



Liech v Sameer Agricultural & Livestock (K) Ltd (now) Devyan Food Industries (K) Limited (Cause 7 of 2020) [2022] KEELRC 24 (KLR) (5 May 2022) (Judgment)

Neutral citation: [2022] KEELRC 24 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
CAUSE 7 OF 2020
ON MAKAU, J
MAY 5, 2022**

BETWEEN

DUNCAN HASTING LIECH CLAIMANT

AND

SAMEER AGRICULTURAL & LIVESTOCK (K) LTD (NOW) DEVYAN FOOD INDUSTRIES (K) LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant's case is that, he was employed by the Respondent on the December 1, 2014 as area Sales Manager for a monthly salary of Kshs 130,000. The contract period was for of one and a half years which expired on May 30, 2016. He averred that after the expiry of the contract he continued working for the Respondent under the same terms for a further three years without being issued with any new contract. Therefore, according to him, after expiry of his fixed contract, his employment converted to permanent terms by operation of law.
2. The Claimant's place of operation was within the South Rift, North Rift and Western Region of Kenya, where he served diligently until October 12, 2019 when his services were terminated on the basis that his contract of employment had expired.
3. Before the termination, the Claimant avers that he received an email from the Human Resource Manager on the September 27, 2019 with an attached letter dated September 23, 2019 giving him notice that his contract was expiring on the October 31, 2019 and it would not be renewed. The Claimant responded to the said email and protested the notice on the basis that he never entered in to any contract save for the one for 2014 to 2016. He further sought to take his leave which was declined by the Human resource on grounds that his contract was about to expire.



4. The Claimant further averred that the Respondent's Head of Human Resource Management further advised the Human Resource Manager at Eldoret Depot not to allow the Claimant to transact any other business on behalf of the company. The Claimant was then ordered to clear and give a proper summary of all outstanding collections from the Respondent up until September 27, 2019. The Claimant was also directed to report to the Head Office in Nairobi on September 30, 2019 to address the status of his employment with Chief Operations Officer, one Mr. Kenneth Kareithi.
5. The Claimant then travelled to Nairobi where he was kept waiting the whole day to meet the Chief Operations Officer who just instructed him to go back to work and follow up on customers with outstanding arrears that are recoverable. However, upon reaching Eldoret, Mr. Manoch, the Eldoret Depot Human Resource made it impossible for him to carry out his duties as all sales personnel had been warned against dealing with him and also his contacts had been removed from all WhatsApp groups which were used for communication, report and updates. Subsequently, the Claimant was denied entry to Eldoret Depot.
6. He further averred that despite his efforts to address the issue both in Eldoret and Nairobi the Respondent became adamant. On October 4, 2019 he further raised his concerns with the Headquarters however no action was taken. He wrote two emails raising similar concerns on the 12th and October 14, 2019 but they never elicited any response either. On October 12, 2019 the Claimant's position was replaced forcing him to concede defeat and accept that his employment had come to an end. He averred that the termination was done without following due procedure as provided for under section 41 of the *Employment Act*.
7. The Claimant also alleged that his salary of Kshs. 379,925 was deducted from March, 2018 to August, 2018 to recover the Kshs 690,000 which was lost as a result of robbery after collecting from a customer.
8. In view of the aforesaid matters, he brought this suit on 31st January, 2020, seeking the following Orders: -
 - a. A declaration the Claimant was unlawfully, unprocedurally and unfairly terminated from employment.
 - b. Payment of dues amounting to Kshs. 3,713,823.
 - c. Costs of this suit and interest at court rate from the time of filling this suit until payment in full.
 - d. A certificate of service as per section 51 of the *Employment Act*.
 - e. Any other further and better relief that the Honourable Court may deem just and fit to grant.
9. The Respondent filed a response to the claim on the 2nd June, 2020 and an amended response and counterclaim on the 12th June, 2021. The Respondent averred that it employed the Claimant by the offer letter dated December 1, 2014 for a one and half year contract which expired on May 30, 2016. Thereafter it then employed him under a series of six months' contracts the last one of which was to expire on 31st October, 2019. Therefore, it averred that the Claimant's employment contract expired automatically on the said date and denied that it was unfairly terminated.
10. The Respondent further averred that the Claimant performed his duties so negligent that he caused the company to lose of Kshs 690,000. As a result of the foregoing, the company decided to recover the lost money from his salary by installments, pursuant to Section 19(1)(b) of the *Employment Act*, but as at the time of expiry of the contract there was outstanding balance of Kshs. 310,075.00 which forms the basis of its counterclaim.



11. The suit went to full hearing where both parties tendered evidence and thereafter filed written submissions.

Evidence

12. The Claimant testified as CW-1 and adopted his written statement dated January 30, 2020 which basically reiterates the facts set out in his pleadings. He also produced his documents which were marked as Exhibit 1-10 respectively.
13. He maintained that he only signed one contract for 1st December, 2014 to May, 2016 and upon expiry he never signed any other. He was shocked when he was informed that his contract was expiring on October 30, 2019 yet he had not signed any other contract since 2014. Therefore, he stated that he was dismissed from employment without being subjected to disciplinary hearing or being served with a show cause letter. He was also not paid his terminal dues including his salary for September and marketing reimbursements set out in the claim forms filed.
14. On cross examination, CW-1 he maintained that he only signed one contract of December 1, 2014 which expired in May 2016 after which the Respondent's Human Resource Manager, Mr. Cedric told him to continue working without any other contract being given to him. He was also not given a termination letter but his termination became apparent when he was denied entry to his place of work.
15. He admitted that the internal Memo of December 1, 2017 required Sales Managers to collect pay from client via M-Pesa, Cheques or Direct Bank Deposits. However, he denied being aware of the said Memo. He admitted that it was against the said memo to collect the cash from the client, which ended up being stolen.
16. On re-examination, he clarified that, he had instructions from his Boss Mr. Nitin Vashishdha to collect the said money which eventually was stolen. He contended that Sales Managers were always reimbursed marketing expenses since he joined the company. He contended that all what was required, which he did that always, was to file Claim Forms which were to be approved by the Respondent then paid.
17. On the other hand, the Respondent's Assistant Human Resource Manager, Paul Maina, testified as RW-1 and adopted his witness statement dated November 16, 2021 as his evidence in chief. He then produced the list of documents dated September 1, 2020 and the supplementary documents dated November 16, 2021 as the Respondent's exhibits.
18. His brief testimony was that the Claimant was employed by the Respondent under four contracts, the last one was dated October 27, 2017 and expiring on October 31, 2019. When the contract was about to end, he was notified of the same and the fact that the Respondent was not considering renewal.
19. He testified that the company has a new management and therefore he could not get hold of all employment records from the previous management including the Claimant's last contract. However, he maintained that all the employees at the respondent are on contract and the same is reflected in the payslips.
20. The witness further testified that the Claimant was not paid his terminal dues because he did not clear with the company. With regard to the marketing expenses reimbursements sought, he admitted that the Claimant was not paid the same because he did not avail supporting receipts as per the company's policy. On the lost cash, he stated that the Claimant went against the company policy when he collected the same from the client and as such the Respondent lawfully deducted the same from the Claimant's salary after informing him about the intended recovery.



21. On cross examination by Kirwa Advocate, the witness stated that he joined the company in August, 2020. He further stated that the Claimant's contract before court is dated May 19, 2017 and ended in the year 2019. He also admitted that the Respondent deducted the 379,925 from the Claimant salary to recover money lost in the said robbery.
22. The witness further testified that the Claimant's gross salary was inclusive of house allowance. He also stated that the Claimant was not paid his September salary and leave allowance because he had not cleared with the company.

Submissions

23. It was submitted for the Claimant that he was a permanent employee of the respondent having attained the status when the contract dated December 1, 2014 came to an end on May 30, 2016. It was argued that upon expiry of the initial contract and in absence of another contract signed by the parties the employment which was initially contractual converted to permanent terms. Additionally, it was submitted that in as much as the Respondent produced employment contracts in line with section 10 of the [Employment Act](#), the same were not signed and as such they were unenforceable.
24. The Claimant then submitted that when he was allowed to continue working for the Respondent without signing new contract his employment was converted as per Section 37 of the [Employment Act](#). In support of his case the Claimant relied on the case of [Chemelil Sugar Company Vs Ebrahim Ochieng Otuon & 2 others](#) [2015] eKLR and the case of [Nanyuki Water and Sewerage Company Limited v Benson Mwiti Ntiritu & 4 others](#), Civil Appeal No.20 of 2017.
25. On whether the Claimant was unfairly terminated, it was submitted that when the Claimant's services were converted to permanent after the lapse of the contract on May 30, 2016, the Respondent ought to have adhered to Section 41 and 43 of the [Employment Act](#) before termination. The Claimant then relied on the case of [Anthony Mkala Chitavi V Malindi Waters & sewerage Company Limited](#) [2013] eKLR, and urged this Court to allow the claim as prayed.
26. The respondent on the other hand, submitted that the Claimant was employed under various contract and the last one was dated 19th May, 2017. It further submitted that upon expiry the contract was renewed by implication. On the employment contracts not being signed, the Respondent submitted that the parties intended to be bound by the terms in the contracts therein regardless of them being signed. It was submitted that the Claimant was aware of the said contracts and the failure to sign the said contracts of employment does not invalidate the same. For emphasis it cited the case of [Tony Ben Olang Akello V Rural Development Solutions Limited](#) [2019] eKLR and the case of [Andia Lauara Chakava V Alpha Africa Asset Managers Limited](#) [2020] eKLR.
27. With regard to the deductions made on the Claimant's salary, it was submitted that the Claimant was aware of the deductions till the lapse of his contract. Throughout this time, he never complained of the said deduction and therefore, he should be estopped from seeking for reimbursement of the same. Furthermore, that Section 19 of the [Employment Act](#) allows an employer to deduct salary of the employee on occasion of willful default on the part of the employee.
28. On whether the Claimant was unfairly terminated, it was submitted that the Claimant's employment lapsed upon expiry of his contract and therefore the same cannot be deemed to have been unfair termination. To support this position, the Respondent relied on the case of [Margaret A. Ochieng V National water conservation and Pipeline Corporation](#) [2014] eKLR.



29. On the terminal dues sought, it was submitted that the Claimant does not deserve any of the reliefs sought save for balance of leave days and 25 days worked in October, 2019 together with certificate of service.
30. On their counterclaim the Respondent submitted that they have clearly demonstrated the negligence of the Claimant in losing the Kshs 690,000 which was deducted from the Claimant leaving a balance of 310,000 which they urged this Court to grant as prayed.

Analysis and Determination

31. I have considered the pleadings, evidence and submissions. There is no dispute that the Claimant was employed by the respondent under a fixed term contract from December 1, 2014 to May 30, 2016. There is also no dispute that after the expiry of the said contract, the Claimant continued working for the respondent until October 31, 2019. The issues for determination are: -
 - a. Whether from June 2016 to October 2019 the Claimant was a permanent or fixed term contract employee.
 - b. Whether the Claimant's contract of employment was unfairly terminated or it lapsed automatically.
 - c. Whether the Claimant is entitled to reliefs sought in his suit.
 - d. Whether the respondent's counter claim should be allowed.

Permanent employment or fixed term contracts

32. The Claimant's case is that he only signed one contract of employment which commenced on 1st December, 2014 as per the letter of contract dated November 26, 2014. The said contract expired on 30th May, 2016 and since no other contract was signed between him and the Respondent, his services converted by dint of Section 37 of the Employment Act and he became a permanent employee. The Respondent on the other maintained that the Claimant entered into three more contract dated May 20, 2016, November 10, 2016 and May 19, 2017 for a duration of six months each.
33. I had an opportunity to peruse the said contract and indeed all the three contract were not signed by the Claimant. The Respondent in its defence argued that signing an acceptance of the employment contract is not necessary as long as the parties agree to be bound by the terms therein.
34. It is trite law that the employer is obliged to be issued his employee with written employment contract. Such contract should spell out the terms and conditions of work. The employer is also obliged to explain to the employee the terms of service and cause him to sign acceptance.
35. Section 9 (2) of the Employment Act provides thus;
 - “(2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).
 - (3) For the purpose of signifying his consent to a written contract of service an employee may—
 - (a) sign his name thereof, or



(b) imprint thereon an impression of his thumb or one of his fingers in the presence of a person other than his employer.”

36. The Respondent failed to act in accordance with the above provisions of the law by having the Claimant sign his contract. The said provision is not a suggestion to the employer but it is couched in mandatory terms. The employer took the risk of continuing to employ the Claimant without causing him to consent to the six months’ fixed term contracts by signing. In the circumstances, one cannot confirm when the contracts were drawn or rule out whether the contracts were not drawn conveniently to fix the Claimant after he fell out with the management of the company.
37. This court is of the view that a party who alleges that another party is bound by the terms and conditions contained in a written contract, then he/she is obliged to produce as an exhibit the said contract duly signed by the other party. Even a reasonable employer cannot be faulted for denying a written contract of service if the employee waves in his hand a contract signed only by himself minus the employer. Consequently, I find and hold that the three contracts contained in the respondent’s supplementary list of documents are nothing more than drafts or proposals whose existence was unknown to the Claimant until the alleged notice of non-renewal.
38. Accordingly, the said contracts were not binding on the Claimant and they cannot be enforced against him to justify a termination of his employment. The court finds that after the contract dated November 26, 2014 lapsed in May 2016, the parties continued relating as employer – employee without a written contract. The contract was for an indefinite period but terminable with notice or for a cause after following the due process of law.

Whether the contract expired or it was unfairly terminated

39. In view of the foregoing matters, the issue of expiry of the contract between the parties herein does not arise. The contract was terminated by the employer on allegation that the contract period had expired. The employer also blamed the Claimant for poor performance and failure to comply with the company policy.
40. The question which begs for answer is whether the termination passed the test of substantive and procedural fairness. Section 45 (1) and (2) of the *Employment Act* makes the following provisions regarding unfair termination of employment—

- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove—
- (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employee’s conduct, capacity and compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.”



41. The above provisions of the law have been reinforced by case law including the case of *Walter Ogal Anuro –v- Teachers Service Commission* [2013] eKLR where the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

42. In the Court of Appeal case of *Pius Machafu Isindu vs. Lavington Security Guards Limited* [2017] eKLR the Court of Appeal stated as follows;

“There can be no doubt that the Act which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination / dismissal (Section 43); prove reasons are valid and fair (Section 45)... among other provisions. A mandatory and elaborate process is then set up under Section 41 requiring notification and hearing before termination.”

43. In this case the Claimant was employed for monthly salary and as such he was entitled to one-month notice before termination of his contract of service. In this case he was not served with such notice or paid salary for one month in lieu of notice. RW1 contended that the Claimant breached policy on collection of payment from customers and thereby caused a loss of cash totaling to Kshs.690, 000. The alleged offence is the basis of the counterclaim.

44. However, the termination notice did not state the reason for the termination other than the alleged expiry of the contract period. It follows that the respondent has not proved that there was valid and fair reason for the termination. Section 43 of the *Employment Act* provides that:

“In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”

45. Even if the Claimant had indeed performed his duties negligently by breaching the said company policy, the employer was obliged to follow a fair procedure to ascertain the alleged misconduct or poor performance. Section 41 of the *Employment Act* provides that: -

“41(1) Subject to section 42(1), An employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provisions of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”



46. In the case of *Kenfreight (EA) Limited V. Benson K. Nguti* [2016] eKLR, the Court of Appeal held that: -

“It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee’s conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure...

Apart from issuing proper Notice according to the contract (or payment in lieu of Notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service”.

47. In this case the Claimant was not served with a show cause letter or subjected to disciplinary hearing for the alleged breach of company policy. The respondent merely alleged that the Claimant’s employment contract had expired. Having considered the matters aforesaid, I find that the termination of the Claimant’s employment contract was not done in accordance with justice and equity. Consequently, I hold that it was unfair within the meaning of section 45 of the *Employment Act*.

Remedies

48. In view of the foregoing, I make declaration the Claimant’s employment was unfairly and unlawfully terminated. Flowing from the said declaration, I find that the Claimant is entitled to damages under section 49 (1) of the Act being salary in lieu of notice and compensation for unfair termination.

49. The Claimant sought for one-month salary in lieu of notice. I have already observed that the Claimant was entitled to one-month notice before termination and as such I grant the Claimant one month’s salary in lieu of Notice being kshs 135,000.

50. As regards compensation for unfair termination, the Claimant worked for the respondent for four and half years and he did not contribute to the termination through misconduct. Therefore, I award him 4 months’ salary for the unfair termination calculated as follows. Kshs 135,000 x 4= 540,000.

51. The prayer for house allowance is declined because the gross salary payable to the Claimant was inclusive of house allowance as indicated at the bottom of the Claimant pay slips, in any case the Claimant’s advocates abandoned that prayer in his submissions.

52. The prayer for payment of September salary was not contested by the Respondent. I therefore allow the prayer for September salary being Kshs 135,000.

53. With regard to market reimbursement, the Claimant argued that, it was a practice that the area sales managers could carry out task and then claim reimbursement afterward. The Respondent on the other hand admits that it usually pays its employees market reimbursement on conditions that the said claims are supported by receipts. In this case it contended that the Claimant did not produce receipts in support.

54. There is no doubt that the Claimant’s claim for market reimbursement was special damage claim. In that regard, the law is settled that a claim for special damages must not only be specifically pleaded,



it must also be strictly proved to the required standard. The Claimant did not produce receipts to support the claim. He only produced forms filled by himself and not approved by the management.

55. In *Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited* [2016] eKLR, the Court of Appeal held that it is a legal requirement that apart from pleading special damages, they must also be strictly proved with as much particularity as circumstances permit.

56. In *David Bagine v Martin Bundi* (283 of 1996) [1997] eKLR, the Court of Appeal, referred to the judgment by Lord Goddard CJ in *Bonhan Carter v Hyde Park Hotel Limited* [1948] 64 TLR 177), and again observed that:

“It is trite law that the Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying ‘this is what I have lost’, I ask you to give me these damages; they have to prove it.”

57. The Claimant also sought for 29 outstanding leave days. The Respondent did not oppose this claim and instead argued that the Claimant was not paid the leave days because he had not cleared with it. Therefore, I grant him cash in lieu of the 29 leave days being Kshs. 135,000/30x 29=130,500.

58. The Claimant then prayed to be reimbursed Kshs 379,925 which were deductions made by the respondent from March, 2018 to August, 2018 based on the loss of Kshs 690,000 collected by the Claimant in the course of his employment. The Respondent contending that the Claimant collected said cash from its customer against company policy which required the Claimant and other sales managers only to receive payment through Mpesa, cheques or bank deposit. Therefore, it contended that the deduction was justified in law.

59. The Claimant denied knowledge of the said policy and contended that he collected the said cash with instructions from his Boss Mr. Nitin Vashishda. The said Boss did not give evidence in this suit to rebut the allegation by the Claimant. However, the mere allegation that instruction had been give did not shift the burden of proof to the respondent. Even without a written policy, the Claimant owed duty of care to the respondent to ensure that money was not lost. He breached that duty of care by accepting to carry the said huge amount of money without any security escort and therefore caused loss to the company.

60. Section 19 (1) (d) of the *Employment Act* permits an employer to deduct from an employee’s salary the following:

“an amount equal to the amount of any shortage of money arising through the negligence or dishonesty of the employee whose contract of service provides specifically or his being entrusted with receipt, custody and payment of money.”

61. The foregoing provisions of the law permits an employer, where there exists credible and factual evidence that the loss of money or property is attributable to the negligence or willful action of an employee, to make reasonable deductions from such employee’s salary. Such deductions however must not exceed two thirds of the employee’s salary as per section 19(3) of the Act.

62. With regard to the deduction made, the same were reproduced in the claim at paragraph 26 of the claim. The law provides that the maximum an employer can deduct from an employee should not be more that 2/3 of his salary. The Claimant in this case was earning Kshs.135,000 and the most that the Respondent could have deducted should not exceed Kshs 90,000. However, there is evidence to



show in the month of April, 2018 the Respondent deducted Kshs 100,000 from the Claimant's salary contrary to the law.

63. Having considered the totality of the circumstances leading to the loss of the said monies, I am satisfied that the Claimant was negligent. He received a large amount of money and carried the same in a car without any security to escort it to the bank. As a result, the money was robbed by thugs and the Respondent suffered loss. There is evidence that the Respondent's insurers refused to compensate it for the loss. Therefore, the claim for refund of the Kshs 379,925 deducted from the Claimant's salary to recover the lost money is declined.
64. In view of the foregoing finding that the Claimant caused the loss of Kshs.690,000 through negligence, I allow the Respondent's counterclaim for Kshs.310,075 being the balance of the lost money.
65. The Claimant is to be issued with a certificate of service in line with Section 51 of the Employment Act.

Conclusion

66. In consideration of all the matters above, I enter judgment for the Claimant against the respondent in the following terms; -

Notices Kshs. 135,000.

Compensation Kshs. 540,000.

September salary Kshs. 135,000.

Leave of 29 days Kshs. 130,500.

Less respondent's counterclaim (Kshs. 310075)

Net payable Kshs.630,425

67. The above award is subject to statutory deductions but the Claimant is awarded costs and interest from the date hereof. He will also be issued with a Certificate of Service by the Respondent.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 5TH DAY OF MAY, 2022

ONESMUS N. MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

