



Ogayah v Network for Adolescent and Youth of Africa (NAYA) (Cause 444 of 2017) [2022] KEELRC 13401 (KLR) (7 December 2022) (Judgment)

Neutral citation: [2022] KEELRC 13401 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 444 OF 2017
S RADIDO, J
DECEMBER 7, 2022**

BETWEEN

VINCENT OPIYO OGAYAH CLAIMANT

AND

**NETWORK FOR ADOLESCENT AND YOUTH OF AFRICA
(NAYA) RESPONDENT**

JUDGMENT

1. Vincent Opiyo Ogaya (the claimant) sued the Network for Adolescent and Youth of Africa (the respondent), alleging unfair termination of employment and breach of contract.
2. The respondent filed a response on February 28, 2018, prompting the claimant to file a reply on March 13, 2018.
3. The cause was heard on May 23, 2022, when the claimant testified, and on October 6, 2022, when the respondent's witness testified.
4. The claimant filed his submissions on October 27, 2022 and the respondent on November 29, 2022.
5. The claimant set out the issues for determination as:
 - i. Did the events leading up to the termination constitute fair labour practice?
 - ii. Can a backdated contract be termed as a new contract?
 - iii. Was my termination/summary dismissal or a case of lapsed contract?
 - iv. Was the summary dismissal substantively and procedurally fair within the meaning of the law?
 - v. Respondent's failure to prove their case through certain evidence that is statutorily within their remit.



6. The respondent, on the other hand, outlined the issues for adjudication as follows:
 - i. Whether there was a written contract between the parties?
 - ii. Whether there was a written contract between the parties at the time of separation?
 - iii. Whether the claimant can be said to have been unfairly dismissed where the claimant refuses to sign an agreement?
7. The court has considered the pleadings, evidence, and submissions.

Nature Of Contract At The Point Of Separation

8. The respondent engaged the claimant under an oral contract from May 2014 to January 2015.
9. From January 2015, the respondent and the claimant executed a fixed-term contract (copy not produced in court).
10. On February 1, 2016, the parties entered into a fixed-term contract with an end date of April 30, 2017.
11. When the contract ended, the parties did not have an agreement of minds, and thus a written contract was not signed.
12. However, the claimant continued to work with the respondent and was paid wages until around July 2017.
13. Since the claimant was paid by the month after April 2017, the court finds that he was on monthly contracts pending agreement on the terms and conditions of service.

Unfair Termination Of Employment

14. The claimant asserted that the respondent unfairly terminated his contract on August 17, 2017 after he declined to execute a contract that he alleged had unilaterally altered the terms of the previous contract.
15. Before the decision, the claimant had served the respondent without a written contract, the previous contract having lapsed.
16. The claimant was on fixed-term contracts. When the last such contract expired, the respondent required the claimant to execute new contracts.
17. The claimant conceded that he declined to sign the contracts because he did not agree with some terms of the new contract.
18. Like any other contract, an employment contract needs an agreement of the minds. The parties herein did not have an agreement of mind.
19. The respondent could not be expected to force or compel to the terms of the contract.
20. The court is, therefore, of the view that the oral contract was frustrated by the failure of the parties to agree and not on any misconduct, physical incapacity, or performance on the part of the claimant.
21. In the circumstances, the protections assured employees by sections 43 and 45 of the [Employment Act, 2007](#) are not implicated.
22. Nevertheless, since the claimant was paid by the month and by dint of section 35(1)(c) of the [Employment Act, 2007](#), the respondent was required to give him one month's written notice.



23. The written notice was not given, and the claimant is entitled to the equivalent of one month's salary in lieu of notice in the sum of Kshs 70,000/-.

Breach Of Contract

Accrued leave

24. The claimant prayed for Kshs 40,833/- for outstanding leave for 2017, Kshs 87,500/- for 2016, Kshs 122,500/- for 2015 and Kshs 122,500/- for 2014.
25. The respondent's witness testified that the claimant did not apply for leave and was, therefore, not entitled to commuted leave.
26. Section 28(4) of the *Employment Act*, 2007 circumscribes how many leave days can be carried forward to the last eighteen months.
27. The respondent did not produce the claimant's leave records, and the court will allow this head of the claim for the eighteen months preceding separation in August 2017.
28. Since leave is on full pay, the court awards the equivalent of one and a half months' salary. The claimant's salary at separation was Kshs 70,000/-.
29. The court awards Kshs 70,000/-.

Certificate of Service

30. A certificate of service is a statutory entitlement, and the respondent should issue one to the claimant within 30 days.

Conclusion and Orders

31. The court finds and declares that the respondent was in breach of contract in not giving the claimant written notice of termination of oral contract and, further, that it was in breach of the statute in respect to leave.
32. The claimant is awarded:
- i. Salary *in lieu* of notice Kshs 70,000/-
 - ii. Accrued leave Kshs 105,000/-
- Total Kshs 175,000/-
33. The respondent to issue a certificate of service within 30 days.
34. Claimant acted in person. No order on costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 7th day of December 2022.

Radido Stephen, MCI Arb

Judge

Appearances

Claimant in person

For Respondent Simiyu, Opondo, Kiranga & Co. Advocates



Court Assistant Chrispo Aura

