



**Endire & 4 others v Kisumu Water & Sewerage Co Limited (Cause 79 of 2015) [2022] KEELRC 12995 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12995 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 79 OF 2015  
CN BAARI, J  
OCTOBER 27, 2022**

**BETWEEN**

**ALBERT ENDIRE ..... 1<sup>ST</sup> CLAIMANT  
JOHN OKAKA ..... 2<sup>ND</sup> CLAIMANT  
KENNEDY OWITI ..... 3<sup>RD</sup> CLAIMANT  
OMOL OMOL ..... 4<sup>TH</sup> CLAIMANT  
CALEB ORONDO ..... 5<sup>TH</sup> CLAIMANT**

**AND**

**KISUMU WATER & SEWERAGE CO LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimants lodged this suit through a memorandum of claim dated March 5, 2015, and filed in court on March 10, 2015, seeking special damages of Kshs 1,176,122.00, general damages, cost of the suit, interest and any other relief the court may deem fit and just to grant.
2. The respondent filed a statement of defence on April 16, 2015, wholly denying the claimants claims, and only admitting that the claimants were her employees whose contracts of service terminated by effluxion of time.
3. The suit was heard on June 7, 2022. All the claimants testified in support of their case. They adopted their witness statements and produced the documents they filed in support of their case.
4. Although the respondent filed a statement of defence and a witness statement, she failed to prosecute her defence even after being allowed various adjournments to allow her substitute her witness. The court deemed the respondent's case closed and directed parties to file submissions.



5. The claimants filed submissions. The respondent did not.

### **The Claimants' Case**

6. The claimants state that they were employed by the respondent on diverse dates between the year 2004, until February 6, 2015, when they were wrongfully dismissed by the respondent for no justifiable cause.
7. The claimants states that at the time of their dismissal they held various positions of employment with the respondent at a monthly salary.
8. It is the claimants case that they worked diligently throughout their employment without any disciplinary complaints or otherwise up until February 6, 2015, when they received a phone call from the respondent's human resources office summoning them to the office, where the human resources manager, one Evelyn Opiyo, informed them that their services have been summarily terminated.
9. The claimants states that upon making an inquiry on the reasons for their termination, they were informed that there was pressure from the director to terminate their services, but with no further and or logical explanation.
10. The claimants state that the respondent never wrote or gave them any notice or termination letters, and further that they were never given audience upon termination as required under the rules of natural justice.
11. The claimant states that their positions and those of others terminated on that day, were immediately filled, some by relatives of members of the respondent company.
12. The claimants state that their contracts with the respondent provided for just cause termination by either party giving notice or payment in lieu thereof and subject to the *Employment Act* 2007.
13. The claimants states that their dismissal from employment was not based on any wrong doing, but on sustained witch hunt, discrimination and nepotism by the respondent.
14. The claimants state that they performed their employment contract with satisfaction and have not been informed of any particular wrong doing to warrant their dismissal.
15. The claimants state that at the time of their termination, the 1<sup>st</sup> claimant (driver) was supposed to be earning Kshs 19,361.00, while the 2<sup>nd</sup> – 6<sup>th</sup> claimants supposed to be earning Kshs 15,730.00 in accordance with the minimum wage regulations which came into effect on May 1, 2013.
16. The claimants state that the respondent is in breach of contract and as a result, the claimants have suffered loss and damage for which they claim as per their statement of claim.
17. On cross-examination, the claimants admitted signing various three months fixed term contracts in the year 2014, and one month's fixed term contracts later in January, 2015. It is their evidence that the last contracts they executed were to end by February 6, 2015, except that of the 2<sup>nd</sup> claimant, whose last contract was said to have been for three months.
18. The 2<sup>nd</sup> claimant stated that his last contract was terminated on February 6, 2015, yet his contract term was three months.
19. The claimants' further evidence on cross-examination, is that their contracts carried a 7 days termination period.



### **The Respondent's Case**

20. The respondent states that the claimants were not wrongfully or unlawfully dismissed, and further avers that their termination was due to the expiry of a 3-month fixed term contracts, under whose terms they were employed
21. The respondent avers that the claimants were not given notices or hearing prior to their termination for reason that their contracts had terminated by effluxion of time, and as such did not warrant any issuance of notice or audience.
22. The respondent denies that the dismissal of the claimants as stated in their memorandum of claim was based on witch-hunt or discrimination or nepotism or that the same was engineered to remove the claimants from employment at whatever cost.
23. The respondent states that the claimants were not supposed to earn the salaries they indicated in their statement of claim.
24. The respondent states that the said claimants were never employed as drivers or plumbers, but were employed as general workers on a fixed term contract for a period of 3 months, and as such were not qualified to earn the alleged wages provided for under the minimum wage regulations as they alleged.
25. The respondent denies that the claimants have suffered any loss or damage resulting from her breach of contract, or that they are entitled to claim special and general damages in the circumstance.

### **The Claimants' Submissions**

26. It is submitted for the claimants that fixed term contracts were introduced in the year 2013, when they had already served for more than three years. They further submit that in 2015 when they were terminated, their contracts had been renewed religiously after every three months for two consecutive years, hence creating legitimate expectation that they will continue being renewed.
27. The claimants submit that though their contracts carried a one week notice period, no notice was issued to them prior to their termination, rendering the termination unfair.
28. It is the claimants' submission that the absence of a signed verifying affidavit in their pleadings, is a procedural technicality and which is a lapse in form which does not go to the root of the suit. They called to their aid the case of *Kenya Ports Authority v Kenya Power & Lighting Co Limited* (2012) eKLR.

### **Analysis and Determination**

29. I have considered the pleadings, the witnesses' oral testimonies and the claimants' submissions. The issues for determination are: -
  - i. Whether the claimants were unfairly terminated
  - ii. Whether the claimants are entitled to the remedies sought.

### **Whether The Claimants Were Unfairly Terminated**

30. The claimants' case is that they worked with the respondent without employment agreements/ contracts for a period of over three years, and that in the year 2013, the respondent introduced fixed term three months' contracts, which were renewed in the whole of 2013 and 2014 for three months at a time.



31. The claimants with the exception of the 2<sup>nd</sup> claimant, admitted signing one-month fixed term contracts on January 1, 2015. The contracts, they told the court, were terminated on February 6, 2015, including that of the 2<sup>nd</sup> claimant whose last fixed term contract was for a term of three months.
32. The contracts were not produced in evidence before court, and the claimants argued that the respondent did not supply them with copies of the contracts.
33. Although the respondent filed a statement of defence, a witness statement and a bundle of documents, they did not present their witness and hence the documents filed in support of their case were not produced, hence they remain mere statements in the court record with no probative value.
34. Fixed term contracts are meant to be for a fixed term. They establish a start and an end date of the employment agreement. Fixed term contracts are usually self-terminating and do not require notice. In *Mombasa Apparels (EPZ) Limited v Tailor and Textiles Workers Union* (2016) eKLR, the court held that fixed term contracts are meant to lapse automatically unless parties mutually agree to extend them, and that there is no legitimate expectation for an employee under a fixed term contract that he would continue serving after the expiry of the contract
35. Further in *The Registered Trustees De La Salle Christian Brothers T/A St Mary's Boys Secondary School v Julius D. M Baini* [2017] eKLR and the *Registered Trustees of the Presbyterian Church of East Africa & another v Ruth Gathoni Kariuki* [2017] eKLR, the court stated that:-

“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 to have been maintained. Similarly, since the respondent’s contract came to an end by effluxion of time any claim for wrongful termination could not be maintained”.
36. The claimants’ contracts were renewed every three months for over three years. This is contrary to the intention expected of a fixed term contract, that the contract starts and ends on a definite date.
37. This in my view, created legitimate expectation that though the contracts were christened ‘fixed term’, they were renewable and the claimants legitimately expected that they will continue to be renewed as they had in the previous three years.
38. By religiously renewing the claimants’ contracts every three months for over three years, the respondent through this practice, led the claimants to legitimately expect their contracts to be renewed. This expectation then becomes protected based on the principle of fair dealing between the parties concerned.
39. In my view, the regular renewal of the claimants’ contracts, created legitimate expectation, which expectation, entitled the claimants to notice should the respondent decide not to renew the contracts.
40. For the reasons foregone, I find the termination of the claimants contracts unfair, and I so hold.

#### **Whether The Claimants Are Entitled To The Remedies Sought.**

41. The claimants sought special damages of Kshs 1,176,122.00, general damages, cost of the suit, Interest and any other relief the court may deem fit and just to grant.

#### **Special Damages**

42. Special damages are awarded to compensate a party for actual out-of-pocket expenses and provable losses that have been incurred as a direct result of the respondent's actions or behaviour.



43. There was no prove that the claimants incurred or suffered any losses that are provable as to warrant an award of special damages, and this claim fails and is dismissed.

### **General Damages**

44. The finding of an unfair termination, entitles the claimants' to compensation. in determining an award of compensation, the court is to consider the 13 factors set out under section 49 (4) of the *Employment Act* (See *Alphonse Maghanga Mwachanya v Operation 680 Limited* [2013] eKLR)

45. The claimants were constantly engaged on three months contracts that were renewed upon their expiry. In this regard, I deem an award of three months' salary sufficient compensation for the unfair termination, and are hereby awarded.

46. The 1<sup>st</sup> claimant (driver) was supposed to be earning in accordance with the minimum wage regulations which came into effect on May 1, 2013.

47. Although the respondent denied the monthly salary payable to the claimants is Kshs 19,361.00 for the 1<sup>st</sup> claimant and Kshs 15,730.00 for the rest of the claimants, they squandered the opportunity to produce their evidence in support of their position, leaving the court with no option but to work with the amount provided by the claimants.

48. In whole, the court makes orders as follows: -

- i. That the respondent pays the claimants three months' salary equivalent as compensation for unfair termination at Kshs 58,083 for the 1<sup>st</sup> claimant and Kshs 47,190 for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> claimants.
- ii. That the costs of the suit shall be borne by the respondent.

49. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 27<sup>TH</sup> DAY OF OCTOBER, 2022.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

All Claimants present in person

Mr. Ouma Njoga present for the Respondent

Christine Omollo- C/A

