



REPUBLIC OF KENYA



**Kaveke v Pak Space Limited (Cause 744 of 2018)
[2023] KEELRC 1690 (KLR) (11 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1690 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 744 OF 2018**

JK GAKERI, J

JULY 11, 2023

BETWEEN

JEROME K. KAVEKE CLAIMANT

AND

PAK SPACE LIMITED RESPONDENT

JUDGMENT

1. By a statement of claim filed on 16th March 2018, the Claimant sued the Respondent alleging unfair dismissal and non-payment of terminal dues.
2. The Claimant prays for Orders That;
 - a. The Honourable do declare that the respondent has engaged in unfair labour practice contrary to Article 41 of *the constitution*.
 - b. The Honourable court do declare that the dismissal/termination of the claimant was unlawful, illegal and null and void.
 - c. The Honourable court do declare the respondent wrongfully declared the claimant redundant.
 - d. The claimant be paid the full salary and allowances during the period of dismissal
or
The court does reinstate the claimant back to his/her employment with the respondent without loss of position/ rank, salary and benefits to date.
In the Alternative
 - e. Respondent be and is herein ordered and directed to pay the claimant;
 - i. Notice pay at 3 months all, Kshs.518,400/=



- ii. Compensation for 12 months, Kshs.2,073,600/=
 - iii. Leave pay, Kshs.172,800/=
 - iv. Redundancy pay of 3 months, Kshs.518,400/=
 - f. The Honourable court do issue such orders and give directions as it may deem fit to meet the ends of justice.
 - g. Interests be paid on the above amounts as awarded by the court
3. The Respondent filed a statement of defence on 25th July, 2018 praying for dismissal of the suit with costs.

Claimant's Case

4. The claimant avers that he was employed by the Respondent in the position of Managing Director on the 1st October, 2014 at a gross salary of Kshs.130,000/= per month, fuel cost of Kshs.10,000/=, maintenance of Kshs.10,000/=, telephone allowance of Kshs.10,000/= which totalled to Kshs.160,000/= per month.
5. The claimant further avers that he worked diligently and was confirmed as the Chief Executive Officer effective 1st April, 2015 but his terms of appointment were varied to a fixed term contract of two years which was not agreed upon.
6. The claimant avers that because of his dedication and diligence, he was recognised and awarded 8% salary increment which raised his pay to Kshs.172,800/= per month.
7. It is averred that the Claimant was shocked to receive a letter dated 28th February, 2017 terminating his employment on the ground that the respondent was restructuring and the position of Chief Executive Officer had been scrapped and was being replaced with junior positions of factory manager and factory supervisor.
8. The claimant avers that he had noticed positive returns and growth of the company from 2014 to 2017 and being in a management position he was not aware of any performance review whose results showed that the business was not doing well.
9. The claimant avers that his termination was a summary dismissal or an unlawful declaration of redundancy contrary to section 40 of the *Employment Act* and Article 41(1) of *the Constitution*.
10. The claimant avers that the Respondent issued him with a termination notice taking effect on the same day contrary to the provisions of the appointment letter that required a 3 months' notice or payment in lieu of notice.
11. The claimant further stated that the procedure adopted in terminating his employment was contrary to Section 35 and 41 of the *Employment Act*. He stated that he was not given genuine reasons for termination nor subjected to a disciplinary hearing and the terminal dues paid were not in accordance to the law which amounted to a wrongful and unfair termination.

Respondent's case

12. In its response to the claim, the respondent confirmed that the claimant was its employee serving in the capacity of Managing Director on a 2-year contract which was subject to renewal on the basis of performance.



13. The respondent states that the growth of the business was normal and denies that the profit margins were profound as claimed. It also stated that the company was not meeting the expected targets which necessitated the decision to restructure.
14. The respondent further states that it was under no obligation to extend the claimant's employment.
15. The respondent denied having summarily dismissed the claimant nor issuing him with a termination letter that took effect on the same day.
16. The respondent states that it issued a letter to the claimant dated 28th February, 2017 notifying him that his contract would not be renewed upon expiry on 31st March, 2017 effluxion.
17. The respondent further stated the claimant was not entitled to any leave pay since he had utilised all his leave days as at 3rd January 2017.
18. It is the Respondent's case that the claimant was derelict in his duties hence the decision by the Board of directors not to renew his contract upon expiry.
19. The Respondent further states that the claimant was paid two months salary consistent with the company's policy.

Claimant's Evidence

20. The claimant (CW1) testified in support of his claim and adopted the witness statement as evidence in chief and produced as evidence the documents filed together with the memorandum of claim.
21. On cross-examination the witness stated that he received the dismissal letter on 1st March, 2017 and was paid Kshs.318,380/=.
22. The witness stated that it was true that there were instances of theft and the directors dealt with it.
23. He also stated that the employment terms were changed and when he tried to engage the management of the same he was urged to make use of the exit clause which he decided not to follow.

Respondent's Evidence

24. RW1, Elias Ikinyua, the Chairman/Director of the respondent adopted his statement as his evidence in chief and produced the documents filed on the 18th October, 2022.
25. On cross-examination the witness stated that he knew the claimant before he joined the respondent as they were friends and college mates.
26. The witness stated that the letter dated 28th February 2017 and received on 1st March 2017 confirmed that the contract period was 2 years.
27. The witness stated that the termination was not malicious and there was no grudge against the claimant.

Claimant's submissions

28. The Claimant identified three issues for determination, namely;
 - i. Whether the claimant was on a fixed term contract or permanent employment.
 - ii. Whether the claimant was unlawfully or unfairly terminated.
 - iii. Whether the claimant is entitled to the reliefs sought in the statement of claim.



29. On the first issue, the claimant submitted that the document governing his employment was the letter of employment dated 21st September, 2014 which contained the terms of employment. He urged that the employment was not intended to be a fixed term contract under Section 10(3) (c) of the [employment Act](#).
30. The claimant submitted that at the time of accepting the terms and conditions of the letter, he had a legitimate expectation that the contract was a non-term contract and that he was taking employment on permanent basis.
31. The claimant further submitted that the Respondent did not adduce any evidence addressing the issue of the term of contract. He further submitted that had the intention of the respondent been for a 2 year contract the same would have lapsed on the 1st September, 2016. However, the claimant remained in office until 31st March, 2017 when he was unlawfully and unfairly terminated.
32. The claimant relied in the holding in *Chengo Kitsao Chengo v Umoja rubber Products Limited* (2016) eKLR where the court stated as follows;
- “After careful consideration of the pleadings and submissions, the court finds on a balance of probability that the claimant was employed on a permanent basis but not a fixed term contract basis. If the Claimant was on a fixed term contract the respondent could have produced a contract signed by parties stating the commencement and termination date.”
33. On the 2nd issue, it was the claimant’s submission that the termination on account of redundancy was as a result of no fault on his part. He submitted that Section 40 of the [Employment Act](#) required that an employee had to be notified in writing and the labour office had to be notified as well and consultations were necessary.
34. The claimant further submitted that the requirements were not complied with and all he received was a letter notifying him of the termination.
35. The Claimant relied on the holding in *Kenya Airways Ltd v Aviation & Allied Workers & others* (2014) eKLR cited with approval in *Onesmus Kinyua Magoiya v Prudential life assurance Kenya* (2022) eKLR where Maraga JA (as he then was) stated as follows;
- “My understanding of this provision is that when an employer contemplates redundancy, he should first give a general notice of intention to the employees likely to be affected or their union. It is the notice that will illicit consultation between the parties..... the act requires a months’ notice. The period runs from the date of service of the notice. It is after conclusion of the consultations on all issues of the matter that a notice will be issued to the affected employees of the decision to declare them redundant.”
36. The claimant submitted that the respondent’s failure to follow the procedure rendered the termination procedurally unfair.
37. The claimant further submitted that his employment was terminated unfairly and the burden of proving that it was fair was on the respondent. He submitted that the respondent admitted that there was growth in business and there was no evidence that the claimant failed to meet his targets as alleged.



38. Reliance was made on the holding in *Super Group Supply Chain Partners v Arthur Dlamini & Another* (JA 77/10) cited with approval in *Onesmus Kinyua Magoiya v Prudential Life Assurance Kenya* (Supra) where the court stated;
- “For an employer to successfully dismiss an employee for its operational requirements its obliged to have a bonafide economic reason. In my view that would be demonstrated by a detailed and or cogent evidence not supported by assertions.”
39. The claimant submitted that the termination was not substantively fair.
40. The claimant urged the court to find that the termination was unlawful and to award three months’ salary in lieu of notice, Kshs.172,800 x 3 = Kshs.518,400/=.
41. He also prays for 12 months salary as compensation for unlawful and unfair termination as provided under section 49 (1) (c) of the *Employment Act*.
42. The claimant also prays for redundancy pay under Section 40(1) of the *Employment Act*, Kshs.518,400/=.
43. The claimant also prays for full salary and allowances since the date of dismissal on the basis that he would have worked until attaining the statutory retirement age.
44. The claimant urges the court to allow the claim as prayed.

Respondent’s Submissions

45. The Respondent isolated two issues, namely;
- i. Whether the Claimant was on a fixed term contract or permanent employment.
 - ii. Whether termination of the Claimant’s employment was procedural.
46. On the first issue, the respondent submitted that the claimant was employed on a 2-year fixed term contract which was stipulated in the letter dated 11th June, 2015 issued to the claimant after completion of the probationary period.
47. The respondent submitted that the contention that the confirmation letter varied the terms of employment without consultation was inconsequential since the claimant continued to work under the terms of contract stipulated in the letter.
48. The respondent further submitted that the claimant did not plead legitimate expectation and only raised it in the submissions. Further, it was argued that the letter stipulated that renewal of a contract would be based on performance and his underperformance occasioned the non-renewal of the contract.
49. Reliance was made on the holding in *Amatsi Water Services Company v Francis Shire Chachi* (2018) eKLR;
- “For the proposition that a fixed term contract will terminate on the sunset date unless extended in terms stated in the contract; the court cannot rewrite the terms of the contract freely unless entered into between the parties and there is no obligation on the part of the employer to give reasons to the employee why a fixed term contract of employment should not be renewed.”



50. The respondent submitted that fixed term contracts carried no expectancy of automatic renewal.
51. As regards the 2nd issue, the respondent submitted that the claimant had the statutory burden to prove that the termination was unfair and the respondent to prove that the termination was justified.
52. It was respondent's submission that the claimant was employed on a fixed term contract which was not pegged on automatic renewal. That a notice was issued and all dues were paid and as such due procedure was followed.
53. It was submitted that termination of the Claimant's employment was not pre-mature and the claimant did not allege redundancy.
54. The respondent also submitted that the prayers by the claimant were untenable as the contract period had come to an end and notice was dully issued. The court was urged to dismiss the claim with costs.

Analysis and determination

55. The issues for determination are;
 - i. Whether the Claimant was employed under a fixed term contract or permanent.
 - ii. Whether the claimant's employment was unfairly terminated.
 - iii. Whether the Claimant is entitled to the reliefs sought.

Terms of employment

56. On the first issue, the claimant pleaded and submitted that he was employed by the respondent to as its Managing Director vide a letter dated 21st September, 2014 taking effect on the 1st October, 2014. The letter stated that the employee will be required to serve six months' probation during which period either party could terminate the contract of employment by giving one months' notice.
57. After the claimant completed the probationary period, he was issued with a letter dated 11th June, 2015 which read in part;

“.....The terms and conditions of your employment will remain the same as detailed in your appointment letter except for the contract duration. This will be a two (2) year contract renewable depending on your performance and conduct.....”
58. Evidently, terms of a contract can be derived from various sources and documents and in the instant case the terms of employment are contained in the letter of appointment together with the letter of completion of probation.
59. Strangely, on cross-examination, the Claimant testified that when he received the letter of confirmation, he engaged the Chairman of the respondent who allegedly informed him that company policies were amenable to change and if the Claimant was uncomfortable, he was free to invoke the exit clause in the contract.
60. No doubt the respondent varied the Claimant's terms of engagement by introducing the two (2) year contractual period not in the letter of appointment, without consulting the Claimant as by law required.
61. However, the variation does not appear to have bothered the Claimant as he confirmed on cross-examination that he decided not to follow-up and continued working. The Claimant adduced no



evidence of having communicated his disagreement or reservations with the variation throughout his period of employment.

62. Having accepted the variation of the terms by conduct, the Claimant cannot be heard to say that the situation was different. He is estopped from alleging otherwise and was bound by the term hook, line and sinker.
63. (See the sentiments of Denning L.J in *Combe V Combe* (1951) 2 KB 215, *Central London Property Trust Ltd V High Trees House Ltd* (1947) KB 130 and *Century Automobiles Ltd V Hutchings Biemer Ltd* (1965) EA 304.)
64. Having considered the pleadings and the evidence on record, the court is satisfied and finds that the claimant was employed on a two (2) year fixed term contract as indicated in the letter dated 11th June, 2015.
65. As to whether termination of the Claimant's employment was unfair, the letter dated 28th February, 2017 reads in part.

“The board of directors of Pak Space Limited have reviewed the performance of the company for the last few years and noted with concern that the company has not been doing well. To arrest the downward trend the board has decided to carry out restructuring process aimed at turning around the company.

Among the affected areas is the office of the CEO which has been scrapped and replaced with two junior positions of factory manager and factory supervisor. This is meant to improve supervision, enhance accountability, strengthen internal controls, control costs and improve efficiency and effectiveness in the company processes.

This is to notify you that your contract which is coming to an end on the 31st march 2017 will not be renewed. You will therefore cease duty after working hours on 31st March 2017.....”

66. Needless to emphasize, the respondent adduced no documentary evidence that it had evaluated the Claimant and found his performance wanting and the termination letter made no reference on his performance.
67. From the contents of the letter, it is clear that the respondent had indeed declared the claimant redundant without due process.
68. The mandatory provisions of Section 40(1) of the *Employment Act*, 2007 were not complied with in any respect.
69. Strangely, the respondent's letter purports to be the notice of non-renewal of the Claimant's contract of employment which expired on 30th September, 2016 yet the Claimant continued working and was being paid.
70. Having found that the claimant was employed on a 2-year fixed term contract that commenced on 1st October, 2014, the employment period ended on 30th September 2016. However, from the evidence on record, it would appear that the Claimant continued working as usual and the Respondent continued paying for the services rendered. The Respondent appear to have forgotten about the contractual period. Five months after the expiry of the contract the Respondents vide the letter dated 28th February, 2017 gave the claimant a 1 month notice of expiry of the contract.
71. Judicial authority is unwavering that for a termination of employment to pass muster, it must be substantively justifiable and must have been conducted in accordance with fair procedure.



72. In *Walter Ogal Anuro V Teachers Service Commission, Ndolo J. held;*
- “For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.”
73. It requires no belabouring that five months is a long time and the respondent had by its conduct impliedly renewed the claimant’s contract of employment. It was justifiable for the claimant to have legitimate expectation of renewal of the contract. The Court of Appeal has recently pronounced itself on the issue of legitimate expectation.
74. In *Transparency International Kenya v Teresa Carol Omondi (2023) KECA 174 KLR* where the court stated as follows;
- “The respondent was under a fixed term contract with a definite commencement date and termination date. There was no ambiguity created to create an expectation of contract renewal by the appellants issuance of a fixed term contract. The contract terminated automatically when the termination date arrived.”
75. Coincidentally, the renewal clause in the foregoing case was similar to that in the instant case where the contract was “renewable depending on performance and conduct.”
76. Although the letter dated 11th June, 2015 had no end date of the contract, it was capable of being ascertained.
77. Since the Claimant’s contract of employment lapsed after 2 years, did the respondent’s conduct of permitting him to continue working and paying him for about 5 months create a legitimate expectation?
78. According to the Court of Appeal in *Transparency International-Kenya V Teresa Carlo Omondi (Supra)*,
- “Whether a contract with a renewal clause will be extended or not, is an issue that is at the discretion of the employer and it cannot create a legal right under the doctrine of legitimate expectation.
79. The requirements of legitimate expectation are;
- a. an express, clear and unambiguous promise given by a public authority.
 - b. the expectation itself must be reasonable.
 - c. the representation must be one which it was competent and lawful for the decision maker to make.
 - d. there cannot be a legitimate expectation against clear provisions of the law or *the Constitution*.
80. (See *Communications Commission of Kenya & 5 others V Royal Media Services Ltd & 5 others (2014) eKLR*, *South African Veterinary Council V Szymanski (2003) (4) SA 42 (SCA)*, *Walele V City of Cape Town & others (2008) 6SA 129 (C.C)* and *Republic V Kenya Revenue Authority Ex-Parte M-Kopa Kenya Ltd* among others).
81. In the court’s view, since the doctrine of legitimate expectation is a basic principle of fairness and the respondent had by its conduct induced in the Claimant a reasonable expectation that the contract



of employment would be renewed, the letter of non-renewal written over 5 months later was an afterthought and amounted to an unfair termination of the Claimant's employment.

82. The 5 month period in this case was too long to have created a legitimate expectation.
83. The respondent's conduct was unequivocal that the state of affair would continue and had not indicated that it would subject the Claimant to a performance appraisal or had any concerns about his performance.
84. The court is persuaded that the respondent should not be permitted to benefit from its inaction which created an expectation on the part of the Claimant.
85. From the foregoing, the court is satisfied that the respondent had no justifiable reason to terminate the Claimant's employment and did not comply with the procedural requirements and the same was unfair and unlawful.

Whether the Claimant is entitled to the reliefs sought

- a. Having found that the claimant's employment was unlawfully and unfair, a declaration to that effect is merited.
 - b. Salary and benefits after dismissal
86. This is a claim for anticipatory benefits and lacks anchorage in law and is unavailable. Similarly, the claimant adduced no evidence of entitlement to the prayer.

The prayer is declined.

c. 3 months notice pay

87. Since the claimant was paid two month's salary as terminal dues, he is entitled to one (1) month's salary in lieu of notice which is hereby awarded.

d. Leave pay, Kshs.172,800/=

88. The claimant adduced no evidence on the number of leave days outstanding. Relatedly by letter dated 1st March, 2017, the respondent undertook to pay earned leave upto 31st March, 2017, a fact the claimant did not deny.

The prayer is denied.

e. Redundancy pay of 3 months, Kshs.518,400.00

89. The claimant adduced no evidence to establish this claim and having pleaded unfair termination of his employment contract, he could not additionally claim compensation for redundancy.

The prayer is dismissed.

f. 12 months compensation, Kshs.2,073,600.00

90. Having found that termination of the claimant's employment was unfair, the claimant is entitled to the relief provided by Section 49(1)(c) of the *Employment Act*, 2007. The court has taken into consideration the fact that the claimant was an employee of the Respondent for a duration of 2 years 5 months, a fairly short time, sought reinstatement as a relief and did not contribute to the termination of employment though he admitted that there were incidences of theft by members of staff.

In the circumstances, the court is satisfied that the equivalent of 3 months' salary is fair.



91. In conclusion, judgement is entered in favour of the Claimant against the Respondent in the following terms;
- a. Declaration that termination of the Claimant's employment was unfair.
 - b. One month's salary in lieu of notice.
 - c. Equivalent of three (3) months' salary.
 - d. Costs of this suit.
 - e. Interest at court rates from date of judgement till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 11TH DAY OF JULY 2023

DR. JACOB GAKERI

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 *Civil 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.

DR. JACOB GAKERI

JUDGE

