



**Nyamai v David Engineering Limited (Cause 2040 of 2016)  
[2022] KEELRC 33 (KLR) (26 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 33 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2040 OF 2016  
NZIOKI WA MAKAU, J  
APRIL 26, 2022**

**BETWEEN**

**MUTUNGA NYAMAI ..... CLAIMANT**

**AND**

**DAVID ENGINEERING LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant instituted the suit vide a Memorandum of Claim dated October 3, 2016 against the Respondent seeking damages for unfair termination of his employment and non-payment of his terminal dues totalling Kshs. 434,822/-. He avers that the Respondent employed him as a Machine Operator from July 2011 to September 9, 2016 and was a Senior Fitter earning Kshs. 20,446/- per month at the time of his termination. The Claimant avers that the Respondent was so erratic in the payments of his salary, that at the time of termination it owed him Kshs. 5,456/- in salary arrears for September 2016. He avers that the Respondent terminated his employment without any reasonable cause on September 8, 2016 and has refused and or neglected to pay him his dues and that he also prays for a certificate of service, costs of this suit and interest on the sums above. The Claimant asserts in his Witness Statement that the Respondent never allowed him to go for leave or pay him any leave allowance and that one time when he got injured at work, the Respondent took him to hospital and later asked him to refund the costs it incurred for his treatment. He states that the Respondent summarily dismissed him without notice when he inquired and complained about the said refund being wrong.
2. In reply, the Respondent filed a Memorandum of Reply dated February 22, 2017 averring that the contract which existed between it and the Claimant came to an end as per the terms of engagement and that there is thus no dispute between parties. Furthermore, the engagement between the parties was for successive fixed terms as per signed written agreements between them. That the Claimant is free to collect his certificate of service from the relevant office and that the claim for notice pay cannot be sustained because the Claimant's contract was fixed term and its action was based on his terms of



employment. The Respondent avers that the claim for service gratuity is contra-statute and an attempt to extort money from it as the Claimant was a contributing member to the NHIF and cannot thus claim gratuity. The Respondent avers that the Claimant was also fully paid leave due to him and his salary for September 2016 upon expiry of his contract which payment he signed for and that separating with the Claimant upon expiry of his contract does not warrant the Respondent to be punished by being made to compensate the Claimant. It is the Respondent's averment that it did not dismiss the Claimant and that their separation occurred due to expiry of his employment contract. It prays the Claimant's claim to be dismissed with costs to it.

3. The Respondent also filed a Witness Statement made by its HR Manager, Gilbert Meo who states that the Respondent had employed the Claimant on 3 months fixed contract renewable on mutual need and agreement. He states that the Respondent exercised its right under the contract between parties to inform the Claimant that it would not be renewing the contract after September 6, 2016. That the Claimant was always paid leave due to him at every expiry of the fixed term engagement as can be established in his payslips and that the Claimant is not justified to claim for compensation because his contract simply expired. The Claimant submits that dismissal for no justifiable cause or just cause amounts to unfair dismissal under the provisions of Section 45 of the *Employment Act*, 2007 and that him being denied leave days was contrary to Section 28 of the *Employment Act*. That the Respondent also violated Section 44(1) of the Act as it terminated his employment without notice and that he is entitled to a Certificate of Service in accordance with Section 51 of the Act. It is the Claimant's submission that he has proved his case on the balance of probability and that he requests this Honourable Court to enter Judgment in terms of the prayers pleaded in the Claim herein. In support of his submissions, the Claimant relies on the decisions in: ELRC Cause 2028 of 2016: *Onesmus Mbiti Muia v David Engineering Ltd* [2021] eKLR; *Henry Juma Obudho v David Engineering Ltd* [2018] eKLR; *Nathan Ogada Atiagaga v David Engineering Ltd* [2015] eKLR; and *Farana Yusuf Ibrahim v David Engineering Ltd* [2014] eKLR.
4. The Respondent on the other hand submits that the Claimant's claim on notice pay cannot be sustained as the Claimant's contract had expired and it cites the case of *Margaret A Ochieng v National Water Conservation & Pipeline Corporation* [2014] eKLR where the Court stated that fixed term contracts are built contracts with their own terms. The Respondent submits that since the Claimant's contract did not provide for payment of gratuity at the end of the engagement period, the claim for gratuity cannot stand as was similarly found by the Court in Civil Appeal No. 82 of 2005 - *Central Bank of Kenya v Davies Muteti* [2009] eKLR. It is the Respondent's submission that the Claimant has referred to cases that are distinguishable from the present case because the *Henry Juma Obudho case (supra)* was based on termination caused by redundancy while the claimant in the case of *Nathan Ogada Atiagaga (supra)* had resigned from the respondent company.
5. The Claimant was employed on a fixed term contract which was for 3 months. It would seem this contract expired and he in anticipation it would be renewed asserts he was unfairly terminated. The Respondent from all accounts did not terminate the contract as it was ended by effluxion of time. In regard to the leave claimed, the Claimant expended all his leave days as the payslips show. The Claimant was not entitled to recover any such pay in 2016 for leave allegedly not taken in 2011, 2012, 2013, 2014 and 2015. There is no demand for leave the Claimant produced to show he was entitled to the same. He also claimed the salary for September 2016. He did not demonstrate how he is entitled to this sum claimed. On service pay, he was a contributing member of the National Social Security Fund and per Section 35(6) of the *Employment Act* he is precluded from service pay. The cases cited by the Claimant do not aid his case at all as all of them relate to circumstances different from his as none is on all fours. None of the cases is in relation to a contract that ran out by effluxion of time. Suit is unmerited and is dismissed with costs to the Respondent.



It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL, 2022**

**NZIOKI WA MAKAU**

**JUDGE**

