



**Kirichu v Legend Hotels Limited (White Rhino (Appeal E008 of 2021)
[2022] KEELRC 13174 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13174 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
APPEAL E008 OF 2021
DKN MARETE, J
OCTOBER 31, 2022**

BETWEEN

DAVID MAINA KIRICHU APPELLANT

AND

LEGEND HOTELS LIMITED (WHITE RHINO RESPONDENT

JUDGMENT

1. This matter is originated by way of a memorandum of appeal dated July 26, 2021 and comes out as follows;
 1. That the learned trial magistrate erred in law and in fact not finding that the appellant's contract of employment was renewable.
 2. That the learned trial magistrate erred in law and in fact in not finding that the claimant had unlawfully been dismissed and/or had his contract unlawfully terminated.
 3. That the trial court erred in law and fact in not awarding the unpaid public holidays and overtime.
 4. That the learned trial magistrate erred both in law and in fact in finding that overtime and public holiday's prayer was time barred.
 5. That the learned trial magistrate erred both in law and in fact in not awarding notice pay in lieu of notice and in not awarding gratuity.
 6. That the learned trial magistrate erred both in law and in fact in not ordering that the award, be paid with interest till payment in full.She prays thus;



1. That this appeal be allowed.
 2. That the judgment delivered on the June 30, 2021 be reviewed and/or set aside
 3. That judgment be entered for the appellant together with interest thereon from the date of filing the suit until payment in full and/or prayed in the statement of claim.
 4. That the costs of this appeal and of the court below be borne by the respondent.
2. The respondents case is that at all times, the contract of employment was a fix term contract. This was not renewed with notice to the appellant.
- The issues for determination therefore are;
1. Whether the appeal is sustainable in law and facts.
 2. Whether the appellant is entitled to the relief sought.
 3. Who bears the costs of this appeal.
3. The 1st issue for determination is whether the appeal is sustainable in law and facts. The parties hold diametrically oppose position on this. The appellant, in his written submissions dated April 28, 2022 spelt out a case in support of the appeal. It is the submission that the contract inter partes was one of a renewal contract of employment. This was not renewed due to poor performance apparent in poor stock taking and lack of proper planning leading to poor service delivery.
4. The appellant's further case and submission is that instead of warning on poor performance, the respondent reacted rashly and terminated his employment without a hearing.
5. He again buttresses his case by relying on the authority of *Kenya Service Research International Technical and Allied Workers Union v Stanley Kinyanjui and Magnate Ventures Cause No 273 of 2010*, where the court held that before a termination can be said to be unlawful, the employee must be given a chance to be heard, and his or her representations on poor performance must be considered.
6. Again, he further sought to rely on the authority of *Liberata Njau Njioka v Magadi Soda Company Limited [2011] eKLR*, where the claimant's employment was terminated on grounds of poor performance but without giving any warning or offering the employee a chance to make representations on the issue of poor performance.
7. Further in *Walter Olal Anuko v Teachers Service Commission [2013] eKLR*, the court held that if the procedure followed in the termination of employment contract, no justification whatsoever can be entertained.
8. It is the appellants penultimate submission that the respondent failed to demonstrate a valid reason for the appellant conduct, incapacity or operational requirement as is required under section 45 of the *Employment Act*, 2007. She should have demonstrated the criteria for assessing poor performance and rating him as a poor performer.
9. The respondent in a written submissions dated March 28, 2022 comes out thus;
2. The learned trial magistrate did not error in both fact and law when she found that the claimant had not been unfairly terminated but rather his employment contract ended by effluxion of time. The trial court considered all evidence



before her and rightly held that the contract had lapsed and as such, there was no unfair termination. This Honourable court has previously held that fixed term contracts end by effluxion of time in Kericho ELRC Cause Numbers 16, 17 and 18 of 2015 (Kennedy Ouru Okise, Mildred Gubuoji Lazaro and Alex Otundo Ogembo v James Finlays (K) Ltd. The respondent urges this Honourable court to adopt the findings in these cases and uphold the trial court's finding that the fixed term contract of employment lapsed.

3. The learned trial magistrate did not err in both fact and law by not awarding pay for work allegedly performed on public holidays and overtime because it was ably demonstrated in the statement of defence how these benefits were not payable. The claims were statute barred by section 90 of the *Employment Act* because they constituted continuing injuries. Further, these are special damages which were only pleaded but not proven. No details of these claims were given in support thereof leaving the trial court with no option but to dismiss them.
 4. The learned trial magistrate did not err in both fact and law by not awarding notice pay. It is trite law that there is no notice required where there is a fixed term contract in place. The end date of the contract is known by all parties in advance so there is no notice required. The court in *Ronald Ongeru Gwaki v Styroplast Limited [2022] eKLR* had an opportunity to delve into the issue of fixed term contracts in dismissing a suit where a fixed term contract lapsed. The court referred to several decisions that upheld the notion that no notice is required to be issued before a fixed term contract lapses. In the appellant's case, he was notified in advance that his contract would not be renewed. The trial court did not err in this aspect.
 5. The learned trial magistrate did not err in both fact and law by not awarding gratuity to the appellant. The appellant did not provide any contractual or legal basis why he was entitled to gratuity. If his claim for gratuity referred to service pay, it was ably demonstrated that he was a contributing member of NSSF and therefore excluded from earning service pay by dint of section 35 (6) (d) of the *Employment Act*.
10. The respondent case and submission is that the appellant was on a fixed term contract of employment which lapsed through effluxion of time on September 14, 2016. He was notified of the intent not to renew his contract in writing and thereafter paid all his terminal dues.
 11. The learned trial magistrate captured and analysed the respective cases of the parties and came up with a conclusion of lawful termination of the employment of the appellant. This was through a thorough and distinguished analysis of the evidence and data availed in support and defence of the case.
 12. Having looked at the proceedings, evidence and judgment of the lower court, I find that the learned trial magistrate cannot be faulted for the outcome and results of the case. She rightly addressed herself to all the issues, evidence and facts of the case and came up with a conclusion of dismissal of the claim. The matter comes out as clear as daylight.
 13. I am therefore inclined to dismiss the appeal with orders that each party bears their costs of the same.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF OCTOBER 2022.

D K NJAGI MARETE



JUDGE

appearances

- 1. Mr Makoro instructed by Gori, Ombongi & Company Advocates for the appellant.**
- 2. Mr Kilonzo instructed by Kilonzo Anthony & Company Advocates for the respondent.**

