



REPUBLIC OF KENYA



KENYA LAW
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**Baya & another v Antoneta (Appeal E009 of 2022)
[2023] KEELRC 2280 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2280 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
APPEAL E009 OF 2022
M MBARÚ, J
SEPTEMBER 21, 2023**

BETWEEN

KHAMISI NDEGWA BAYA 1ST APPELLANT

JOHN KAZUNGU HALUI 2ND APPELLANT

AND

MARIA FARINATTO ANTONETA RESPONDENT

*(Being an appeal from the judgment and decree of Hon. D Wasike
delivered on 24 August 2022 in Malindi CM ELRC No. E43 of 2021)*

JUDGMENT

1. The background of this appeal is that, the appellants filed Malindi CM ELRC No. E43 of 2021 on the grounds that they were employed by the respondent as chef and gardener at a wage of Kshs. 13,487.50 and 12,948.50 per month respectively but on 28 June 2021 their employment terminated after the sale of Kipepeo house, the place of work. There was no severance pay or payment of the full employment term ending on 31st December 2021. The appellants' claim was that their employment was terminated unfairly and claimed the following terminal dues;
 - a. Severance pay;
 - b. Payment of 5 months' term contract;
 - c. Compensation for unfair termination of employment; and
 - d. Costs of the suit.
2. The respondent's case before the trial court was that parties in an employment contract have the right to terminate the same by notice and in this case, parties entered into express contracts of service for a fixed term ending 31st December 2021 but allowed for a premature termination by one month's



notice or payment in lieu thereof. Upon the expiry of the contract, there was no obligations to justify termination of employment beyond the lapse. The 1st appellant was on 1st July 2021 paid Kshs. 41,962.50 inclusive of his gross wage for June 2021, notice pay and one month gross wage in appreciation of his services to the respondent. The 2nd appellant was paid Kshs. 40,453.50 which included his pay, notice pay and one month's gross wage in appreciation for services rendered to the respondent. With the freedom to contract, the parties had the freedom for terminate the contracts in accordance with Section 35 and 36 of the Employment Act and in adherence to Section 35(6) of the Act, the respondent made remittances to the NSSF and NHIF and the claims made not justified.

3. The learned magistrate heard the parties and in judgment delivered on 24 August 2022 dismissed the suit on the ground that the employment contracts provided for termination notice which issued and there was payment in lieu of notice, there was no declaration of redundancy to justify a claim for severance pay and in any event the respondent made statutory remittances and the appellants were paid a full month's wage in appreciation for their services.
4. Aggrieved by the judgment, the appellants filed the appeal on 6 grounds, summarised that the trial court failed to award severance pay despite the same not being disputed by the respondent having worked for 9 and 7 months respectively and that the finding that the termination of employment was fair was in error and the judgment should be set aside or reviewed with an award of terminal dues as claimed.
5. Both parties attended and agreed to address the appeal by way of written submissions.
6. The appellants submitted that the judgment of the trial court should be set aside for being erroneous with regard to the finding that there was no unfair termination of employment as this is contrary to the evidence submitted. The respondent did not fully compensate the appellants while paying terminal dues and the response that there were payments for two months in terminal dues was without proof. In the case of Gas Kenya Limited v Odhiambo Appeal No. E006 of 2022 the court held that where there is unfair termination of employment, notice pay and compensations should be awarded. The appellants had no disciplinary case and should have been awarded notice and compensation.
7. The appellants submitted that under Rule 21 of the Employment and Labour Relations Court (Procedure) Rules, 2016 the trial court failed to give consideration to the written submissions and hence arrived at an erroneous judgment which should be set aside and the orders sought issued.
8. In response, the respondent submitted and regurgitated pleadings and that the appellants were employed on 1st January 2013 and 1st January 2015 respectively and placed under fixed term contracts renewable annually. The last contracts were to lapse on 31st December 2021 and it was a term that employment could be terminated upon one months' notice or payment in lieu thereof which the respondent did and paid in notice. Each appellant was paid for days worked and a full month wage in appreciation.
9. A fixed term contract ends on its terms and parties are free to terminate the contract upon notice.

Determination

10. This being a first appeal, the court has a duty to re-evaluate the entire record and arrive at own findings.
11. The records confirm that the appellants were at all material times in the service of the respondent under written and fixed term contracts of employment. Each was an annual contract and last covered, 1st January 2021 to 31st December 2021.



12. This last contract had a termination clause which allowed termination of employment upon notice of one month or payment of one month's gross wage in lieu thereof.
13. Through notices dated 28 June 2021, the respondent terminated the appellants in their employment on the grounds that after the Kipepeo House was sold and Mrs Maria Antonietta Farinato is no longer the owner of the property. The property where the appellants were working as chef and gardener was sold.
14. The respondent offered to pay the 1st appellant as follows;
 - a. June gross wage + food Kshs. 13,487.50 + 1,500;
 - b. One-month notice Kshs. 13,487.50;
 - c. Bonus one month gross wage Kshs. 13,487.50Total paid Kshs. 41,962.50
15. The 2nd appellant was paid in the same order on a gross wage of Kshs. 12,984.50 and total paid was Kshs. 40,453.50.
16. Indeed, a fixed term contract starts and ends on the agreed date. There is no requirement to issue notice on the lapse of the fixed term contract since this is already addressed through the fixed term contract as required under Section 10(3) (c) of the *Employment Act*, 2007 that;
 - (c) where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end;
17. A fixed term contract of employment does not create a legitimate expectation of renewal. See *Transparency International Kenya v Teresa Carlo Omondi* [2023].
18. In this case, employment terminated by issuance of notice and the underlying reason was that the respondent had sold the work premises.
19. Unlike the previous position before the enactment of the *Employment Act*, 2007 and *Constitution*, 2010 the position that an employer could terminate employment at will and upon notice or payment in lieu thereof no longer holds. Even where the employer is willing to pay in lieu of notice, and notice has issued in terms of Section 35 and 36 of the *Act*, the employer is bound under the entire *Employment Act*, 2007. Before termination of employment, the employer must give reasons leading to the same in terms of Section 40, 43, 44 and 45 of the *Act*. The employer must state the reason(s) leading to termination of employment and based on such reason(s), the employee is allowed in terms of Section 35(4) and 47(5) of the *Act* to dispute the lawfulness and unfairness of such reasons.
20. In the case of *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited*, Cause No. 74 of 2013 the court held that whatever reasons an employer may have leading to terminate employment of an employee, that employee must be given the reasons in written.
21. This position is reiterated by the Court of Appeal in the case of *Oyombe v Eco Bank Limited* (Civil Appeal 185 of 2017) [2022] eKLR that where an employee is not given the reasons leading to termination of employment, such results in both procedural and substantive unfairness.
22. In this case, the respondent gave the reasons leading to termination of employment. Such were that;

We regret to inform you that your services with us will no longer be needed, effective from 30th June, 2021.



This unfortunate decision was reached after the Kipepeo House was sold and Mrs. Maria Antonietta Farinato is no longer the owner of the property.

23. There was loss of employment due to no fault of the appellants. Due to an operational requirement, the respondent, Kipepeo House was sold and Mrs Maria Antonietta Farinato is no longer the owner of the property.
24. Such a matter is well foreseen under the law, Section 2 and 40 of the *Employment Act*, 2007 which defines a redundancy and allocates the procedures to be undertaken by an employer who is no longer capable of maintaining the employees in the business.
25. Notice must issue and payment of severance pay.
26. With the appellant's employment starting and ending each year under the fixed term contracts, under the last contract starting and ending on 1st January to 31st December 2021, notice issued on 28 June 2021 and taking effect on 30 June 2018.
27. Service was under a year in the given contracts. Hence, severance pay is not due and is not prorated.
28. Part of the terminal dues paid included pay for June 2021 in full and notice pay equivalent to one month gross wage.
29. The respondent also paid bonus one month gross wage.
30. The appellants had claimed for 5 months unexpired term contracts, save, termination of employment was due to an operational requirement which is lawful and legitimate subject to the employer undertaking the due process under Section 40(1) of the *Employment Act*, 2007. That is issuance of notice or payment in lieu thereof which in this case was done.
31. The appellants also claimed for service pay for the full years of service.
32. Under the fixed term contracts, the employment started and ended on its terms. The appellants cannot go back under each term contract and claim for severance pay, the reasons for termination of employment being lawful and legitimate.
33. For the under one year of service, severance pay is not prorated. The court also takes into account that the respondent paid a bonus of one month gross wage to the appellants. Pursuant to Section 45(5) (a) of the *Employment Act*, 2007 the court is required to take into account the procedures applied by the employer in terminating employment and the payment of terminal dues;
 - (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—
 - (a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision; ...
34. In this case, notice issued and the appellants were paid for time worked, pay in lieu of notice and bonus pay which was not due since they had served under a year within the fixed term contract. The reasons leading to termination of employment are lawful and justified in the circumstances of the respondent.
35. Save for different reasons as addressed above, the claim dismissed by the learned magistrate in judgment delivered in Malindi CM ELRC No. E43 of 2021 on 24 August 2022 is hereby confirmed and the appeal dismissed. Each party to bear own costs.



DELIVERED IN OPEN COURT AT MOMBASA THIS 21ST DAY OF SEPTEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:-

Court Assistant: Japhet Muthaine

..... and

