



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 949 OF 2017

(Before Hon. Justice Ocharo Kebira)

RONALD ONGORI GWAKO.....CLAIMANT

VERSUS

M/S STYROPLAST LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Through a statement of Claim dated 19<sup>th</sup> May 2017, the Claimant sued the Respondent claiming that at all material times he was an employee of the latter, as a machine attendant. The claim is anchored on a prime fact that on or about the 26<sup>th</sup> October 2014, the Respondent brought to termination, the employee-employer relation that was between them in a manner that was afoul the provisions of the Employment Act, 2007. Consequently, the Claimant feeling entitled to redress, sought for various reliefs against the Respondent.
2. The statement of Claim was contemporaneously filed with a witness statement of the Claimant and a bundle of documents all of which he placed reliance on in fortification and justification of his claim, when the matter came up for hearing.
3. Upon being served with summons to enter appearance, the Respondent did enter appearance and file a reply to the statement of Claim dated 9<sup>th</sup> May 2018, which was subsequently amended on the 30<sup>th</sup> day of September 2019 consequent to leave of the court. An amended reply to statement of Claim was filed side by side with a witness statement of **Sheilesh Shah** and a list of documents of the even date under which various documents that the Respondent intended to rely on as documentary evidence were filed.
4. The Claimant's and Respondent's cases were heard on the 27<sup>th</sup> September 2021, and 27<sup>th</sup> October, 2021, respectively. Parties were directed to file written submissions, directions which they complied with.

The Claimant's Case

5. The Claimant's case is not hard to comprehend. It is a straight forward one. He contended that in or about the month of January 2007, the Respondent employed him as a machine attendant at a monthly salary of **Kshs. 11,085** plus a house allowance of **Kshs. 1663**, therefore a total of **Kshs. 12,748.70**.
6. The Claimant stated that the Respondent is a manufacturer of plastics, which they sell in wholesale, and that at the time of employment the latter did represent to him that their business in nature did fall under the realm of "wholesale distributive industry." Consequently, he was made to believe that the terms and conditions of work were to be in line with those for the industry and more specifically 45 working hours a week or 195 hours in a month.
7. The claimant contended further that contrary to what he had been made to believe, the Respondent made him work for 222 hours in a month. Therefore, working 27 hours overtime in a month, and for the 94 months he worked with the Respondent a total of 3807 hours.
8. He alleged that the Employment Act, bestows upon an employee a right to a one day's rest per a week, in breach of this right, the Respondent made him work for 19 hours during his rest days without compensation.
9. It was his case that his employment was terminated on the 26<sup>th</sup> October, 2014. He contended that at the termination, he was paid by the Respondent **Kshs. 47,596** as service pay for the years 2007- 2014. He signed for this amount as a final pay. He further stated that besides this amount, he was not paid any other amount.

10. Cross examined by counsel for the Respondent, the Claimant admitted that the relationship between him and the Respondent was one that was upon written contracts. He stated that however, he was never given copies thereof. Shown the Respondent's document number 1, he acknowledged that it was a contract which he signed whose lifespan was for that period between 1<sup>st</sup> May 2014 to 31<sup>st</sup> August 2014. He admitted that the contract provided for working hours - 52 hours a week.

11. He stated that the contract was a short-term contract, and it was the last contract. He did not have any contract to demonstrate that their relationship went beyond this contract. The contract provided for a one month's termination notice.

12. On being referred to the pay slips for, September 2014 [**page 24 of the Respondent's bundle of documents**], August 2014, the Claimant stated that they had items for overtime. The Other pay slips too. He admitted that on those pay slips where overtime pay had been multiplied by two, the payment was for hours worked overtime on Sundays.

13. The Claimant was shown, the payment voucher obtaining at page 28 of the Respondent's bundle, on the same he stated that, that payment voucher dated 13<sup>th</sup> July 2014, showed a payment of **Kshs. 6,860** for overtime difference for the period 15<sup>th</sup> February 2007 to 31<sup>st</sup> July 2014.

14. The Claimant confirmed that the Respondent's document dated 12<sup>th</sup> January 2017 was a return-to-work formula.

15. He stated in admission that the document dated 18<sup>th</sup> January 2017, a document among the document he presented to court, indicated that the unpaid overtime compensation was to be calculated for a period of 24 months, and those affected to be paid.

16. The Claimant stated that the Respondent's document dated 27<sup>th</sup> January 2017, at page 31 of the Respondent's bundle of documents, showed overtime arrears as **Kshs. 4120**. That the document indicated that the amount paid thereunder was a final payment.

17. Under re- examination by his counsel, the Claimant stated that during normal shifts, he worked from 7:30 am to 4:30 pm, while during night shifts, he worked from 4:30 pm to 7:30 am. He used to be paid for the overtime.

18. He stated that prior to the year 2014, the Respondent never used to furnish them with pay slips. The Respondent introduced them in March 2014. Then salary to employees was paid on payment vouchers. The salary vouchers itemized the payment. He was given all the pay slips.

19. The Claimant asserted that he was not aware of any strikes as alleged by the Respondent and that he signed the document dated 27<sup>th</sup> January 2017 without reading and understanding the contents thereof. He was told to sign the document to enable payment of his dues.

#### **The Respondent's case**

20. To support its defence against the Claimant's claim, the Respondent presented Mr. Shailesh Shah, its director to testify. The witness urged court to adopt the contents of his witness statement as part of his evidence in chief, and admit the documents that were filed as herein before stated, as the Respondent's documentary evidence. The Claimant did not oppose, the contents and documents were so adopted and admitted, respectively.

21. The witness stated that the Claimant was employed by the Respondent in February 2007 on a fixed term contract, renewable under independent subsequent contracts subject to a prior application by the Claimant and availability of work.

22. The witness contended that the Claimant was at the expiry of the forestated contract, engaged under various independent fixed term contracts whenever, he applied for employment, and there was availability of work. The last of such contracts was that which ran from 1<sup>st</sup> May, 2014 to 31<sup>st</sup> August, 2014 but with a one month's notice, effectively setting the termination date for the 30<sup>th</sup> September, 2014. The witness tendered the various fixed term contracts before court as evidence.

23. The witness asserted that under the various independent fixed term contracts, the Claimant was duly remunerated. The pay slips tendered as evidence by the Respondent were testament of this. The pay slips were particularized with the following items discernable; basic pay, House allowance; overtime; holiday[leave]; and statutory deductions. The payment vouchers availed by the Respondent demonstrate this too.

24. The witness asserted that the Respondent deducted the Claimant's salary for statutory dues like PAYE, NHIF and NSSF, dutifully remitting the amounts so deducted to the relevant entities.

25. The witness stated that the Respondent duly settled the Claimant's overtime arrears for the period February, 2007 to July 2014, in the sum of **Kshs. 6860** on the 13<sup>th</sup> July 2014. In acknowledgement of the payment, the Claimant signed the payment voucher dated 11<sup>th</sup> May 2014.

26. On the 1<sup>st</sup> November, 2014, the Respondent entered into an agreement, an outsourcing labour agreement with **Insight Management Consultants Limited** for a period of two years. This agreement was entered into long after the Claimant's last fixed term contract.

27. The witness testified that in or about January 2017, the Respondent's former employees through their representatives lodged a complaint with the labour officer agitating for severance pay notwithstanding that the Respondent had duly remitted their NSSF deductions and made payments for overtime arrears which had been agreed to be capped at 24 months. That culminated to an agreement dated 18<sup>th</sup> January 2017, and it is upon this agreement that the Claimant was paid all his dues on the 27<sup>th</sup> January, 2017.

28. The witness stated that the Respondent did duly settle the Claimant's overtime arrears for the period October 2012 to 30<sup>th</sup> September 2014 and severance pay for 7years [2007 to August 2014] totaling to **Kshs.47,576**, on the 27<sup>th</sup> January 2017. The Claimant duly acknowledged this by executing the document dated the even date.

29. Under cross examination by counsel for the Claimant, the witness reiterated that the Claimant was employed under a fixed term contract, that he worked for 51 hours a week and whenever he worked extra hours, he was compensated for the extra hours as overtime.

30. The witness asserted that absence of an item "overtime" on any pay slip is indicative of the fact that the Claimant did not work overtime during the month to which the pay slip is relevant.

31. He further stated that whenever the fixed term contracts came to a lapse, the Claimant was paid all his dues. The Claimant acknowledged that the payment that was made in 2017 was a final payment to him.

### **Claimant's Submissions**

32. The Claimant's Counsel, identifies four issues as the issues that emerge for determination in this matter, thus:

***I. Whether the Claimant was paid for all the overtime he worked for the Respondent?***

***II. Whether there was unfair termination of the Claimant?***

***III. Whether the Claimant is entitled to terminal benefits as tabulated in paragraph 9 of the statement of Claim.***

***IV. Whether the Claimant is entitled to costs.***

33. On the first issue, counsel submitted that in his evidence in chief, the Claimant testified that he was engaged by the Respondent on monthly fixed terms, which could range from a period of one month to five months depending on the contract. According to the contracts, the Claimant was to work for 52 hours spread over six days a week.

34. That the Claimant testified that he used to work for 222 hours in a month instead of 195 hours as was stipulated in the employment contract, and in the wholesale and distributive industry order. That the totality of the evidence by the Claimant on the aspect of overtime is that he used to work for 27 hours overtime monthly for which he was never compensated for.

35. It was further submitted that the Respondent was in the circumstances of this matter under an obligation under section 74 of the Employment Act, to tender a record like a master roll and or pay statement indicating the particulars of overtime worked each day, or week, or month and how the Claimant was compensated. In absence of such record, the Claimant's claim on overtime stands uncontroverted.

36. Counsel further submitted that an employee's daily working hours are regulated by Section 27 of the Employment Act,2007. According to the provision, any hour[s] worked outside the statutory daily working hours must be compensated for by the employer. Rule 5[2] of the Labour Institutions Act No. 12 of 2007 provides that normal working hours shall consist not more than 52 hours of work spread over six days of a week.

37. As to whether the termination of the Claimant's employment was fair, Counsel submitted that Section 45 of the Employment Act stipulates that no employer shall terminate the employment of an employee unfairly. Section 43 of the Act places an obligation on the employer to prove the reason for termination of an employee's employment, in default the termination shall be deemed unfair. Reliance is placed on the holding in *Mary Chemweno Kiptui vs Kenya Pipeline Company Limited [2014]*, thus;

***"The duty rests upon the employer to prove reason or reasons for termination and failure to do, such termination shall be deemed to have been unfair"***

38. It was argued that the Respondent failed to give any reason for the decision to terminate the employment of the Claimant. Too, that they did not demonstrate that they followed due process.

39. Counsel submitted that the Claimant is entitled to all those reliefs brought forth in paragraph 6 of the statement of Claim. On salary in lieu of notice, counsel argued that the Claimant was not issued with any notice as contemplated by section 44[2] of the Employment Act. Therefore, the Claimant was entitled to a one month's pay pursuant to the provisions of Section 36. He urged court to award **Kshs. 12,748.70**.

40. It was further submitted on the reliefs that the Claimant worked for a total of 222 hours a month instead of 195 hours, thus working for 27 hours overtime, and this entitles him to compensation to an extent of **Kshs. 216,426.97** overtime worked but not paid for.

41. It was asserted that the Claimant worked for a total of 14288 hours on Sundays for which he was not paid for, at a double daily rate. The Court is urged to award, **Kshs. 808,269.13**.

42. Lastly Counsel contended that the Claimant is entitled to compensation under Section 49 of the Act to an extent of twelve months' gross salary for unlawful and unfair termination.

43. That the Claimant has proved his case, against the Respondent, he is entitled to costs therefore.

**The Respondent's Submissions.**

44. The Respondent's counsel proposes two issues for determination in this matter namely;

I. *Whether the Respondent terminated the Claimant's employment on the 26<sup>th</sup> October, 2014 or any other date.*

II. *Whether any terminal dues/ Continuous injury benefits are due to the Claimant.*

*[a]. Settlement agreement dated 27<sup>th</sup> January 2017; and*

*[b]. Section 90 of the Employment Act on Continuous Injury benefits [overtime, leave, and house allowance].*

45. Counsel submitted that the Respondent's witness testified that the Claimant was employed on independent fixed term contracts of various periods from 2007 to 31<sup>st</sup> August 2014. The last such contract had a one month's notice period, 1<sup>st</sup> -30<sup>th</sup> September, 2014. The contracts contained all those terms expected of a contract of employment e.g. leave, overtime, rest days and salary.

46. The contracts were renewable subject to an application by the Claimant and availability of work, according to clause 10 of the contract for the period May-August 2014.

47. The contracts were coached in a manner that was express of the commencement date and lapse date, that they were independent of each other, and that renewal of one once it expired was not automatic.

48. It was submitted that the Claimant in his evidence under cross examination confirmed that he was in the employment of the Respondent up to 30<sup>th</sup> September 2014 under a fixed term contract. That the contract had an inbuilt start and end dates, and therefore as at the 26<sup>th</sup> October 2014, the alleged date of termination, the Claimant was not an employee of the Respondent. He summed up the submission on this, by stating that it is difficult to comprehend therefore how the Claimant can successfully allege that the Respondent terminated his employment contract unfairly.

49. The Respondent's take was that the Claimant's employment with the Respondent was at all material times to this suit on fixed term contracts with an inbuilt termination notice and without any expectancy of renewal, on this proposition, the Respondent placed reliance on the holding by Justice Rika, in *Margaret A. Ochieng v- National Water Conservation & Pipeline Corporation [2014] eKLR* thus;

*“Automatic renewal would undermine the very purpose of the fixed-term contract, and the revert to indeterminate contracts of employment..... Courts have upheld the principle that fixed-term contracts carry no expectancy of renewal, in a catena of judicial authorities..... The Court is persuaded that the Claim has no merit. The fixed term contract had its own in-built termination notice, in that the date of termination was advised to the Claimant on execution of the three-year contract in December 2008. She knew termination would be upon the lapse of the three years in 2011.....”*

50. Further fortification was sought in the Court of Appeal decision in *Registered Trustees of the Presbyterian Church of East Africa & another V Ruth Gathoni Ngotho [2017] eKLR* where the Court held;

*“29. .... Bearing the foregoing in mind, we note that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry. Accordingly, any claim based after the expiry of the respondent's contract ought not have been maintained. This is in relation to the salary for the months 5<sup>th</sup> of April up to May, 2010. Similarly, since the respondent's contract came to an end by effluxion of time any claim for wrongful termination could not be maintained.”*

51. As regards the issue on terminal benefits, Counsel submitted that the Respondent through the documents that it tendered before court, was able to demonstrate that indeed all dues to the Claimant were duly paid. That the Claimant acknowledged that he received the dues save that in his estimation, he considered the same insufficient.

52. Counsel submitted further that the Claimant along with other co-workers who later signed up for the employment of a 3<sup>rd</sup> party, **Insight Management Consultants Ltd**, but offered services to Polythene Products manufacturing factory, orchestrated chaos, go-slow and frequent strikes at the factories in late 2016 that led to the signing of *Return to work formula of 12<sup>th</sup> January 2017, Certificate of agreement dated 18<sup>th</sup> January 2017, Certificate that the Claimant filed as one of his documents, and which agreements birthed the Settlement Agreement dated 27<sup>th</sup> January 2017 that was signed by the Claimant and the Respondent, the Claimant acknowledging receipt of his full and final payment.*

53. That the Claimant confirmed before this Court that he indeed received Kshs. 47,576 before the labour officer and the Respondent's witness, read and signed the agreement besides undertaking that the amount received marked his full and final settlement on any employment rights with the Respondent.

54. Relying on the Court of Appeal decision in **Coastal Bottles Limited vs Kimathi Mithika [2018] eKLR** Counsel submitted that the Claimant is bound by the settlement agreement dated 27<sup>th</sup> January 2017, he waived any right to make any further claim in relation of his employment relationship with the Respondent.

55. Lastly Counsel submitted that the Claimant's Claim for Overtime and public rest days is time barred on the pleaded date of termination, 26<sup>th</sup> October, 2014, since the Claim was filed in May 2017 which is far longer than 12 months post the alleged date of termination. Counsel relied on the decision in **G4S Security Services [k] Limited v Joseph Kamau & 468 Others [ 2018] eKLR** where the Court of Appeal pronounced itself thus;

***“.....Regarding ‘a continuing injury’ the proviso to Section 90 of the Employment Act requires that the claim be made within 12 months next after the cassation thereof. The learned Judge did not determine when the continuing injury ceased, for purposes of computing the twelve months’ period. In absence of a defined period, the learned Judge erred in concluding that the Claims had no limitation of time. Further upon the Claimant’s dismissal, any claim based on a continuing injury ought to have been filed within one year failing which it was time barred.*”**

#### **Analysis and Determination**

56. Looking at the material presented before this Court, the following issues present themselves as the issues for determination in this matter;

**[a]. Whether the employment was terminated on the 26<sup>th</sup> October, 2014 or any other day or at all.**

**[b]. Whether the Claimant is entitled to the reliefs sought or any of them.**

**[c]. Who should be condemned to shoulder the costs of this suit.**

57. The Claimant does not come out clearly in his pleadings and evidence in chief on how the separation between him and the Respondent, his employer occurred. However, why the inability, shall come out shortly herein after. The nearest he got to putting forth how, in his pleadings is at paragraph 8 of the statement of claim where he stated;

***“On or about the 26<sup>th</sup> October 2014 the management of styroplast transferred the Claimant to Insight Management Consultants without due regard or the knowledge of the Claimant and styroplast limited seized to run the affairs of the company without proper consultation of the Claimant”***

58. One cannot be faulted to gain an impression from this averment that the separation occurred as a consequence of a transfer of the Claimant by the Respondent to a 3<sup>rd</sup> party, **Insight Management Consultants**. In a number of occasions, this Court has stated that for the sake of certainty and finality, parties are bound by their pleadings, never to be allowed to depart therefrom or put in another way to raise a different or fresh case without first amending the pleadings. I am afraid the Claimant did not at any time amend his pleadings so as to allege that there was a termination of his contract of service and lead evidence towards establishing that. Counsel for the Claimant did make a submission that there was a termination and that the termination was unfair in terms of Section 45[1] of the Employment Act. Submissions have never been and shall not be a substitute for pleadings and evidence.

59. The Claimant pleaded that the transfer took place on the 26<sup>th</sup> October 2014, as shall come out hereinafter based on the Respondent's evidence and the admissions by the Claimant, this date comes long after the date when the Claimant ceased to be an employee of the Respondent.

60. It was the Respondent's case that the employer-employee relationship that were between it and the Claimant at all material times was one where the latter would serve it for specific periods that were encompassed in various employment contracts, that were independent of each other. The last of such a fixed term contract was that which ran from the Month of May – 31<sup>st</sup> August 2014, with an inbuilt notice period of one month, therefore effectively ending on the 30<sup>th</sup> September 2014. Therefore, the Contract of service lapsed by effluxion of time.

61. The Claimant admitted under cross examination that indeed he worked under the contract and that the same lapsed by effluxion of time at the appointed time, that were.

62. By reason of this premises, I find that the Respondent did not terminate the Claimant's employment on the 26<sup>th</sup> October, 2014 or any other date or at all. The contract of service that were between the two lapsed by effluxion of time.

63. By pleading that the Respondent transferred him to a 3<sup>rd</sup> party without consultation, and abandon this claim by pursuing an unfair termination claim, is to me all indicative that the Claimant was by all means trying to fish for a cause of action against the Respondent.

#### **Whether the Claimant is entitled to the reliefs sought or any of them.**

64. Having found that the Claimant was in employment under a fixed term contract and that the contract came to an end at the appointed time that were, I am of the view that any relief sought by the Claimant on basis of his assertion that his employment was unfairly terminated is automatically not available to him. In this I find support in the Court of Appeal decision in **Registered Trustees of the Presbyterian Church of East Africa & Another v Ruth Gathoni Ngotho [2017] eKLR** where the Court pronounced itself, thus;

***“29. Bearing the foregoing in mind, we note that fixed term contract carries no rights, obligations, or expectations beyond the date of expiry. Accordingly, any claim based after the expiry of the respondent's contract ought not to have been maintained. This is in relation to the salary of the months 5<sup>th</sup> of April up to May, 2010. similarly, since the respondent's contract came to an end by effluxion of time any claim for wrongful termination could not be maintained.”***

65. By reason of this premise, the Claimant cannot be awarded any compensatory sum pursuant to the provisions of section 49 [1] [c] of the Employment Act, and pay in lieu of notice.

66. The Claimant's claim for overtime is one that this Court cannot grant. It cannot be in dispute that the issue of overtime payments was an issue that was the subject matter of negotiations that were between the employees of the Respondent and the Respondent. That the negotiations birthed the return-to-work formula which was in form of an agreement, a certificate of agreement, and eventually the agreement dated 27<sup>th</sup> January 2017 that the Claimant executed in acknowledgement of receipt of the sum of money, that had been agreed upon as due and owing to him, and that the payment was a final one.

67. The Claimant is bound by the terms of the settlement agreement dated 27<sup>th</sup> January 2017. There has not been demonstrated any reason why this Court can hold otherwise. In any event the Claimant has not sought so.

68. To hold otherwise would be tantamount to rewriting an agreement for the parties, agreement that they freely entered into. It has never been the role of a court of law to do so. In fact, allowing the Claimant to run away from the terms of the settlement agreement will be aiding him to breach the Respondent's legitimate expectation that a party who has freely entered into an agreement is bound by the terms of that agreement not unless there is a show that the same has been vitiated for one or more of those reasons recognized in law.

69. In **Coastal Bottlers Ltd vs Kimathi Mithika [2018] eKLR** the Court of Appeal held;

*“ ..... In our minds it is clear that the parties had agreed that the payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the respondent's termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent's part at the time he executed the same. It did not matter that the amount thereunder would be deemed inadequate. As it stood, the agreement was a binding agreement between the parties.” In Trinity Prime Investments Limited vs. Lion of Kenya Insurance Company Ltd [2015] eKLR this Court, while discussing the import of a discharge voucher which is more or less similar as an agreement in question observed;*

*“The execution of the discharge voucher, we agree with the learned Judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud and other. The appellant was thus fully discharged.”*

70. In **Damonder Jihabhai & Co. Ltd and another vs. Eustace Sisal Estates Ltd [1971] EA 153**, cited by Counsel for the Respondent, Sir Charles Newbold stated and I concur;

*“The function of our courts is to give effect to the intention of the parties as expressed in their agreement. In English Court of Appeal case above-Globe Motors Inc &Others vs TRW Electric Steering Ltd & Others [supra] -Lord Justice Beatson stated as follows: -*

*“Absent statutory or common law restrictions, the general principle of the English law of contract is that parties to a contract are free to determine for themselves what obligations they will accept. The parties have the freedom to agree whatever terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct.”*

71. In the upshot, I find that the Claimant's case lacks merit and it is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13<sup>TH</sup> DAY OF JANUARY, 2022.**

**OCHARO KEBIRA**

**JUDGE**

Delivered in presence of;

No appearance for the Claimant.

Mr. Mudao for the Claimant.