



**Nyabongo & 2 others v Auto Springs Manufacturers Limited (Cause 1053, 1563 & 1977 of 2017 (Consolidated)) [2022] KEELRC 13329 (KLR) (30 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13329 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1053, 1563 & 1977 OF 2017 (CONSOLIDATED)**

**BOM MANANI, J  
NOVEMBER 30, 2022**

**BETWEEN**

**ZAKARIA MUSA ODHIAMBO NYABONGO ..... 1<sup>ST</sup> CLAIMANT  
WYCLIFFE MUNDIA ALUSO ..... 2<sup>ND</sup> CLAIMANT  
CHARLES SUBA SAHANI ..... 3<sup>RD</sup> CLAIMANT**

**AND**

**AUTO SPRINGS MANUFACTURERS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimants were all employees of the respondent in various capacities until the parties separated on March 30, 2017. The claimants allege that they were unfairly terminated, a claim that is denied by the respondent. And hence the current action.
2. The circumstances leading to the separation of the claimants and the respondent are the same. Having regard to this fact, the court by an order issued on February 6, 2018 directed that the three suits be consolidated and heard together.

**Claimants' case**

3. It is the claimants' case that they were employed by the respondent on diverse dates in diverse positions. That they together served the respondent diligently and faithfully until the evening of March 30, 2017 when they were summoned to a staff meeting at which the decision to terminate their services was communicated to them.
4. According to the claimants, on this date, the respondent's management informed its employees including the claimants that it was relocating its operations from Athi River to Limuru. As a result, some of the respondent's members of staff were to give up their employment in lieu of being relocated



to Limuru. As fate would have it, the three claimants fell in the list of the employees who had to be left behind with the consequence that they lost their employment.

5. The claimants testified that prior to this development, they had not been notified of the impending closure of the respondent's Athi River plant or that the respondent would be relocating to Limuru. They also state that they had not been notified that the consequence of the relocation would be loss of their employment.
6. It is the claimants' case that they were not consulted over the matter or offered the opportunity to express their desire to be relocated alongside the plant in order to save their jobs. Further, the claimants state that no notice of the relocation was issued to their trade union or local labour office in contravention of statute.
7. The claimants state that as a result of the relocation, they lost employment. They contend that they were not paid various terminal dues arising from closure of their employment contracts. Consequently, they pray for the various reliefs as more specifically set out in their Statements of Claim.

### **Respondent's case**

8. The respondent admits having employed the claimants. The respondent also admits that the parties separated on March 30, 2017 but denies that the separation was occasioned by the factors alluded to by the claimants.
9. According to the respondent, the claimants had fixed term contracts of service. These contracts expired on the evening of March 30, 2017. Consequently, the claimants' discharge from employment was on account of expiry of their term contracts.
10. In the respondent's view, the claimants' contracts of service having lapsed by reason of expiry of time, the parties were discharged from their obligations under the various contracts. There was therefore no obligation on the respondent to issue notice to the claimants or the local labour office about the lapse of the contracts. And neither was the respondent under obligation to renew the contracts and relocate the claimants to Limuru. In the premises, the respondent prays that the claimants' cases be dismissed with costs.

### **Issues for determination**

11. The parties gave oral evidence in court in addition to adopting their respective witness statements. They also produced their respective documents as exhibits. The evidence tendered orally in large part reiterates the parties' positions on the dispute as appears from their pleadings.
12. After analyzing the pleadings as filed, I consider the following to be the issues for determination:-
  - a. Whether the Claimants were on fixed term employment contracts with the respondent.
  - b. Whether the Claimants' contracts of service lapsed by reason of passage of time or at the instance of the respondent and if at the instance of the respondent, whether the termination was lawful.
  - c. Whether the parties are entitled to the remedies they seek through their pleadings.
13. I have considered the evidence and submissions on record. It is clear to me that initially, the respondent hired every of the claimants on the basis of a fixed term contract of service. For the 1<sup>st</sup> claimant, his contract ran between September 3, 2015 and August 30, 2016. For the 2<sup>nd</sup> and 3<sup>rd</sup> claimants, their contracts ran between May 1, 2015 and April 30, 2016.



14. After the lapse of these contracts, there is evidence that they were renewed. For the 1<sup>st</sup> claimant although he was issued with a termination notice on May 3, 2016, he continued in employment after the expiry of the notice. This fact is confirmed by the evidence of the respondent's witness who stated that all the claimants remained in employment until March 30, 2017 when their contracts allegedly lapsed on account of time. This fact is also confirmed by the 1<sup>st</sup> claimant's October 2016 pay slip which shows that he was still receiving salary from the respondent as at October 2016. Importantly the printout from the National Social Security Fund (NSSF) also shows that the respondent continued remitting the 1<sup>st</sup> claimant's employee contributions to the fund until March 2017.
15. With regard to the 2<sup>nd</sup> and 3<sup>rd</sup> claimants, there is evidence that they were issued with indefinite term contracts on July 1, 2016. Besides, the NSSF printouts also prove the fact that the respondent continued to remit the two claimants' employee contributions to the fund until March 2017. The respondent can only have continued to make these remittances for the benefit of the two claimants because it acknowledged them as its employees.
16. Although the respondent asserts that the renewed contracts of service between the parties were fixed term, no evidence was laid before the court to verify this fact. In respect of the 2<sup>nd</sup> and 3<sup>rd</sup> claimants, their renewed contracts did not make reference to their expiry date. They were therefore contracts of indefinite term.
17. In respect of the 1<sup>st</sup> claimant, after his first fixed term contract expired, he continued in employment without any formal contract being concluded between the parties. He continued serving until March 2017 when the parties separated.
18. It is noted that the fixed term contract between the 1<sup>st</sup> claimant and the respondent lapsed on August 30, 2016. He thereafter continued in service of the respondent for seven months until March 30, 2017. In terms of section 35 (1) (c) of the *Employment Act* (EA), the contract between the parties was converted into a periodic contract of service which could only be terminated with cause and upon issuance of notice to terminate in terms of sections 35, 40, 41, 43 and 45 of the EA as the facts demanded. It was not a fixed term contract of service.
19. It is therefore incorrect for the respondent to suggest that the claimants were serving under fixed term contracts. Apart from failing to issue the claimants with such contracts in writing, the respondent provided no evidence to support this claim. Consequently, I hold that the claimants were serving the respondent on the basis of indefinite and not fixed term contracts of service.
20. The second issue is whether the claimants' contracts of service lapsed by reason of passage of time or at the instance of the respondent and if at the instance of the respondent, whether the termination was lawful.
21. As already stated in the preceding sections of this decision, the claimants were on indefinite term contracts. Therefore, it follows that their contracts did not lapse through passage of time as suggested by the respondent.
22. The contracts having been of indefinite term, the claimants' contracts enjoyed the protection offered to contracts of service that do not terminate by reference to time under the EA. If the respondent wanted to terminate the contracts on account of redundancy, it had to comply with the provisions of sections 40, 43 and 45 of the EA. If the termination was on account of the misconduct, incapacity or incompetence of the employee, the employer is required to work within the parameters set under sections 41, 43 44 and 45 of the EA in terminating the employee. Does the evidence on record demonstrate compliance by the respondent with these provisions of statute, whichever is applicable?



23. The parties are in agreement that their separation was not due to the misconduct, incompetence or incapacity of the claimants. Therefore, sections 41 and 44 of the EA does not apply to the dispute.
24. What I understand the evidence to suggest is that the claimants were forced out of employment due to the decision by the respondent to relocate its business from Athi River to Limuru. This was therefore loss of employment due to the operational requirements of the respondent. It was a case of redundancy.
25. The law on redundancy is now well settled. For Kenya, it is encased in section 40 of the EA as read with article 41 of the *Constitution*. Any employer wishing to declare a redundancy must comply with the following requirements:-
  - a. Issue a notice of the intended redundancy to the employees, the local labour office and the Trade Union representing the employees where such representation exists.
  - b. The notice must be for a minimum period of a calendar month.
  - c. The notice must indicate the reasons for and extent of the proposed redundancy.
  - d. The employer must thereafter undertake a selection process to determine the employees to be released from employment. This is guided by the principles of seniority in time of the employees affected by the redundancy and the skill, ability and reliability of each employee of the particular class of employees affected by the process.
  - e. The employer must then pay the identified employees: one month salary in lieu of notice; accrued leave day dues; any unpaid salaries; and severance pay calculated in accordance with the statutory guidelines.
  - f. Where the parties have a Collective Bargaining Agreement (CBA) providing a better package, the employer is required to terminate the employee with reference to the CBA.
26. In terms of section 45 of the EA, where the employer is unable to demonstrate compliance with this procedure before terminating the employee on account of redundancy, he is deemed to have unfairly terminated the contract of employment.
27. The respondent admits that as it relocated to Limuru on March 30, 2017, it left the claimants behind. However, there is no evidence of the respondent having subjected the claimants to the redundancy process contemplated under section 40 of the EA.
28. The court having found that the claimants were still in the respondent's employment as at March 30, 2017 on indefinite terms, the respondent was under obligation to comply with the law on redundancy before releasing them. Consequently, the respondent's failure in this respect resulted into the unfair termination of the claimants.
29. The third issue relates to whether the parties are entitled to the remedies they seek through their pleadings. In respect of the respondent, the answer to the question is in the negative. Having unfairly terminated the claimants, the respondent is undeserving of orders dismissing the claimants' suits with costs.
30. The claimants having been unfairly terminated, I consider that they are to pursue reliefs contemplated under section 49 as read with section 35 of the EA and not those provided for under section 40 of the Act. This is because there was no valid redundancy declaration to warrant payments under section 40 of the EA.
31. I will therefore award the claimants as follows:-



- a. Zakaria Musa Odhiambo Nyabongo
  - i. Salary in lieu of notice ksh 17,416.
  - ii. Compensation for wrongful termination equivalent to eight months gross salary ksh 139,328.
  - iii. Interest on the award at court rates from the date of institution of the case.
  - iv. The award is subject to the applicable statutory deductions.
  - v. Claimant to be issued with a certificate of service.
- b. Wycliffe Mundia Aluso
  - i. Salary in lieu of notice ksh 16,495.
  - ii. Compensation for wrongful termination equivalent to eight months gross salary ksh 131,960.
  - iii. Interest on the award at court rates from the date of institution of the case.
  - iv. The award is subject to the applicable statutory deductions.
  - v. Claimant to be issued with a certificate of service.
- c. Charles Suba Sahani
  - i. Salary in lieu of notice ksh 15,955.
  - ii. Compensation for wrongful termination equivalent to eight months gross salary ksh 127,640.
  - iii. Interest on the award at court rates from the date of institution of the case.
  - iv. The award is subject to the applicable statutory deductions.
  - v. Claimant to be issued with a certificate of service.

32. The claimants shall be paid costs of the consolidated suit.

**DATED, SIGNED AND DELIVERED ON THE 30<sup>TH</sup> DAY OF NOVEMBER, 2022**

**B O M MANANI**

**JUDGE**

**In the presence of:**

..... **for the claimants**

..... **for the respondent**

**ORDER**

In light of the directions issued on July 12, 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision 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.

B O M MANANI

