



**Matheka v Association for the Physically Disabled of Kenya (APDK) Likoni Quality Furniture
(Appeal E024 of 2022) [2023] KEELRC 2478 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2478 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E024 OF 2022
M MBARÚ, J
OCTOBER 12, 2023**

BETWEEN

JAMES NTHYAKA MATHEKA APPELLANT

AND

**ASSOCIATION FOR THE PHYSICALLY DISABLED OF KENYA (APDK)
LIKONI QUALITY FURNITURE RESPONDENT**

*(Being an appeal against the judgment and decree of Hon. C. M Ndegwa
(SPM) in Mombasa CM ELRC No170 of 2018 delivered on 23 March 2022)*

JUDGMENT

1. The background to this appeal is the appellant's claim filed in Mombasa CM ELRC No.170 of 2018 on the grounds that in December 2009 he was employed by the respondent as a security guard at a wage of Kshs. 14,421.90 per month and which would be paid weekly at Kshs. 3,481. On 18 January 2018 at around 6AM the claimant handed over his duties to the day guard, Jacob Andai and Sospeter Ochieng and then went home. At 9AM he was called back by Peter Ochieng on the grounds that there was a missing windscreen of a TukTuk. Upon inspection, the TukTuk had no windscreen and while handing over his duties earlier, the day guards had confirmed that everything was in order. The claimant was suspended by the manager to allow for investigations but since such date, there was no communication or payment of his wages.
2. The appellant's case was that his employment was terminated unfairly and was entitled to his terminal dues. he claimed the following;
 - a. 18 days' pay in January 2018 Kshs. 9,984.39
 - b. Notice pay Kshs. 14,421.90
 - c. Refund of Kshs. 1,500 deducted every month as house rent Kshs. 99,000



- d. House allowances for 66 months Kshs. 142,776.81
 - e. Unpaid leave allowance for 8 years Kshs. 115,375.20
 - f. Gratuity pay for 9 years Kshs. 89,859.53
 - g. Unpaid overtime of 4 hours each day for 9 years Kshs. 98,733.04
 - h. Service pay for 9 years Kshs. 89,859.53
 - i. 12 months' compensation
 - j. Certificate of service.
3. The respondent as the employer's case was that the appellant had been employed as a guard in December 2009 at a monthly wage of Kshs. 14,421 payable weekly at Kshs. 3,481. Employment had been on casual basis and then reduced into a written fixed term contract for one month which would be renewed 7 days after expiry and the last final contract of employment covered the period of 21 December 2017 to 19 January 2018 for a gross wage of Kshs. 14,421.90 which would be paid in 4 equal instalments. The appellant was allocated duties from 6AM to 6PM during day shift or 6PM to 6AM for night shift and was required to hand over and any incident noted in the occurrence book with an inspection of vehicles leaving the compound.
 4. The respondent's case was also that the appellant had a chequered record with numerous incidences of gross misconduct resulting in a caution letter on 5 December 2011 and 15 February 2017 and warnings on 12 January 2016 and suspension on 12 March 2012. On 19 January 2018 the appellant handed over his duties to the day guards when it was discovered that a TukTuk windscreen was missing. He was suspended to allow for investigations with regard to the theft and the matter reported to the police. The claimant travelled home and when his contract expired, he never asked for renewal.
 6. On the claims, the respondent response was that the appellant had been offered a room for accommodation by the respondent. To be able to accommodate his family he asked for more rented space which was allocated at a fee. Leave days were allocated at the end of each contract lapse monthly and no leave allowance was due. Work during public holidays was compensated and the work regulated under the applicable regulations.
 7. The trial court heard the parties and in judgement delivered on 23 March 2022 held that the claims made had no legal basis and dismissed the claim in its entirety with costs to the respondent.
 8. Aggrieved, the appellant filed this appeal on the grounds that his employment was regulated under fixed term contracts which were not produced. This was erroneous and hence employment was continuous from December 2009 to January 2018 and his claims should have been assessed accordingly. The appeal is also on the grounds that the finding that the last contract expired on 19 January 2018 is not correct since it was not produced and this date was referred to following the incident reported and the fact that the appellant was suspended to allow for investigations. The finding that the claim was filed after the respondent failed to renew the employment contract was in error.
 9. The appellant faulted the trial court with regard to the findings that he had been allocated a room for accommodation yet he was paying rent to the respondent and he produced receipts. There was no NSSF payments, no records were attached and gratuity ought to have been awarded and for these reasons the appeal be allowed as pleaded.
 10. Both parties attended court on 24^{April} 2023 and agreed to address the appeal by way of written submissions.



11. The appellant submitted that the termination of employment was unfair and his terminal dues were not paid in full and the dismissal of his case by the trial court was erroneous. The respondent as the employer failed to produce any work records particularly the assertion that there were fixed term contracts of employment. Had this evidence been put into account, the appellant's terminal dues would have been correctly assessed and awarded.
12. On the claim for unpaid house allowance, the appellant submitted rent payment receipts whereas by virtue of his employment he ought to have been allocated housing or payment of an allowance in terms of Section 31 of the *Employment Act*, 2007.
13. On the claim for service pay and gratuity, the trial court held that this was not due despite the appellant abandoning this claim. Under Order 17 on the Regulation of Wages (Protective Security Services) Order 1998, gratuity pay is due at the rate of 18 days for every year worked and should have assessed and awarded.
14. The respondent submitted that between December 2009 to January 2018 the appellant was employed as a security guard on monthly contracts which matters the trial court considered and made a finding that parties were regulated under written contracts and the last contract was not renewed upon expiry. There is no reason to fault the judgment.
15. In his evidence, the appellant confirmed that he had been employed under written contracts and the last expired on 19 January 2018. This evidence was supported by that of the manager Mr Victor Nyongesa that there existed monthly fixed term contracts which regulated employment.
16. The claims made by the appellant were dismissed for lack of merit. He had been accommodated by the respondent and due to his expanding family he rented extra room and he paid rent. At the end of each contract, the claimant took all his annual leave days. There was no overtime work or work during public holidays without pay. such was properly compensated. Payment of gratuity is regulated under Section 17 of the Regulation of Wages (Protective Security Services) Order 1998 through Legal Notice No. 24 which gives the criteria to be applied. Gratuity is only payable after 5 years of continuous service and an employee who is summarily dismissed from his employment is not entitled to such payment. The appellant was not under continuous employment and under Section 35 of the *Employment Act*, 2007 his NSSF dues were remitted.
17. The respondent submitted that notice pay is not due in a case where there is a fixed term contract that expires on its terms as held in *Emily Migwa v Seventh Day Adventist Church Central Kenya Conference (CKC) & another* [2020] eKLR. The appellant failed to prove his case to the required degree that his employment was continuous and therefore, the findings by the trial court should be upheld as stated in *Patrick Lumumba Kimuyu v Prime Fuels (K) Limited* [2018] eKLR that even though the law enjoins the employer to keep work records, this does not absolve the employee from discharging his burden of proving his case. The claim that the appellant worked continuously and not under monthly fixed term contract was not proved and the appeal should be dismissed with costs.
18. The duty of a first appellate court is addressed in the case of *Selle & another v Associated Motor Boat Co. Ltd. & others* that the court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.
19. In his evidence before the trial court, the appellant testified that he was employed on contract terms and worked for the respondent until 18 January 2018. He would work for 12 hours each day but was



not paid for overtime hours. On his wages, statutory deductions were removed yet he never went on leave or took public holidays and was not compensated.

20. Upon cross-examination, the appellant confirmed that upon employment by the respondent he was allocated accommodation but his rent was being deducted from his wages and a receipt issued and in the year 2016 he asked to rent another house at Kshs. 1,500 and that he had a wife with a child and so he rented a house for himself.
21. The appellant also testified that he would work for 6 days each week and there are some days when he would not be working.
22. His last contract was running up to 19 January 2018 with a termination date.
23. The fact of the appellant working under a contract that expired on 19 January 2018 is discernible from his evidence and confirmed by the respondent.
24. A fixed term contract has a start and end date and is lawful and legitimate mode of employment in terms of Section 10(3) of the *Employment Act*, 2007 as held in Civil Appeal No. 18 of 2018 Transparency International Kenya v Teresa Carlo Omondi [2023] eKLR that a fixed term employment contract does not create a legitimate expectation of renewal and the non-renewal does not amount to unfair termination of employment warranting compensation.
25. The evidence that the appellant's contract lapsed and was not renewed despite the fact that on the same date he had an incident reported at his workplace does not create any legal duty upon the respondent to pay for notice or compensation. Employment lapsed at the end of the term contract as held in Trocaire v Catherine Wambui Karuno (2018) eKLR that upon the lapse of a fixed term contract an employer is under no obligation to justify termination of employment on other grounds beyond the lapse of the fixed term contract.
26. With regard to pay for 18 days worked in January 2018, the appellant's case was that he had a monthly wage but would be paid weekly. He has filed his bank statements and this is evident. He has however not filed the bank statements from January 2018. As this is his appeal, based on his alleged non-payment of weekly wages, he ought to have addressed this aspect.
27. With regard to claims for refund of deducted monthly house rent, the record is clear in so far the appellant was accommodated by the employer. He asked to get new accommodation and this was allowed. Under Section 31 of the *Employment Act*, 2007 the duty of the employer is to provide accommodation and where the employee opts to secure own housing, the legal burden to provide is addressed.
28. Payment of leave allowance is not a legal requirement under Section 28 of the *Employment Act*, 2007 unless this is secured under the written contract or is addressed as a benefit in a private treaty, which is lacking in this case.
29. Payment of gratuity is gratuitous as the term suggests. However, Order 17 of the Regulation of Wages (Protective Security Services) Order 1998, grants Guards who have worked for over 5 years, gratuity of 18 days' salary for every completed year of service;

17.

- (1) After five years' service with an employer, the employee shall - be entitled to eighteen days' pay for every completed year of service by - way of gratuity based on the employee's wage at the time of termination of service.



30. The appellant remained under a fixed term contract, the last ending on its terms in January 2018. Each term contract commenced an employment relationship with terms and conditions and ending as agreed upon by the parties. There was no continuous service for over 5 years for the appellant to claim the benefit of gratuity.
31. With regard to claim for overtime, the appellant testified that he worked for 12 hours for 6 days each week and would enjoy off on several other occasions. In the security service industry, a guard has a total 60 hours of work each week. The claimant was at work for 6 days each week. This translates to 12 hours each day to add up to his total days.
32. The claim for service pay only arise in a case where there are no statutory deductions and remittances to the statutory body in terms of Section 35(5) and (6) of the *Employment Act*, 2007. This was done with regard to the appellant. He testified to this fact.
33. With regard to the Certificate of service this is legally due in accordance with Section 51 of the *Employment Act*, 2007 whatever reasons is applied to terminate employment. Upon clearance, the appellant should be issued with his Certificate of Service.
34. Accordingly, save for the reasons outlined above, the judgment of the trial court in Mombasa CM ELRC No. 107 of 2018 dismissing the appellant's case is hereby upheld with costs to the respondent. Save, the respondent shall issue the appellant with his Certificate of Service in accordance with Section 51 of the *Employment Act*, 2007.

DELIVERED IN OPEN COURT AT MOMBASA THIS 12 DAY OF OCTOBER, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

