



**Akado v Bollore Africa Logistics Ltd & another (Cause 587 of 2017)
[2022] KEELRC 1340 (KLR) (1 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1340 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 587 OF 2017**

**B ONGAYA, J
JULY 1, 2022**

BETWEEN

KENNEDY ONYANGO AKADO CLAIMANT

AND

BOLLORE AFRICA LOGISTICS LTD 1ST RESPONDENT

**SHEER LOGIC MANAGEMENT CONSULTANTS LIMITED 2ND
RESPONDENT**

JUDGMENT

1. The claimants filed the memorandum of claim on 20.07.2017 through Matete Mwelese Advocates LLP. The claimant subsequently filed an amended memorandum of claim on 02.07.2019. The claimant's case is as follows:
2. In April, 2010 he was employed as a Forklift Operator working within the 1st respondent's premises. He worked for 7 continuous years without a warning. His case is that he was terminated on 05.06.2017 when his monthly salary was Kshs. 36,890.00.
3. The claimant pleads that the 1st respondent had been operating under the shadow of outsourcing companies to provide labour so as to escape its obligations under the employment contracts.
4. The claimant further case is that he was terminated on 05.06.2017 after his contract of service was verbally renewed by the 2nd respondent. It is his case that the termination was by a text message sent to him by Joseph. The claimant further states that his contract ended on 30.05.2017 and thereafter was renewed verbally and he continued to work until 05.06.2017 when Joseph send him the text message to return all the company's belongings under the claimant's possession.
5. The claimant alleges that the termination was unfair in procedure under both the statute and natural law. He claims 12 months' compensation together with salary for 6 months because his termination



was premature. He also claims notice pay, house allowance, NSSF funds, and salary for 5 days worked in June, 2017 at Kshs. 6,148.00.

6. It is his case that the termination breached Sections 41 and 43 of the Employment Act, 2007 because he was terminated without a fair hearing, he was not given a notice to show cause, his terminal benefits were not paid, and he had a clean record of service. He has prayed for judgment against the respondents for:

- a) Notice pay Kshs. 36,890.00.
- b) 12 months' compensation Kshs. 442,680.00.
- c) Unpaid house allowance 36,890 being 15%
2017 – 5,533 x 6 months Kshs. 33,201.00.
2016 – (5,533 x 12 months) Kshs. 66,402.00.
2015 – salary was 32,940 x 15% (4,941 x 12=) Kshs. 59,292.00.
2014 – Kshs. 59,292.00.
2013 – Kshs. 59,292.00..
2012 – Kshs. 59,292.00.
2011 – Kshs. 59,292.00.
2010 – Kshs. 59,292.00.
2009 salary 26,940 x 115% = 4,041 x 12 months Kshs. 48,492.00.
2008 April (8 months' x 4,041) Kshs. 32,328.00.
Total unpaid house allowance Kshs. 536,175.00.
- d) Accrued leave days for 4 years (36,890 x 4 years) Kshs. 147,560.00.
- e) 5 days worked in June, 2017 Kshs. 6,148.00.
- f) Certificate of service.
- g) Unlawful deductions of NHIF for 2015 – 2016 Kshs. 4,000.00.
- h) 6 months' salary for premature breach of contract 6 months x 36,890/= Kshs. 221,340.00.
Total Kshs. 1,394,793.00.
- i) Costs of this suit.
- j) Certificate of service.

7. The 1st respondent filed a response to memorandum of claim on 23.08.2017 through Ameli Inyangu & Partners Advocates. Subsequently, the 1st respondent filed the response to amended memorandum of claim on 04.07.2019.

8. The 1st respondent's case is that it contracted the 2nd respondent to provide outsourced labour effective 01.06.2016 per clauses 3.0, 3.1 and 4.0 of the outsourcing contract. Under that contract the 2nd respondent retained all the obligations and responsibilities of an employer under the Employment Act, 2007. The 1st respondent's case is therefore that it never employed the claimant so that it is improperly sued. The 1st respondent prayed that the suit be dismissed with costs.



9. The 2nd respondent filed the response to the memorandum of claim on 29.08.2017 in person. The 2nd respondent admitted employing the claimant on a fixed term contract from 01.12.2016 to 31.05.2017. Further, the fixed term employment contract terminated naturally as per the terms stated within the contract on 31.05.2017. The 2nd respondent denied that it verbally renewed the contract after it lapsed on 31.05.2017. Thus the contract expired on 31.05.2017 when the agreed term of 6 months lapsed.
10. The 2nd respondent further case is that the claimant was employed at an agreed consolidated monthly salary of Kshs. 36,890.00. The 2nd respondent pleaded that the discharge of a fixed term employment contract upon expiration does not require notice and neither does it amount to summary dismissal as the memorandum of claim seem to intimate.
11. The 2nd respondent prayed that the Court finds that the contract ended on 31.05.2017 when the agreed time lapsed, the parties to bear their own costs of the suit, and the claimant is free to collect his certificate of service which is available at the respondent's offices in Nairobi.
12. The claimant testified to support his case. The 1st respondent's witness (RW1) was Michael Kariuki, the Senior Human Resource Officer. The 2nd respondent's witness (RW2) was Joseph Kithyoke, the Human Resource Officer.
13. Final submissions were filed for the parties.
14. The Court has considered all the material on record and makes finding as follows:
 - 1) The evidence is that the 1st respondent under an outsourcing contract engaged the 2nd respondent to provide labour. The 2nd respondent has admitted it was the sole employer of the claimant. The Court finds accordingly and further finds that the 1st respondent never employed the claimant as there was no contract of service between the claimant and the 1st respondent.
 - 2) The Court finds that the 2nd respondent employed the claimant as a Forklift Operator in the service of the 2nd respondent's client Mombasa Container Terminal Limited (MCT). The last of the fixed term contracts was by the letter dated 01.12.2016 and with effect from 01.12.2016 to 31.05.2017. The parties agreed on a consolidated monthly salary of Kshs. 36,890.00 to be subjected to statutory deductions being PAYE, NSSF and NHIF.
 - 3) The evidence is that the claimant served the full contractual term up to 31.05.2017. While alleging a verbal renewal, the details of the parties to such verbal renewal have not been established by way of relevant evidence. The claimant alleged he was terminated when Joseph sent him a SMS on 05.06.2017 to return all company property. However, the claimant did not exhibit the alleged printed copy of the SMS. Further he did not offer evidence on the person and the time or date and venue of the alleged verbal renewal.

In cross examination, the claimant was unable to establish that after 31.05.2017 he reported on duty and was indeed assigned to work at the 1st respondent's premises. The court therefore returns that the contract of service between the claimant and the 2nd respondent lapsed on 31.05.2017 by reason of effluxion of the contractual term. Further the Court finds that the claimant has failed to establish the alleged unfair termination or breach of Sections 41 and 43 of the *Employment Act*, 2007.
 - 4) The Court returns that the parties agreed on consolidated monthly salary of Kshs. 36,890.00 and the claim for house allowance was misconceived. In absence of any other material on record, the consolidated salary is found to have included a provision for reasonable housing accommodation as envisaged in Section 31 of the *Employment Act*, 2007. Further, there was



no unfair termination and the claim for notice pay and 12 months' compensation is found unjustified. The Court has found the claimant did not work for 5 days in June, 2017 and the claim for payment in that regard is declined. The claimant has offered no evidence to support the claim on unlawful deduction of NHIF for 2015 to 2016 and the prayer is declined. The claim and prayer for 6 months' salary for premature breach of contract is declined because the claimant has not established the alleged breach of contract of service. The Court considers that the 2nd respondent is ready to deliver the Certificate of Service and the same should be done within 30 days from the date of this Judgment. The claimant offered no evidence to support the claim on leave and the same will collapse.

- 5) The 2nd respondent pleaded that parties to bear their own costs. The 2nd respondent being the employer the Court considers that there is no reason to disturb that position as urged for the 2nd respondent. In making that finding the Court has considered that the claimant's payslips show a letterhead bearing the 1st respondent's name and the claimant appears to have had a good ground in suing the 1st respondent.
15. In conclusion, Judgment is hereby entered for the respondents against the claimant for dismissal of the memorandum of claim as amended with orders each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 1ST JULY, 2022.

BYRAM ONGAYA

JUDGE

