



**Achipeng'a v County Government of Homabay (Employment and Labour Relations Appeal E052 of 2021) [2022] KEELRC 12781 (KLR) (6 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12781 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E052 OF 2021  
CN BAARI, J  
OCTOBER 6, 2022**

**BETWEEN**

**BENSON OKECH ACHIPENG'A ..... APPELLANT**

**AND**

**COUNTY GOVERNMENT OF HOMABAY ..... RESPONDENT**

*(Being an appeal against the Judgment and Decree of Hon. B. Omwansa Senior Principal Magistrate, delivered on 22nd September, 2021, in Oyugis Principal Magistrate's Court ELRC Cause No. 1 of 2020)*

**JUDGMENT**

1. The appellant lodged Cause Number 1 of 2020 at the Principal Magistrate's Court at Oyugis against the respondent, seeking payment of one month's salary in lieu of notice, 12 month's salary for unlawful termination, compensation for underpayment, overtime pay, leave pay, house allowance and special damages amongst other reliefs.
2. In a judgment rendered on September 22, 2021, the learned trial magistrate entered judgment in favour of the appellant against the respondent for Kshs 84,969/- being payment in lieu of notice, overtime pay and leave earned but not paid.
3. The appellant being dissatisfied by the decision of the trial court, filed a memorandum of appeal dated December 9, 2021, and filed on the December 15, 2021, premised on the grounds that:
  - i. The learned trial magistrate misapprehended both law and fact in failing to award the specific items of claim as prayed for, given that the claims were undefended.
  - ii. The learned trial magistrate erred both in law and fact in not appreciating that the appellant had proved his case on a balance of probabilities as required by law.



- iii. The learned trial magistrate misapprehended both law and fact in failing to appreciate that his duty was only to assess awards as prayed for, an interlocutory judgment having been regularly obtained.
  - iv. The learned trial magistrate erred both in law and fact in not considering the appellant's submissions together with the provisions of the law and precedent hence arriving at wrong findings.
  - v. The learned trial magistrate erred both in law and fact in making arbitrary awards under the heads of the appellant's claim by applying wrong principles of the law or by failing to apply the right legal principles.
4. The appellant's prayer is that this appeal be allowed and the judgment and decree of the trial magistrate be set aside, and be substituted therefore with a just judgment with a proper award of the appellant's claim.
  5. The appellant further prays that he be awarded the costs of this appeal and any other or further relief that this honourable court may deem fit and just to grant.
  6. Submissions were filed for both parties.

#### **The appellant's submissions**

7. It is submitted for the appellant that his testimony before the trial court is clear indication that he had a contract with the respondent for more than seven years which contract was terminated prematurely. The appellant contends that he was not issued with any warning letter before the termination and had no representative as no meeting took place before the termination.
8. It is further submitted that the appellant's evidence is clear that his employment was unfairly, unlawfully and unprocedurally terminated.
9. The appellant urges the court to set aside the trial's court's finding dismissing the appellant's claim under the head of compensation for unlawful termination and make an award of 12 months' salary in the appellant's favour. He had reliance in *Banking, Insurance and Finance (Union) Kenya vs Co-operative Bank of Kenya Ltd (2017) eKLR* and *Abraham Gumba vs Kenya Medical Services Authority (2014) eKLR* to buttress this position.

#### **The respondent's submissions**

10. It is submitted for the respondent that the appellant has never been a bona fide employee of the County Government, but was a casual employee of KENTEC, an African Development Bank and Government of Kenya sponsored project for eradication of tsetse fly within Koderia area in Oyugis.
11. It is further submitted that the wages of the appellant were the responsibility of KENTEC and not the respondent. The respondent further submits that the appellant was on daily wage but consolidated and paid at once on a month to month basis by KENTEC.
12. The respondent submits that it never issued the appellant with an appointment letter nor credited any money into his bank account or issue any payslips to him since payslips are only given to employees, and he was not their employee.
13. The respondent asserts that projects have timelines within which they operate and that the KENTEC project wound up its operations on or about the year 2018. The respondent further submits that upon



the project winding up, the appellant was discharged from duty and the project livestock disposed off to community members.

14. The respondent submits that the appellant was contracted for three years and he served diligently with dedication and commitment to the full term of the contract. It is further submitted that the appellant having served for the term of his contract, cannot claim to have been unlawfully terminated.
15. It is submitted for the respondent that courts have upheld the principle that fixed-term contracts carry no expectation of renewal. They sought to rely in *The Registered Trustees De La Salle Christian Brothers T/A St Mary's Boys Secondary School v Julius DM Baini [2017] eKLR* and *The Registered Trustees of the Presbyterian Church of East Africa & Another v Ruth Gathoni Kariuki [2017] eKLR* for the holding that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry.
16. The respondent submits that the appellant failed to satisfy the burden of proof of unlawful termination of employment as provided under section 47 (5) of the *Employment Act*, 2007. She further submits that the appellant has not adduced evidence in support of termination, let alone unlawful termination.
17. The respondent submits that she has proved its case that the appellant served to the full term of his contract hence there was no unfair termination and pray that this court affirms the judgment of the lower court by dismissing this appeal with costs.

### **Analysis and determination**

18. I have carefully considered the grounds of the appeal herein, the submissions by both parties and the impugned judgment.
19. Although the appeal sought the setting aside of the entire decision of the trial court, the appellant in his submission, indicated that he was only dissatisfied with the finding dismissing his claim for compensation for unlawful termination.
20. The question for this court is whether the trial magistrate erred in not awarding the appellant 12 months' salary for unlawful termination.
21. The Court of Appeal in *Musera vs Mwechelesi & Another ([2007] KLR 159)*: stated as follows in regards to appeals:

' We must at this stage remind ourselves that though this is a first appeal to us and while we are perfectly entitled to make our own findings on the evidence, the trial judge has in fact made clear and unequivocal findings and as an appellate court we must indeed be very slow to interfere with the trial judge's findings unless we are satisfied that either there was absolutely no evidence to support the findings or that the trial judge must have misunderstood the weight and bearing of the evidence before him and thus arrived at an unsupportable conclusion.'
22. This being a first appeal, my role is to re-assess and re-evaluate the entire evidence tendered before the trial court and arrive at my own conclusions, while taking into consideration the lower court's exercise of discretion on findings of law and fact.
23. The appellant contends that his contract with the respondent was still valid as at the time he was terminated. He further asserts that he was neither given notice nor heard before the decision to terminate his employment was arrived at.



24. The appellant did not adduce any letter or contract of employment between himself and the respondent. He however presented a recommendation letter in evidence before the trial court, wherein, the respondent's sub-county livestock officer indicated that the appellant was their former employee who served under a project, and which project had been suspended.
25. The recommendation letter does not say that the project had come to an end at the appointed time, but instead, that it had been suspended on account of realignment and reorganization.
26. The respondent's assertion that the appellant served on a fixed term contract was not proved. No such contract was produced in evidence to confirm this position. Further, although the respondent denied having employed the appellant, the recommendation letter is prove to the contrary.
27. I agree with the respondent that projects run for a defined period. I also agree that a fixed term contract is self-terminating and does not require notice or the termination procedures laid out in section 41 of the *Employment Act* (see *Mombasa Apparels (EPZ) Limited v Tailor and Textiles Workers Union (2016) eKLR*). However, without prove that the project had actually come to the end, or the existence of a fixed term contract between the parties herein, and noting that the *Employment Act* imposes an obligation on the employer to reduce an employment agreement into writing, I am inclined to make a finding of an unfair termination.
28. Section 40 of the *Employment Act*, allows employers to declare redundancy where an employee's services become superfluous or when an office is abolished. This in my view, is the route the respondent should have taken immediately the need to suspend the project arose.
29. That the appellant's employment quietly ended, with neither a termination letter nor notice of the suspension or end of the project, is certainly an unfair way to separate with an employee.
30. I find and hold that the appellant was unlawfully and unfairly terminated.
31. On the award of 12 months salary for unfair termination, it is trite law that a finding of unfair termination/dismissal, entitles a party to the remedies in section 49 and 50 of the *Employment Act* (See *Benjamin Langwen v National Environment Management Authority (2016) eKLR*.)
32. The next question for this court is whether the appellant deserves a 12 months' salary in compensation for the unfair termination. The Court of Appeal addressed the issue of awards in the case of *Ol Pejeta Ranching Limited v David Wanjau Muhoro Civil Appeal No 42 of 2015*, where the court held:

' Remedies for unfair termination is provided for in section 49 of the Act. They include, payment equivalent to a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employees at the time of dismissal. In deciding whether to adopt some of the remedies, the court has to take into account a raft of considerations such as the conduct of the employee, which to any extent caused or contributed to the termination.'
33. Considering that the project where the appellant served was suspended or prematurely came to an end, the appellant would not have had his job for longer even if the proper separation procedures were adhered to. In the circumstances, I deem an award of three (3) months' salary for unfair termination appropriate in the circumstances, and is hereby awarded.
34. The upshot is that the appellant's appeal succeeds, and I make orders as follows: -
  - i. The appellant is awarded three (3) months' salary as compensation for unfair termination at Kshs 42,000/-



- ii. The awards by the trial court are left undisturbed.
- iii. The costs of the appeal shall be borne by the respondent.

Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 6<sup>TH</sup> DAY OF OCTOBER, 2022.**

**CHRISTINE N BAARI**

**JUDGE**

**Appearance:**

N/A for the Appellant

Mr Lugano h/b for Mr Yogo for the Respondent

MS Christine Omollo - Court Assistant.

