parts of this judgment. He stated that the said contracts were not renewable automatically but the terms for the entire period that the Claimant was attached to Djibouti remained the same.
28. He stated that the letter of December 7, 2020 by the Respondent to the Claimant was not a notice of termination but the same was only conveying the message that the Respondent was not to renew the contract that was expiring on December 31, 2020. He maintained that the Claimant was neither terminated nor declared redundant and that the contract came to an end by effluxion of time.
29. Further, this witness alleged that the monthly allowance of Kshs 50,000/= and the daily subsistence of USD 20\$ were payable only if and when the Claimant was physically present in Djibouti. He alleged that this explains why the said allowances were not paid as from April, 2020 as the Claimant was in Kenya as from March 18, 2020. He stated that the Claimant was not entitled to internet allowance but was paid a sum of Kshs 3,000/= from May to December, 2020 which was supposed to cater for his internet and airtime.
30. He stated that each of the periodic fixed-term contracts were independent although there was no lapse of time between one to the next from 2018 to 2020. He admitted that the Claimant remained an employee of the Respondent based in Djibouti up to December 31, 2020.
31. It is on the basis of the foregoing that the Respondent prays that the Claimant's cause be dismissed with costs. The submissions by its counsel shall be considered alongside those of the Claimant's counsel in the succeeding parts of this judgment.

### **IV. Issues For Determination**

32. This court has carefully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and submissions by counsel for both parties and the court identifies the following issues for determination –
- a. Was the Claimant unfairly and unlawfully terminated, declared redundant, or wrongfully dismissed by the Respondent? Or
  - b. Did the contract expire by effluxion of time?
  - c. If (a) above is in the affirmative, is the Claimant entitled to the reliefs sought in the claim?
  - d. Who meets the costs in this cause?



## V. Dismissal/termination Or Expiry?

33. On the face of it, this is a fairly straight forward matter. It is one of those disputes that one wonders how and why they landed in court and why the parties could not discuss, negotiate, agree, and settle the same out of court. However, it is the duty and indeed an obligation of this court to hear and determine all matters that come before it where it has jurisdiction and pronounce itself on the contested issues in accordance with the law.
34. The terms and conditions of employment of the Claimant by the Respondent are to a large extent not really in dispute. The Claimant and the Respondent were in an employee/employer relationship based on various independent periodical and fixed-term contracts from 2017 to 2020. The last such contract was executed in March, 2020 and the same was running from 1<sup>st</sup> January to December 31, 2020. The Claimant signed his part on March 23, 2020 while the Respondent's country representative signed on March 3, 2020. Through this cause, the parties herein are calling upon this court to interpret the said contract with each party taking a diametrically opposed position in regard to several terms contained therein and more particularly to the issue of the Kshs 50,000/= salary increment. Was this a salary increment or was it an allowance that was only payable to the Claimant when he was physically present in Djibouti?
35. As per the contract, and this court has no business writing or rewriting the contract for the parties, it was to run from 1<sup>st</sup> January to December 31, 2020. That was the natural life of the said contract and there is no dispute on that. Clause 1.9 of the contract provided that either party may terminate the contract by giving the other one month's notice or by paying one month's salary in lieu thereof. So far these are clear and unambiguous terms of the contract which require no special or Solomonian wisdom for interpretation to anyone who can read and understand the English language.
36. The natural and rather obvious meaning of the clause mentioned in the foregoing paragraph is that, *ceteris paribus*, the Claimant was to remain in service of the Respondent until December 31, 2020 and any extension beyond that date was only possible by way of an express written notice of extension of the said contract or a new contract altogether. The contract provided that any notice to either party was to be in writing.
37. Vide a letter dated December 7, 2020, which the Claimant allegedly received on December 18, 2020, the Respondent informed the Claimant that upon expiry of his contract on December 31, 2020 the same would not be renewed for 2021 as the Djibouti programme was coming to an end. So, come December 31, 2020 the parties parted ways.
38. It is this end of the relationship that the Claimant alleges amounted to declaration of redundancy. He alleges that he had legitimate expectation that the contract was to be renewed. To this court, this is a ridiculous and flawed interpretation of the contract. The contract was for a fixed term and it could only be terminated in the terms discussed above. This means that if the contract was not determined in whatever other manner the same came to its natural intended end on December 31, 2022 through effluxion of time.
39. The Respondent was under no obligation whatsoever to inform the Claimant about the non-renewal of the contract. The contract was to come to an end as agreed either way.
40. It is the opinion and holding of this court that the letter of December 7, 2020 by the Respondent to the Claimant was merely informative and out of courtesy. It was not, and cannot be, a notice of termination of the contract. In any event, and this is not in dispute, the Claimant remained in employment of the Respondent in accordance with the fixed-term contract until December 31, 2020.



41. [\*Black's Law Dictionary Tenth Edition\*](#) defines legitimate expectation as – expectation arising from the reasonable belief that a private person or a public body will adhere to a well-established practice or will keep a promise.
42. The terms of the contract between the parties were clear, precise, and unambiguous. The contract was to expire on December 31, 2020 by effluxion of time. At no time did the Respondent promise, undertake, propose, signal, express, or imply that it was to renew the contract. In fact, the Respondent was under no legal obligation or duty to inform the Claimant that the contract would not be renewed. Each of the contracts prior to this final contract were independent and distinct and the same did not establish a pattern or a practice that the contract would be automatically renewed upon expiry. It would have been unreasonable and delusional for the Claimant to have believed and or expected that the contract was to be renewed automatically upon expiry.
43. The Claimant had worked with the Respondent for long, about four years, and he indeed knew that the various programmes depended on donor funding and availability of funds. The letter of December 7, 2020 by the Respondent to the Claimant indicates that the Claimant was fully aware and was part and parcel of the team that was working on the winding up of the Djibouti programme. In the circumstances, therefore, if the Claimant held any expectations for the renewal of the contract, such expectations were illegitimate, misplaced, and at best only wishful and imaginary.
44. The court has gone through the submissions by counsel for the Claimant and nothing therein can persuade this court to depart from the foregoing reasoning and holding. On the other hand, counsel for the Respondent has submitted at length that the notice of non-renewal of the contract by the Respondent did not amount to a notice of termination. Counsel has cited numerous decisions to buttress this argument including [\*Stephen M Kitbeka V Kevita International Limited \(2018\) eKLR\*](#), [\*Amatsi Water Services Company Limited V Francis Shire Chachi \(2018\) eKLR\*](#), [\*Jonathan Kipchoge V Sylvester Kimaiyo & 2 Others \(2022\) eKLR\*](#), among others.
45. On the issue of legitimate expectation counsel for the Respondent has cited [\*Teresa Carol Omondi V Transparency International-Kenya \(2017\) eKLR\*](#) wherein the judge held, as I hereby do, that the burden of proof of legitimate expectation is on he who alleges. In this cause the Claimant ought to have demonstrated to this court that the Respondent, through conduct, regular practice, or an express or implied promise undertook to renew or extend the fixed-term contract. This court is not convinced that the Claimant was able to discharge this burden and as such the expectation by the Claimant, if any, was hollow, unreasonable, and not properly grounded.
46. For all the reasons stated above, this court takes the considered view and holds that the Claimant was neither dismissed or terminated nor declared redundant but that the fixed-term contract by and between the parties came to its natural and logical end by way of effluxion of time. The Respondent did not expressly or impliedly promise to renew the contract that was expiring on December 31, 2020. There are no logical and or legitimate grounds and or reasons for the Claimant to have expected the renewal of the contract. It is so held and declared in resolution of issues (a) and (b) for determination.

## VI. Reliefs

47. Having held that the Claimant was neither dismissed/terminated nor declared redundant, and that the contract came to its logical conclusion and expiry through effluxion of time, the court shall now consider each of the reliefs sought as hereunder.
48. Prayer (1) is for one month's salary in lieu of notice. This prayer cannot be allowed for the reason that the contract came to its natural end by effluxion of time. The Respondent was under no obligation



to issue a notice of the fixed-term contract coming to an end and the court has found and held that the letter of December 7, 2020 was only informing that the contract would not be renewed in 2021. It was not a notice of termination.

49. Prayer (2) is for payment of unlawful deductions made from the monthly salary of the Claimant at the rate of Kshs 50,000/= for the period from April to December, 2020. The Respondent argues that it stopped paying this allowance to the Claimant after he came back to Kenya in March, 2020 and remained therein until the expiry of the contract on December 31, 2021. On the other hand, the Claimant argues that so long as he was an employee of the Respondent based or attached to the Djibouti office he was entitled to the said allowance regardless of whether he was physically in Djibouti or not.
50. The said allowance of Kshs 50,000/= was introduced into the contract of the Claimant once he was posted to Djibouti effective July 1, 2018. In the letter signed on July 1, 2018 by both parties, which introduced the said allowance, the parties agreed that 'Your salary for this contract is placed at grade 5 step 44 with a corresponding gross amount of Kes 154,384. In addition to this you will receive a field allowance as follows: Kes 50,000 which will be processed through payroll and USD 20\$ for every day spent in Djibouti which will be processed through petty cash.'
51. The parties, and even counsel in their respective submissions, made a big deal in the interpretation of the foregoing term of the contract. The same clause and in the same wording is repeated in the last contract by and between the parties that was to run from 1<sup>st</sup> January to December, 2020 which is to a large extent the subject matter of this cause.
52. In the plain and natural meaning of the words used in this letter, and in the context and construction of the said clause, this court takes the considered view that what the parties intended and what they indeed meant is that upon transfer from Nairobi to Djibouti the Claimant's monthly pay was increased by Kshs 50,000/= which was intended to take care of the increased cost and the inconvenience that the Claimant was to suffer as a result of moving to a foreign country as his new work station. For sure the Claimant, who is a Kenyan, was to incur some extra cost in air tickets, housing, and other incidental costs as a result of the transfer. He was also to suffer inconvenience for being away from his family and loved ones.
53. It is the understanding and opinion of this court that the Kshs 50,000/= was due and payable to the Claimant as long as he was stationed in Djibouti. It was not tagged or pegged to his physical presence in Djibouti but rather to his duty station being in that foreign country.
54. For his physical presence in Djibouti, the parties agreed to a daily allowance of USD 20\$ payable through petty cash. This allowance was clearly marked to cater for the daily subsistence and or out of pocket expenses of the Claimant for each day that he was in Djibouti and he collected the same from office by way of signing a petty cash voucher. In the said contract the parties distinguished this subsistence daily allowance from the additional salary increment of Kshs 50,000/= and the latter was paid together with the monthly salary through the pay roll.
55. The Claimant alleged that he acceded to the transfer under protest and clearly the increased salary was to sooth and massage his protest not to mention the inconvenience caused to him by the relocation. It cannot be possibly true, and the allegations by the Respondent are hereby dismissed and discounted, that the monthly pay for the Claimant remained the same at Kshs 154,384/= even upon transfer from Nairobi to Djibouti. That allegation by the Respondent is illogical, cynical, and hypocritical and the same is dismissed.



56. It is the holding by this court that even after the Claimant travelled to Kenya in March, 2018 and could not travel back to Djibouti due to the Covid 19 pandemic, the said enhanced allowance remained due and payable through the pay roll as agreed by and between the parties. What was not payable was the daily subsistence allowance of USD 20\$, as long as the Claimant remained outside Djibouti, his work station.
57. The Respondent unfairly and unlawfully withheld the said pay without any reasonable cause or justification from April to December, 2020. The Respondent is hereby ordered to pay the same in the total sum of Kshs 450,000/=.
58. Prayer (3) is for refund of cost of internet at Kshs 3,000/= per month. The evidence on record is that while based at Nairobi the Claimant was given an airtime allowance of Kshs 1,000/=. Presumably, there was internet connection in the Nairobi office. Upon relocation to Djibouti the airtime allowance was enhanced to Kshs 3,000/= as there was no internet connection in the Djibouti office. This allowance continued to be paid to the Claimant even after he came back to Kenya to enable him use the same for airtime and internet bundles. There is no official communication requesting and authorizing the Claimant to incur extra cost on internet connection. In any event, if the Claimant needed more bundles nothing would have stopped him from officially applying for the same and obtaining authorization to incur such cost. If the Claimant indeed spent Kshs 3,000/= per month on internet, how is this court to determine which quantity of the same was applied to official business and what portion went into his personal use?
59. This court holds that the request by the Claimant for refund of the internet expenses is illogical and unreasonable and that the Claimant has failed to either prove and or justify the same. This prayer is dismissed.
60. Prayer (4) is for severance pay. Severance pay is payable to an employee who has been declared redundant under Section 40(1)(g) of the *Employment Act*. This court has already found in the preceding parts of this judgment that the Claimant was neither declared redundant nor dismissed or terminated in any manner whatsoever, and that the employer/employee between the Respondent and the Claimant came to its natural and logical end through effluxion of time. This prayer, for all the reasons stated in this judgment, is denied and dismissed.

## VII. Costs

61. The Claimant is awarded costs of this cause as his claim has succeeded albeit only to some extent.

## VIII. Disposal

62. In final disposal of this cause, this court issues the following orders: -
- a) A declaration be and is hereby issued that the employer/employee relationship between the Respondent and the Claimant fairly and lawfully terminated by way of effluxion of time.
  - b) The Claimant is awarded a total of Kshs 450,000/= in salary/allowance arrears that were unlawfully deducted and or withheld by the Respondent.
  - c) All the other claims are denied.
  - d) Costs to the Claimant.

**DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU**

**THIS 31<sup>ST</sup> DAY OF MAY. 2023**



.....  
**DAVID NDERITU**  
**JUDGE**

