



REPUBLIC OF KENYA



**John Kivunzi Musyoka t/a Jona Pestcon v Nyae & another (Appeal E028 & E027 of 2023 (Consolidated)) [2023] KEELRC 3077 (KLR) (16 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3077 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E028 & E027 OF 2023 (CONSOLIDATED)**

**M MBARÚ, J  
NOVEMBER 16, 2023**

**BETWEEN  
JOHN KIVUNZI MUSYOKA T/A JONA PESTCON ..... APPELLANT**

**AND**

**JIBA MWAVALU NYAE ..... RESPONDENT**

**AS CONSOLIDATED WITH  
APPEAL E027 OF 2023**

**BETWEEN  
JOHN KIVUNZI MUSYOKA T/A JONA PESTCON ..... APPELLANT**

**AND**

**MAMBO NDEGWA ..... RESPONDENT**

*(Being appeals from the judgment and decree of the Chief Magistrate  
J.B. Kalo at CM ELRC No. 74 of 2017 and CM ELRC No.73 of  
2019 delivered on 29 December 2022 and 2 March 2023 respectively)*

## **JUDGMENT**

1. The appeals herein were consolidated as they related to similar facts arising from the same appellant.
2. The background to these appeals is claims filed by the respondents, Joba Mwaivalu Nyae and Mambo Ndegwa in CM ELRC No 73 and 74 of 2017 and on the grounds that Mambo Ndegwa filed his claim on the grounds that he was employed by the appellant in June 2014 as a cleaner where he worked at a wage of Kshs 8,000 and later increased to Kshs 10,000 per month. He worked until 31<sup>st</sup>



January 2018 when his employment was terminated through summary dismissal. That there was unfair termination of employment which was without notice or the due process. He also claimed that there was a redundancy without pay and underpayment of wages amounting to Kshs 130,365.94, there were no NSSF and NHIF remittances amounting to Kshs 4,800; pay in lieu of taking annual leave at Kshs 29,731, overtime work at Kshs 30,334.30, service pay for 3 years at Kshs 23,891 and notice pay at Kshs 14,865.53.

3. In response, the appellant's case before the lower court was that the claims made from the year 2014 to February 2016 were time barred and contrary to Section 90 of the Employment Act, 2007 (the Act) and the employment relationship was governed under a written contract of service for a period of 6 months or the lifespan of the contract that the respondent had with Kenya Ports Authority (KPA). The appellant allowed the respondent his annual leave, he was not required to work during public holidays and when he did, he was paid for it. All statutory dues were remitted. The employment relationship was contractual and on 11 May 2016 the appellant informed the respondent that its contract with KPA had come to an end, hence his employment would be terminated. A meeting was held on 27 August 2016 and all employees informed of the end of tender with KPA, the employment contract was only extended until the termination notice issued on 31<sup>st</sup> January 2018. The appellant paid all terminal dues and nothing is owing.
4. In the judgment of the learned magistrate delivered on 2 March 2023 there was a finding that there was unfair termination of employment and the following terminal dues awarded;
  - a. Notice pay Kshs 14,865.53;
  - b. 6 months' compensation for unfair termination of employment Kshs 89,193.18;
  - c. Underpayments Kshs 82,784.77;
  - d. Certificate of service;
  - e. Costs and interests to accrue after 45 days.
5. Jiba Mwalu Nyae's claim was in June 2014 he was employed by the appellant as a clearer at the wage of Kshs 8,000 per month for 6 months and later Kshs 10,000 per month. On 31<sup>st</sup> January 2018 his employment was wrongfully terminated without notice, reasons and as a result of redundancy. There was no hearing or any disciplinary matter leading to termination of employment. He claimed the following dues;
  - a. There was underpayment contrary to the Minimum Wage Orders at Kshs 130,365.94;
  - b. NSSF not paid from August 2014 to January 2017 Kshs 4,800;
  - c. Service pay for 3 years Kshs 23,891.03;
  - d. Notice pay Kshs 14,865.53;
  - e. Compensation for wrongful termination of employment;
  - f. Certificate of service; and
  - g. Costs.
6. In response, the appellant's case was that the claims made from 2014 to February 2016 are time barred contrary to Section 90 of the Act. The employment was governed under a written contract for a period of 6 months or the lifespan of the contract that the appellant held with KPA. In terms of Section 27 and 28 of the Act, the respondent took his rest and annual leave days and only some employees were



at work during public holidays and the next days there would be off work. The appellant remitted all NSSF and NHIF dues for all employees including the respondent. The employment relationship remained covered under written contracts from 11 May 2016 and the respondent was informed that the KPA contract had come to an end the KPA extended the contract leading to extension of contract through notice dated 3<sup>rd</sup> January 2018 and the contract would expire on 31<sup>st</sup> January 2018. At the end of the contract, the respondent reported the matter to the Minister but despite conciliations there was no settlement.

7. The learned magistrate in the judgment delivered on 2 March 2023 made a finding that there was unfair termination of employment and made the following awards;
  - a. Notice pay Kshs 14,865.53;
  - b. 6 months' compensation at Kshs 89,193.18;
  - c. Underpayments Kshs 32,764.77;
  - d. Certificate of service; and
  - e. Costs and interests to accrues after 45 days.
8. Aggrieved by the judgment and wards made, and appellant filed these appeals on the same grounds hence the consolidation.
9. The grounds of appeal are that;
  1. The learned magistrate erred in law and fact by failing to find that the respondent was employed for a specific assignment and once the assignment became unavailable or completed, the contract of service lapsed as agreed between the parties.
  2. The learned magistrate erred in law and fact by awarding the respondent one month salary in lieu of notice yet the termination was lawful.
  3. The learned magistrate erred in law and fact by awarding the respondent 6 months' salary as compensation for wrongful termination yet the respondent's termination was lawful and fair.
  4. The learned magistrate erred in law and fact by awarding the respondent the sum of Kshs 82,784.77 as underpayment whether respondent had not pleaded the basis of the claim for underpayment.
  5. The learned magistrate erred in law and fact by failing to find that the decision made by the judge in Mombasa Employment and Labour Relations Court Cause No 453 of 2018; *Alexander Mutisya Muya & 7 others v Jona Pestcon Limited* was binding in the claim before the trial court.
  6. The learned magistrate erred in law and fact in arriving at a decision that was wholly against the weight of the evidence, law and justice.
10. The appellant is seeking that the judgment of the trial court be set aside with costs. Parties attended and addressed both appeals through written submissions.
11. The appellant submitted that the respondents were engaged by the appellant under contracts of employment for a specified work assignment for a 6 months' period. The contract was renewed and extended until 31<sup>st</sup> June 2018. The trial court in error held that the respondent had continued to work beyond the 6 months' contract which had been converted from a fixed term contract to a contract of employment for an indefinite period. In the learned magistrate erred in law and fact by failing to put



into account the judgment of the court in *Alexander Mutisya Muya & 7 others v Jonas Pestcon Limited* [2022] eKLR and the finding that the respondent's like other similar employees were employed on contracts for specific work with set time. Notice pay is not due in terms of Section 35(1) of the *Employment Act*.

12. The contracts of employment submitted in court confirmed that the respondents were employed to work as cleaners during the contract with KPA which terminated and leading to termination of the respondent's contract.
13. The contracts having terminated on their provisions, there is no case of unfair termination of employment to justify the award of compensation as held in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR. The appeal should be allowed and the judgment of the trial court set aside with costs.
14. In response, the respondents submitted that they were long serving employees of the appellant having worked continuously until 31<sup>st</sup> January 2018. The employment relationship was governed under a written contract dated 16 March 2015 for a 6 months' period that was subject to renewal. The respondents never signed any other contract. The appellant took the risk of keeping the respondent in employment without any written contract. The trial court correctly made a finding that there was no written contract as at 31<sup>st</sup> January 2018 and no notice issued or reasons given with regard to termination of employment which was unfair since at that point, the provisions of Section 37 of the Act applied.
15. The claim that employment terminated through notice dated 11 May 2016 was addressed and found to be irrelevant since it was not brought to the attention of the respondents. Even where such notice may have issued, there was no notice with regard to termination of employment. The meeting held on 2 May 2016 related to termination of contract with KPA and there was no indication that this would affect the respondents. The threshold of Section 41, 43 and 45 of the Act were not met as held in *Liech v Sameer Agricultural & Livestock (K) Limited Now Devyan Food Industries (K) Limited* [2022] eKLR. The trial court analysed the evidence before it and reached proper conclusions and the same should be confirmed with costs.
16. On the grounds of appeal, the appellant's case is that the trial court failed to find that the respondents were employed for a specific assignment and once the assignment became unavailable or completed, the contract of service lapsed as agreed between the parties.
17. The appellant attached Minutes of a meeting held on 2<sup>nd</sup> May 2016 which are incomplete. The case was that KPA terminated its service contract and employees including the respondents were informed of such matter.
18. On 3 January 2018 the appellant was issued with notice by KPA to the effect that provision of Caretaker Services –zone Ninteen (19) ... the extension awarded to above contract expires on 31<sup>st</sup> January 2018. You are therefore requested to make arrangement to hand over the site to the new contractors by 31<sup>st</sup> January 2018.
19. On 4 January 2018 the appellant issued a general notice to All Cleaners of JONA Pestcon: KPA Zone 5 & 19... your contract with us ended on 31<sup>st</sup> June 2017 and has been on extension likewise...
20. This general notice is not specific to the respondents who were cleaners. Even in a case where such notice issued, which is without proof, the alleged contracts which ended and was renewed from 31<sup>st</sup> June 2017 are not attached.
21. Indeed, where the employment relationship is governed under a written contract, the employer has a duty to write it down and have the employee execute in approval. Once a term contract expires on its



terms, the employer has the duty to issue a new contract or notice of renewal of such contract. This is the implication of Section 10(5) of the Act that;

- (5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.

22. The court in *Kenya Union of Commercial Food & Allied Workers Union (K) v Tusker Mattresses* (2020) eKLR held that under section 10(5) of the Act, a change in terms of employment shall be effected by the employer in consultation with the employee.
23. Indeed, under Section 10(5) of the Act, parties in an employment relationship should hold negotiations and consultations prior to any amendment to an employment contract. In this instance, at the lapse of the written contracts to the respondents, there is no evidence that new contracts issued with fixed terms. The general references to termination notice and memo is not an indication that the respondents were served with such notice in terms of Section 35(10 or 36 of the Act.
24. Having served without any contract that had been renewed as alleged, the respondents then became protected under Section 37 of the Act. Employment could only terminate upon individual notices with given reasons.
25. The learned magistrate addressed all facts before him, analysed the entirety of the evidence and arrived at correct findings. In the case of *Alexander Mutisya Muya & 7 others v Jonas Pestcon Limited* [2022] eKLR upon which the appellant heavily relied upon, by consent, parties agreed to address the matter through filed pleadings and documents. For the trial court, there was call of evidence and the learned magistrate had the opportunity to hear the parties in evidence. The appellant can therefore not apply the findings in one matter in this case.
26. The court finds no matter to fault the learned magistrate with regard to findings that there was no notice issued to the respondents, there were no reasons given before termination of employment and hence the awards in this regard are proper.
27. On whether the notice pay and 6 months' compensation awards were justified, the findings above addressed, these award had a foundation and correct.
28. On whether award of underpayment was justified, the trial court made awards of Ksh.82.193.77 and Kshs 82,784.77 respectively for each respondent. whereas the trial court analysed the facts and the law with regard to unfair termination of employment, there is no review of the claims with regard to underpayments claimed in the Memorandum of Claim by the respondent.
29. Whereas the claims relating to underpayment were for Kshs 130,365.94 and Kshs 82,784.77 respectively, the awards made are not given a foundation.
30. With the contract of service lapsing on 31 June 2017 covering a period of 6 months and employment terminated in terms of Section 37 of the Act read together with Section 35(1) thereof, the claims made with regard to underpayments ought to have been addressed within the meaning of Section 90 of the Act.
31. The claims were filed on 5 February 2019. Proper application of Section 90 of the Act ought to have taken parties back to 3 February 2016.
32. Under paragraph B (1) and (2) of the Memorandum of Claims, the respondents case was that they would be employed under term contracts of 3 months or more. Jiba Mwalu Nyae was employed from June 2014 under term contracts of 3 months. Initially, he was on a 6 months' contract.



33. For Mambo Ndegwa, the same case applied. He was on 3 months' contract.
34. A proper assessment of each term contract ought to have taken parties back to 3 years prior to the end of contract and having filed the claims way after end of employment, the assessment of underpayments should have addressd the period of up to 3 February 2016.
35. For the period of February 2016 to April 2017, under the Wage Orders there were underpayments of Kshs 1,643.21 for 15 months' the total being Kshs 24,648.15.
36. For the period of May 2017 to January 2018 the underpayment was Kshs 2,926.55 and for 9 months the total underpayments are Kshs 26,339.
37. Total underpayments for both respondents are Kshs 50,987.10. To this extent, the appeal is partially successful.
38. Accordingly, the appeal partially succeeds and judgments in Mombasa CMELRC No 73 and 74 of 2019 are hereby confirmed save for the awards of underpayments hereby reduced to Kshs 50,987.10 for each respondent. The trial court allowed payment of the dues owing within 45 days which shall apply and after which time, costs awarded shall accrue from the lower court and the appeal.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 16 DAY OF NOVEMBER 2023.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet Muthaine

..... and .....

