



**Oyuga v Everett Aviation (Charter) Limited (Cause E037 of 2022)
[2023] KEELRC 1136 (KLR) (5 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1136 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E037 OF 2022**

ON MAKAU, J

MAY 5, 2023

BETWEEN

JOSEPH OTIENO OYUGA CLAIMANT

AND

EVERETT AVIATION (CHARTER) LIMITED RESPONDENT

JUDGMENT

1. The claimant was employed by the respondent under a fixed term contract of one year from January 6, 2020 but terminable by 3 months' notice. His position was Licenced Avionic Engineer starting with a gross salary of Kshs 200,000.00 per month. Subject to performance, he would rise to the position of Line Avionics Engineer after 6 months and earn a monthly gross salary of Kshs 250,000.00. The claimant was entitled to 21 leave days per year plus medical cover. The contract was renewable through mutual agreement and it was supposed to be read in conjunction with the respondents' staff handbook.
2. The claimant was promoted to Line Avionics Engineer effective November 1, 2020 and his gross salary increased to Kshs 250,000.00 per month and served through the contract term. On January 7, 2021, the respondent extended the claimant's contract until January 5, 2022 when it would terminate automatically. All the other terms and conditions of service remained the same. The claimant signed acceptance after reading the offer of extension.
3. Again the claimant served through his contract term and on January 5, 2022, the respondent served him with a letter notifying him that the contract was lapsing that day and it would not be renewed. Further, the letter offered to him terminal dues including salary up to January 5, 2022, one month salary in lieu of notice and pay in lieu of 11.5 leave days not taken. He was to receive a certificate of service after completing exit procedure and handing over all the company properties in his possession. The claimant was also required to sign the letter to confirm that he had read and understood the contents therein.



4. The claimant was aggrieved and brought this suit alleging that his contract of service had been unfairly terminated and his right to legitimate expectation was violated. Further he averred that the respondent discriminated against him by paying Kshs 250,000.00 basic salary while his fellow Engineer Mr Vivian Mathews from South Africa was paid Kshs 948,428.00 basic salary per month. In addition, Mr Vivian Mathews was provided with accommodation, transport, foodstuffs and his utility bills paid for. In the claimant's view, he was discriminated simply because he was a black.
5. The claimant seeks the following reliefs:-
 - i. 12 months' salary for unlawful and unfair termination
(250,000 x 12) Kshs 3,000,000.00
 - ii. 2 months' salary in lieu of termination
Notice Kshs 500,000.00
 - iii. Unpaid salary increment from July 2020
To November, 2020 (50,000 x 5 months) Kshs 250,000.00
 - iv. Unpaid house allowance
(15% x 200,000) 6 months + 15% x 250,000)
18 months Kshs 855,000.00
 - v. Service pay at the rate of 1 month salary
For every year worked (250,000 x 2) Kshs 500,000.00
 - vi. Damages for Discrimination Kshs 10,000,000.00
 - vii. Issuance of certificate of service that complies with Section 51 of the [Employment Act, 2007](#)
Sub-Total Kshs 14,605,000.00
 - viii. Costs of the suit.
 - ix. Interest on the above until payment in full.
 - x. Such further or other relief the Honourable court may deem fit.
6. The respondent admits that it employed the claimant as a Licensed Avionics Engineer but denies that it terminated the claimant's contract of service unfairly. Further that it employed the claimant under fixed term contract which expired automatically on January 5, 2022. It denied the alleged discrimination and averred that Mr Vivian Mathews had higher qualification and more experience than the claimant. Hence the disparity in their salaries was justified. Therefore it prayed for the suit to be dismissed with costs contending that the reliefs sought are not merited.

Evidence

7. The claimant testified as CW1 and adopted his written statements dated August 2, 2022 and November 7, 2022 as his evidence. He further produced a bundle of 27 documents as exhibit 1-27. The statements basically reiterated the facts pleaded in the statement of claim as summarized above.
8. The claimant testified that 5 days after termination of his contract, his job was advertised by the respondent but he never applied despite him having the qualification as an Air craft Engineer. He further testified that he had 16 years as a licensed Engineer while his colleague Mr Vivian Mathews,



from South Africa had only 2 years' experience yet being paid more than him. Mr Vivian also did not have validation of his foreign license as required by laws of Kenya.

9. On cross-examination he admitted that on July 3, 2019 when he applied for the job, he indicated that he had over 10 years' experience in Aircraft maintenance. He further admitted that he had no experience working on Helicopters. He also had no Type Rating on Helicopters but other Aircrafts. However on being shown his exhibit No 23, a letter from Kenya Airways, he confirmed that he only held a licence without Type Rating. Further, he contended that the electricals and electronics for aeroplanes and Helicopters are the same.
10. He testified that during his employment by the respondent he could sign Certificate of Release to Service for category 1, 2 and 3 but he had no written authority from the Quality Control Manager to sign such certificates. He however had authority from KCAA to sign certificate of release to service for category 1 and 2.
11. He testified that foreign Engineer working in Kenya must have validation certificate from KCAA. He admitted that Mr.Vivian was a power plant and Air Frames Engineer. He also had Type Rating in MBB-117 Helicopters series achieved on October 7, 2008 translating to 14 years' experience. Referring to Mr Vivian's CV he confirmed that, from 2001-2010 he did day to day maintenance of BBK 117 helicopters. However, he contended that Mr Vivian had no work permit since the one he had was for 2 years from March 7, 2019.
12. The claimant admitted that his contract of employment provided for a gross salary and that it was to be read in conjunction with the staff hard book. His place of work was Nanyuki. The contract indicated the expiry date as January 5, 2022. He admitted that on January 5, 2022, at 4.20pm he received a call from the HR Manager telling him that his contract would not be renewed. He admitted that on January 15, 2022, he wrote an email thanking the employer for the opportunity to serve the company.
13. On re-examination he stated that his first contract was renewed automatically and therefore he had legitimate expectation that his contract would be renewed. His expectation was boosted when he received calls from his supervisor allocating him work on January 6, 2022.
14. The respondent's HR Manager, Mr Emmanuel Muhindi testified as RW1 and adopted his written statement dated September 16, 2022 as his evidence. He further produced 13 documents as exhibits. In brief, he testified that the claimant was engaged as an Entry level licensed Avionics Engineer under a fixed term contract from January 6, 2020 to January 5, 2021. He had zero experience in Helicopters.The contract was extended to January 5, 2022 when it expired.
15. In 2020, the respondent employed Mr Vivian Mathews a South African who had more than 20 years in Helicopters 14 years of which he specifically dealt with BK 117 the type operated by the respondent. The company applied and obtained a no objection from KCAA for Mr Vivian to operate in Kenya. He was also validated as one capable to operate in Kenya. He had over 30 years dealing with all parts of Helicopters while the claimant only dealt with electricals and had no experience in Helicopter except the two years he worked for the respondent. He denied that the company discriminated against the claimant and contended that the claimant never lodged any complaint to the HR office.
16. He further testified that on January 8, 2022, the respondent advertised vacancies for pilots and Engineers but they were not related to the claimant's qualifications. They were for power plant and Air frames Engineers for Helicopters. He confirmed that the claimant's position was filled. He reiterated that the claimant's contract lapsed automatically on January 5, 2022.
17. On cross-examination, the witness reiterated that the jobs advertised in January, 2022 were for Power plant and Air frames Engineer for Helicopters. He admitted that the claimant had 2 years' experience



- required in the interview but he never applied for the job. He clarified that the claimant was a licensed Avionics but he had no Type Rating.
18. He testified that the claimant's salary was increased after his position rose to Line Avionics Engineer. He admitted that the claimant's contract provided for 3 months' notice before termination but clarified that in this case the contract lapsed automatically. He further clarified that the contract of service provided for gross salary. He also contended that the company remitted all NSSF dues for the claimant.
 19. On re-examination, the witness reiterated that the job advertisement in issue asked for KCAA License and Rating. As regards the offer to pay one month salary in lieu of notice, he contended that the offer was only a good gesture from the employer and not an entitlement as notice was only required when terminating the contract before the expiry date. Further, the claimant was paid all his terminal dues and thanked the company for the job opportunity.
 20. Mr Anthony Macharia Gichamba, respondent's General Manager testified as RW2. He also adopted his written statement dated November 2, 2022 and Exhibit D8-13 as his evidence. In brief, he testified that the claimant had experience in Air craft with no Rating and he had zero experience in Helicopters. He denied the alleged discrimination contending that Mr Vivian Mathews had extensive Helicopter experience having learned, trained on the specific type operated by the company from the manufacturer in South Africa.
 21. However, he admitted that Mr Vivian has sat for KCAA exams twice and failed. He contended that failure of exams did not change the level of his experience in Helicopter power plant and Air frames. He is not releasing to service until he is validated. He clarified that an Engineers with validation certificate on licence can release air craft to service.

Submissions

22. The claimant submitted that the termination of his contract was unfair because he was not served with 3 months prior notice but offered one month salary in lieu of notice. He relied on the case of [*Linda Ndenengo Mwakugu v Open Society Institute Company Limited*](#) (2020) eKLR where the termination was faulted for failure to give 3 months' notice of intention not to renew the fixed term contract as provided in the contract between the parties.
23. He further relied on the case of [*John Nduba v Africa Medical and Research Foundation \(AMREF Health Africa\)*](#) (2020) eKLR and [*Jayne Kanini Mwanza v National Water Conservation and Pipeline Corporation*](#) (2014) eKLR where the same position obtained.
24. Further it was submitted that the termination was unfair because there was no valid or fair reason for the termination. It was also submitted that the respondent's witnesses confirmed that he had no disciplinary issues. It was argued that the claimant's contract had been renewed by the respondent's conduct and the subsequent advertisement for his job violated his right to legitimate expectation.
25. As regards the claim for discrimination, it was submitted that the respondent discriminated the claimant by paying him Kshs 250,000.00 while his fellow Engineer, Mr Vivian Mathews was receiving Kshs 948,428.00 plus other fridge benefits. It was contended that the said disparity in pay was unjustified because Mr Vivian did not produce any single certificate to prove he is more qualified than the claimant.
26. In view of the above submissions, the claimant urged the court to award him the reliefs sought in the suit.



27. On the other hand, the respondent, submitted that the claimant's contract expired automatically on January 5, 2022 as agreed by the parties in the fixed term contract dated January 7, 2021. Further, the letter issued on January 5, 2022 was not a termination notice but just a reminder to the claimant that his contract had expired and it would not be renewed/extended. It was also submitted that the contract having been for a fixed term, there was no obligation to serve prior notice since it had a definite end date. Further the employer was not required to cite any reason for the termination of the contract. Reliance was placed on the case of *Oshwal Academy (Nairobi) & another v Indu Vishwanath* (2015) eKLR, *Registered Trustee of the Presbyterian Church of East Africa & Another v Ruth Gathoni Kariuki* (2017) eKLR and *Bernard Wanjohi Muriuki v Kirinyaga Water and Sanitation Co Ltd & Another* (2012) eKLR.
28. As regards implied renewal and legitimate expectation for renewal of the contract, it was submitted that the claimant has not established the legal threshold for the same. Reliance was placed on the case of *Teresa Carlo Omondi v Transparency International-Kenya* (2017) eKLR where the court held that the burden of proof of legitimate expectation lies on the employee, and went on to set out some thresholds.
29. The alleged discrimination was denied and the court urged to dismiss it because the claimant and Mr Vivian Mathews possessed different qualifications and experience. The claimant was an Avionics Engineer dealing with Electrical and electronics maintenance, while Mr Vivian Mathews is an Air frames and power plant engineer who maintains the engine and exterior parts of an Aircraft. Further whereas the claimant had only 2 years' experience working with Helicopters, Mr Mathews had over 30 years' experience working on Helicopters. Mr Mathews, also had Type Rating on Helicopters even before joining the respondent while the claimant had zero experience in Helicopters before joining the respondent.
30. In view of the foregoing, it was submitted that the claimant and Mr Mathews possessed different skills and levels of experience, and their duties were also different. Consequently, the alleged discrimination was made in bad faith as the claimant never raised that during the time he was employed.
31. On the basis of the above submissions, the respondents urged the court to find that the reliefs sought are not merited and proceed to dismiss the suit with costs.

Issues for Determination

32. There is no dispute that the claimant worked for the respondent from January 6, 2020 to January 5, 2022 on fixed term contract basis. The issues for determination are:-
 - a. Whether the contract of service was terminated unfairly by the respondent or it ended automatically.
 - b. Whether the claimant was discriminated against the respondent with respect to the payment of salary.
 - c. Whether the claimant merits the reliefs sought.

Unfair termination

33. The claimant was engaged vide a contract of employment dated December 24, 2019 but effective January 6, 2020. The contract was for 12 months from the effective date but renewable by mutual agreement. The contract was also terminable by either party giving a notice of 3 months in writing.



34. The claimant served the whole contract period and by letter dated January 7, 2021 the employer offered to extend the contract for another 12 months. The letter stated that:-

Mr Joseph Otieno Oyuga

O Box 935-00521

Nairobi, Kenya

+254 7xxxx

otienosxxx@gmail.com

Subject: Extension of your Employment Contract

Dear Joseph

Your current contract expired on 05 January, 2021.

Please accept this letter as a formal extension of your employment contract up until 05 January 2022. Your contract terminates automatically on 05 January 2022.

Other terms and conditions of your employment remain the same.

Please sign on the space provided here below to confirm your agreement to the above.

Yours sincerely

Adrian Dearing

For Everett Aviation

I confirm that I have read and accept the above

Signed:..... Date 7/01/2021

Mr Joseph Otieno Oyuga

35. The claimant accepted the offer and again served the whole contract term. On the last day of his contract, he was served with the letter dated January 5, 2022 via WhatsApp. The letter stated that:-

“Mr Joseph Otieno Oyuga

O Box xxx-00521

Nairobi, Kenya

M: +254 7xxxx

05 January 2022

Dear Joseph,

Subject: Non-Renewal of Your Employment Contract with Everett Aviation.

Reference is made to your contract extension letter dated 07 January 2021.

We write to advise that your contract expires today and will not be renewed or extended. Consequently, today is the last day of your employment with us.

Your final dues which will be paid by bank transfer before end of January 2022 comprises;



- salary up to the final date of your contract 5 days' salary for January 2022,
- one month salary in lieu of notice
- pay in lieu of 11.5 days of untaken leave.

Please note that you will receive certificate of service after completing exit procedure and handing over all company properties in your possession.”

36. Having considered the above two letters from the respondent, it is clear that the extension of the claimant's contract was until a definite end date. The contract was to terminate automatically on January 5, 2022. It could only be renewed by mutual agreement as per the terms of the initial contract which never changed.
37. The contract expired on January 5, 2022 as agreed vide the letter dated January 7, 2021 and on the same date the respondent notified the claimant that the contract was expiring the same day. Further the letter notified the claimant that the respondent did not intend to renew or extend the contract.
38. As correctly submitted by the respondent the letter dated January 5, 2022 was not a notice of termination but rather a reminder to the claimant that his contract was expiring and it would not be renewed. In all the case cited by the respondent above, the courts have been unanimous that in fixed term contracts the issue of unfair Termination does not arise because the contract expires automatically on the date agreed in the contract and the employer has no obligation to give prior notice unless it is a requirement under the contract itself. Likewise there is no requirement for the employer to cite the reason for non-renewal/extension of the contract, or to accord the employee a hearing as to why the renewal/extension will not be granted.
39. The claimant alleges that he had a legitimate expectation that the contract would be renewed considering what happened after the expiration of the previous contract, and further because his supervisor had called him to allocate work. The respondent's case, however is that the said supervisor did not have any mandate to enter into contract of service with the claimant. I agree that, the claimant knew that his contract was expiring on January 5, 2022 and ought to have alerted his supervisor as much. In my view the said ground did not constitute a good ground for legitimate expectation that the contract would be renewed.
40. In the *Linda Ndenengo Mwakugu* case, *supra*, the court held that:-

“In the present case, I find that the claimant had legitimate expectation of renewal of her contract based on the fact that she was not served with a notice of non-renewal of contract, that she was authorized in May, 2016 to attend training in Geneva in July 2016 which was outside the term of her contract that was in force at the time.”
41. Again in the *John Nduba* case, *supra*, the employer's HR Policy manual provided for an “End of contract clause” which required the employer to serve a prior notice of non-renewal but failed to do so. Consequently the court held that the claimant had discharged the burden of proving legitimate expectation of renewal and declared the termination unfair.
42. In the present case, the contract did not require the employer to serve a non-renewal notice prior to the expiry date. The requirement of service of three months' notice was only necessary when terminating the contract before the expiry date. Consequently, I am satisfied that the claim of unfair termination has no merits and it fails.



Discrimination

43. The claimant alleges that he was discriminated against with respect to salary because his fellow Engineer Mr Vivian Mathews was earning Kshs 948,428.00 and him received Kshs 250,000.00. He attributed the disparity to colour of their skin. The respondent admitted the said disparity in salaries but explained that the two engineers had different qualifications, experience and duties.
44. The claimant did not rebut the said employer's evidence. There is evidence that Vivian Mathews had worked with Helicopter for over 30 years and had Type Rating for BK 117 which is operated by the respondent. Further the claimant has admitted that he had not worked with Helicopters before joining the respondent. Again the claimant was an Avionics Engineer dealing only with electrical and electronics while Mr Mathews was Airframe and power plant (A&P) Engineer dealing with the engines and the body of the air- craft.
45. The evidence before the court points to the conclusion that the claimant and Mr Vivian Mathews possessed different qualifications and their duties were different. Consequently the alleged discrimination has not been proved because the pay disparity was justified. Discrimination occurs where individuals serving in similar circumstances are treated differently without any justification like levels of responsibility, expertise, experience skills to name but a few.

Reliefs

46. Having found that the claimant's contract was not terminated unfairly by the employer but rather expired automatically, the claim for salary in lieu of notice and compensation for unfair termination must fail. Likewise the claim for general damages for discrimination also fails because the alleged discrimination was not proved by evidence.
47. The claim for salary arrears of Kshs 50,000.00 per month from July to November, 2020 lacks merits and it is rejected because it is not supported by evidence. The claimant was entitled to salary of Ksh 200,000.00 until he rose to the position of Line Avionic Engineer when he would get salary increment of Kshs 250,000.00. There is no evidence that he became Line Avionics Engineer before November 1, 2020. Consequently I find that the claimant was promoted effective November 1, 2020 and his salary was increased to Kshs 250,000.00. The letter dated November 23, 2020 backdated the pay increment to November 1, 2020 and the claimant accepted. He is therefore bound by that agreement and his claim for salary arrears from July, 2020 is dismissed.
48. The claim for unpaid House allowance for 24 months is also not backed by any evidence. The claimant admitted that his contract provided that his salary was gross. I have perused the contract of employment and confirmed that it provided for a gross salary of Kshs 200,000.00 as his entry pay. Then the salary adjustment letter dated November 23, 2020 provided for a gross salary of Kshs 250,000.00 per month.
49. The claim for service pay is premised on ground that the employer did not remit NSSF contributions for the claimant regularly. The claimant produced his payslip for December, 2021 indicting deduction for NSSF amounting to Kshs 200. However, he did not produce any evidence to prove that the money was not remitted to the Agency. He never produced a statement of his NSSF remittances or some other evidence to support the claim and therefore that claim also fails.
50. The claim for certificate of service has not been denied. The same was to be issued upon clearance by the claimant. He did so and therefore he is entitled to the same. In the end, I dismiss the suit save for the unopposed prayer for certificate of service. Each party shall bear own costs because they have partially succeeded in their respective cases.



DATED, SIGNED AND DELIVERED AT NYERI THIS 5TH DAY OF MAY, 2023.

ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

