



**Baraza v Alice Dale Limited (Civil Appeal E132 of 2021)
[2023] KEELRC 2042 (KLR) (24 August 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2042 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CIVIL APPEAL E132 OF 2021
MN NDUMA, J
AUGUST 24, 2023**

BETWEEN

JOEL WEKESA BARAZA APPELLANT

AND

ALICE DALE LIMITED RESPONDENT

(Being an appeal against the judgment of Hon. C.N. Mugo (Senior Resident Magistrate, Limuru) delivered virtually on the 30th September, 2021)

JUDGMENT

1. This is an appeal against the judgment of Hon. C.W. Mugor, Senior Resident Magistrate, Limuru delivered on 30/9/2021.
2. The appellant's case was that the appellant was employed in the year 2017 as a night Watchman by the respondent at Limuru. He was stationed in the hanger to guard overnight the respondent's planes. The appellant earned Kshs.8,500 upon employment which was increased to Kshs.10,000 per month.
3. The appellant's case was that his employment was terminated without notice as his services were no longer required. That the termination was for no valid reason given nor was the appellant given a hearing. That the appellant was not paid his dues in terms of Section 40 of the *Employment Act*, since the termination amounted to a declaration of redundancy. The appellant claimed compensation for the unlawful termination; severance pay calculated at 15 days salary for each completed year of service; one month salary in lieu of notice and for underpayment in terms of Legal notice No 112 of 2017 for the period 2017 to 2018 in the sum of Kshs.96,880 and 1n terms of Legal notice No. 2 of 2018 in the sum of 16,143.90 and from April, 2018 to April, 2019 in the sum of Kshs.73,716 and from April, 2019 to February, 2020 in the sum of Kshs.61,430 all totaling Kshs.232,026. The appellant also sought costs of the suit and interest on the award.



4. In his judgment the learned trial magistrate found that the appellant was employed on a fixed term contract as a farm worker which expired in February, 2020. That the claim that the employment of the appellant was terminated on grounds of redundancy was not proved since the contract expired by effluxion of time.
5. On the claim for underpayment, the trial Court found the appellant was employed as a farm worker and so the Legal notices applicable were Regulation of Wage in the Agricultural Industry being Legal Notice No. 111 of 2017 and 3 of 2018 where the salary of a watchman was Kshs.7,409 and Kshs.7,779.45 respectively. The Court found that the legal notices relied upon by the appellant were not applicable to his employment. That the appellant was paid Ksh.8,500 and later to 9,000 and Kshs.10,000. That the salary satisfied the minimum wage for a watchman in the Agricultural Industry aforesaid and so the claim for underpayment had no merit and was dismissed.
6. On the issue of termination on grounds of redundancy, the Court found that this was not the case as alleged by the appellant since his employment termination was by effluxion of time in respect of a fixed term contract. That the claim for severance pay was not applicable and was dismissed.
7. The Court also found that since the appellant was employed on a fixed term contract, he was not entitled to notice pay. The Court dismissed the appellant's case with costs.
8. This being a first appeal, the Court is guided by the case of *Selle -vs- Associated Motor Boat Company Limited* [1968] E.A 123 where Sir Clement De Lestang stated as follows:- -

“This Court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it has neither seen nor heard witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances on probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally,”

9. The issue for determination was whether the appellant at the time of termination of employment was on a fixed term contract, which expired by effluxion of time or his employment was on a continuous basis not limited by a fixed term contract and so ought to be terminated only as guided under Section 36, 41, 43 44 and 45 of the *Employment Act*, 2007.
10. The Court firstly observes that this dispute was first conciliated upon by Mr. Joel Omweno, a County Labour Officer, at Kiambu, who recommended to the respondent to pay terminal dues to the appellant including one month salary in lieu of notice in the sum of Kshs.14,038; underpayment in the sum of Kshs.135,161.40, 9,052.20 and 64,499.10 for the various periods set out in the advice note by the Labour Officer dated 20/3/2020 produced by the appellant before Court and Kshs.2,808.60 for unpaid 6 days worked totaling Kshs.225,558.30. The labour officer had relied on the general wage orders for the respective periods to calculate the applicable underpayments.
11. In the memorandum of response and testimony before Court, the respondent stated that contrary to the testimony by the appellant that he was employed on a continuous basis as a Watchman and that he was entitled to payments in terms of the general wage order, R.W.1 Maurice Chege Wanyama testified that the appellant worked for the respondent as a watchman from 26/11/2017 up to 25/2/2020. That the appellant was strictly engaged on fixed term contracts which were renewed on a need basis and depending on availability of work. That the Appellant's last contract was entered into on 29/11/2019 and expired on 25.2.2020. That the appellant was not declared redundant and was therefore not



- entitled to payment of any notice pay and severance pay as claimed or at all. That the appellant was at all material times not underpaid and was paid in terms of the minimum wage regulations applicable to the agricultural sector since the respondent was engaged in the business of growing, processing and sale of tea at Limuru. Therefore, his salary was regulated by legal Notices III of 2017 and No. 03 of 2018.
12. That the suit lacked merit and it be dismissed.
 13. R.W.1 produced copies of contracts dated 29/11/2019 to 25/2/2020 signed by both parties on 29/11/2019; one dated 7/9/2019 to 11/11/2019 signed on 7/9/2019 by both parties; another dated 6/6/2019 to end on 6/9/2019 signed on the 6/9/2019 by both parties, another dated 13/2/2019 to 15/5/2019 signed on the same day by both parties; another dated 28/9/2018 to 31/12/2018 signed on 25/9/2018 by both parties and lastly another dated 26/11/2017 to end on 26/2/2018 signed by both parties.
 14. R.W.1 also produced a Certificate of Incorporation of the respondent and Memorandum and Articles of Association which provided the main objective of the respondent as “being to carry on all or any of the business of farming and agriculture in all their firms and branches...” inter alia.
 15. From the evidence of the appellant and that by R.W.1, Maurice Wanyama, clearly analysed by the trial Magistrate, the trial Court correctly found that the appellant did not work for the respondent on a continuous basis but was employed on several fixed term contracts which were renewed upon expiry. It is clear that the last fixed term contract was dated 29/11/2019 and was due to expire on 25/2/2020.
 16. The evidence before Court is clear that the said last contract was not renewed upon expiry. The various contracts placed before Court shows that there were periods when the appellant was not in employment of the respondent pending renewal of contracts. This corroborated the evidence by R.W.1 that the appellant was employed as and when required and the parties would enter into a new contract. The salary which the appellant was paid from time to time is not in dispute. What is in dispute is whether the minimum wage applicable to the appellant was the general wage order or the agricultural wage order. It is clear that the respondent was engaged in agricultural business and the minimum wage of agricultural industry was guided by the agricultural wage order and in particular the two legal notices presented by the respondent.
 17. The Court therefore finds that the learned trial magistrate did not err in finding that the appellant was not underpaid during the respective periods he served the respondent on fixed term contracts.
 18. Furthermore, the trial Court correctly found that since the employment of the appellant was terminated by dint of expiry of a fixed term contracts, he was not entitled to payment in lieu of notice nor was he entitled to payment of severance pay as claimed or at all.
 19. The Court also correctly found as was stated in the case of *Bernard Wanjohi Muriuki -vs- Kirinyaga Water and Sanitation Company Limited & Another* [2012] eKLR that:-

“In the view of the Court, there is no obligation on the part of an employer to give reasons to an employee why a fixed term contract of employment should not be renewed” The only reason that should be given is that the term has come to an end and no more ... Reasons beyond effluxion of time, are not necessary in terms of a fixed term contract, unless there is a clause in the contract, calling for additional justification for the termination.”
 20. That there was no obligation on the respondent in the present case to provide reasons and or give a hearing to the appellant except that the fixed term contract had come to an end. There is no provision in the last contract between the parties which required that to happen.



21. The Court therefore finds that the trial Court was justified to find that the termination of the employment of the appellant was not unlawful and unfair. This Court affirms that position.
22. The only thing to be said about this matter which was not raised before the trial Court and before us is that the security industry is guided by the Regulations of Wages (Protective Security Services) 1998, 2003 and as amended from time to time. This wage order guides the salary scales of all security personnel in cities, towns and all other areas and should those terms be better than those found in the Agricultural wage order, the Order applicable to security services should prevail. The security services order also provides for payment of gratuity at the rate of 18 days salary for the period served upon termination. The labour officers conciliating matters in the security sector should be so guided. This issue was not raised before the trial Court and this Court say no more about it.
23. In the final analysis, this appeal lacks merit and is dismissed in its entirety. However, considering the services the appellant had given to the respondent and in the spirit of parity in the labour relations, I find this to be an appropriate case not to award costs against the appellant before the trial Court and this Court. Therefore, each party to meet their own costs of the suit before the trial Court and this Court.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 24TH DAY OF AUGUST, 2023.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Okemwa for Appellant

Mr. Muli for Respondent

Ekale: Court Assistant

