



Alpha Logistics Services EPZ Ltd v Magistrate’s Court Mombasa & another (Appeal E006 of 2021) [2022] KEELRC 13358 (KLR) (1 December 2022) (Judgment)

Neutral citation: [2022] KEELRC 13358 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E006 OF 2021
AK NZEI, J
DECEMBER 1, 2022**

BETWEEN

ALPHA LOGISTICS SERVICES EPZ LTD APPELLANT

AND

MAGISTRATE’S COURT MOMBASA 1ST RESPONDENT

IDLE ISSACK OMAR 2ND RESPONDENT

(Being an Appeal from the Judgment of Hon. E.K. Makori – CM delivered on 17th February, 2021.)

JUDGMENT

1. The 2nd Respondent herein, Idle Issack Omar, was the sole claimant in Mombasa Cmc-elr Case No 118 of 2019 wherein he had sued the Appellant vide a statement of claim dated February 8, 2019 and filed in the said Court on February 14, 2019, and pleaded as follows:-
 - a. that he, the 2nd Respondent, had been employed by the Appellant as a security guard since October 1, 2010, earning a monthly salary of Ksh 22,000.
 - b. that on November 30, 2018, the Appellant summarily, illegally and unlawfully terminated the 2nd Respondent’s employment without any reason, or due process or payment of his dues.
 - c. that termination of the 2nd Respondent’s employment was illegal and in contravention of the [Employment Act 2007](#) and the Constitution (of Kenya) as the 2nd Respondent was not given any notice, no reasons were given for the termination and the 2nd Respondent was not given an opportunity to be heard.
2. The 2nd Respondent pleaded and set out his claim against the Appellant as follows:-
 - i. One month salary in *lieu of* notice.....Ksh 22,000



- ii. House allowance (8 years x 12 months
x7,333.00)Ksh 703,968
 - iii. Gratuity pay (8 yearsX15 days X Ksh 733).....Ksh 87,960
 - iv. Overtime worked (2 ½ hr/dayXKsh 91X 312 days).....Ksh 70,980
 - v. 12 months' pay for unfair termination (Ksh 22,000 X 12)Ksh 264,000
 - vi. A declaration that the 2nd Respondent's dismissal was unlawful.
 - vii. A Certificate of Service.
 - viii. Costs and interest.
3. A written witness statement of the 2nd Respondent, which replicated the averments made in the statement of claim, was filed together with the statement of claim. The 2nd Respondent also filed some documents which included an NSSF statement indicating that he had worked with the Appellant from 2010 to November 2018.
 4. The Appellant defended the suit vide a statement of defence dated March 25, 2019 whereby it denied the 2nd Respondent's claim.
 5. Subsequently, the Appellant filed a list of documents dated September 16, 2019, listing four documents. The listed documents included a letter of Appointment (dated September 13, 2018) and a Certificate of Service dated December 3, 2018.
 6. Trial in the lower Court is shown to have opened on November 5, 2019 when the 2nd Respondent testified. He reiterated the averments made in his statement of claim and further stated that for eight years he did not take leave.
 7. Cross-examined, the 2nd Respondent testified that his salary was Ksh 14,421 and a house allowance of Ksh 4,000.
 8. The Appellant's witness (RW-1) testified, both in chief and under cross-examination:-
 - a. that the 2nd Respondent was employed by the Appellant as a casual and later transited to a contract for 3 months which lapsed and was never extended.
 - b. that the 2nd Respondent worked with the Appellant from October 1, 2010 to November 30, 2018.
 - c. that the Certificate of Service issued to the 2nd Respondent showed that he worked for 3 months.
 9. On February 17, 2021, the trial Court delivered its judgment, awarding the 2nd Respondent a total sum of Ksh 158,631, costs of the suit and interest. The said awarded sum comprised:-
 - a. Ten months' pay in view of the long service with the Appellant (Ksh 14,421X10= 144,210).
 - b. One month salary in *lieu of* notice.....Ksh 14,421.
 10. The trial Court further ordered that a certificate of service reading October 1, 2010 to November 30, 2018 be issued to the 2nd Respondent.



11. Aggrieved by the said judgment, the Appellant filed the present appeal against both the 2nd Respondent and the trial Court, which was named as the 1st Respondent in the Memorandum of Appeal dated February 22, 2021 and filed in this Court on February 23, 2021. The naming of a trial Court as a Respondent in an appeal against its judgment is a procedure unbeknown in this Court's rules of procedure. Nevertheless, I will proceed to determine the appeal, that fact notwithstanding.
12. The Appellant set out numerous grounds of appeal against both the 1st and 2nd Respondents, the import of which is that having signed a fixed term contract on September 13, 2018, the parties to the contract were bound by the terms thereof. The Appellant prayed:-
 - a. that the trial Court's judgment delivered on February 17, 2021 be set aside and/or vacated, and the 2nd Respondent's suit in the 1st Respondent's Court be dismissed with costs.
 - b. that alternatively, this Court do take up the matter and re-evaluate the evidence adduced and pronounce itself thereof.
 - c. that costs of the appeal be paid by the Respondents.
13. I will handle the numerous grounds of appeal together as stated in the foregoing paragraph. This is a first appeal. A first appeal is by way of a re-trial. The duty of a first appellate Court is to re-evaluate, to re-analyse and to reconsider the evidence adduced in the trial Court and to draw its own conclusion, bearing in mind that it did not see the witnesses testify, and therefore give allowance for that.
14. As expected, the 1st Respondent (the Magistrate's Court at Mombasa) did not participate in these proceedings. Counsel for the Appellant and for the 2nd Respondent filed written submissions on the appeal pursuant to this Court's directions in that regard. I have considered the submissions.
15. The Appellant submitted that the 2nd Respondent signed a fixed term contract on September 8, 2018, vide which he was appointed for three months, and that when that fixed term contract came to an end by effluxion of time, the 2nd Respondent and the Appellant were bound by their said agreement. That by virtue of Sections 97 and 98 of the Evidence Act, the 2nd Respondent was barred by the law from giving evidence contrary to what was stated in the contract.
16. The Appellant cited the case of L'estrangev F Graucob Ltd[1934] 2KB 394 where it was held:-

“...where an action is brought on a written agreement which is signed...the agreement is proved by proving his signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents...”

“when a document containing contractual terms is signed,...party signing it is bound and it is wholly immaterial whether he has read the document or not.”
17. It was a common ground that the 2nd Respondent was employed by the Appellant as a security guard on October 1, 2010, and remained in such employment until September 13, 2018 when he is shown to have signed a fixed term three months contract with his employer, commencing on September 13, 2018. Simple calculation would show that a period of three months would have ended on December 13, 2018. Both parties testified that the 2nd Respondent's employment was terminated on November 30, 2018. This was before the expiry of three months.
18. Further, although the 2nd Respondent had been in the Appellant's employment for eight years (since October 1, 2010) as admitted by the Appellant's witness (RW-1) and as demonstrated by the 2nd Respondent by production in evidence of an *NSSF* statement, the Court was not told whether, when



and how the 2nd Respondent's employment was terminated prior to him signing the alleged three months' fixed term contract.

19. From the evidence adduced, the 2nd Respondent was still the Appellant's employee as at the time he is alleged to have signed the three months' contract. The allegation by the Appellant that the 2nd Respondent was working as a casual when he signed the contract cannot stand the test of law. The 2nd Respondent may have started off as a casual way back in 2010 or even before, but by dint of Section 37 of the [Employment Act](#), his employment status transitioned after three months of employment to a contract of service where wages are paid monthly. In other words, he became an employee for an indefinite period of time. His employment became terminable by giving one month notice or payment of one month salary in *lieu of* notice, for valid reasons and by following due process.
20. For an employee employed for an indefinite period of time to transition to a fixed term contract of employment, the subsisting regime of employment must first be terminated in accordance with the law and all dues, entitlements and benefits paid to the employee. Unless and until this is done, any purported fixed term contract signed by the parties will be a contract within a contract, and will not be deemed to have extinguished the hitherto existing employment contract and the employee's rights therein unless the subsequent/fixed term contract specifically states so. This was not the case in the present case.
21. As already stated, the 2nd Respondent's employment was terminated on November 30, 2018 before lapse of the 3 months' period stated in the fixed term contract signed by the 2nd Respondent on September 13, 2018. Whichever way it is looked at, termination of the 2nd Respondent's employment on November 30, 2018 was neither by effluxion of time as purported by the Appellant nor fair according to the provisions of Sections 41,43, and 45 of the [Employment Act](#).
22. The two issues that emerge for determination are:-
 - a. whether termination of the 2nd Respondent's employment by the Appellant was unlawful and therefore unfair.
 - b. whether the 2nd Respondent was entitled to the reliefs sought in the lower Court.
23. On the 1st issue, and for reasons that I have already set out herein above, I make a finding that termination of the 2nd Respondent's employment was unlawful and therefore unfair. I so declare.
24. It was held in the case of [Walter Ogal Anuro v Teachers Service Commission](#) [2013] eKLR that:-

“...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

In the present case, the Appellant did not comply with the mandatory procedural requirements set out in Section 41 of the [Employment Act](#), and did not demonstrate that it had a valid reason to terminate the 2nd Respondent's employment.
25. On the second issue, it is to be noted that although the 2nd Respondent pleaded in the lower Court that he earned a monthly salary of Ksh 22,000, no evidence was adduced in proof of that allegation. Both parties were, however, in agreement that at the time of termination of his employment, the 2nd Respondent earned a monthly basic salary of Ksh 14,421 and Ksh 4,000 house allowance, a total of Ksh 18,421. House allowance is shown to have been paid during the last few months of the 2nd



- Respondent's employment. No evidence was presented in Court to show that the 2nd Respondent was paid house allowance for the eight years he had worked prior to September 13, 2018 when he was purported to have signed a three months' fixed term contract. Since there is no cross-appeal on the issue of house allowance, I will not discuss the issue further.
26. Similarly, no evidence was presented by the Appellant to demonstrate that the 2nd Respondent had been paid service gratuity for the eight years that he had worked prior to signing the purported three months' fixed term contract. I will not discuss the issue of service gratuity further as the same was declined by the trial Court and the 2nd Respondent has not filed a cross-appeal.
 27. The claim for overtime payment was neither pleaded nor proved. It was declined by the trial Court and I uphold that finding. I also uphold the trial Court's award to the 2nd Respondent of one-month salary in lieu of notice. As there is no cross appeal on the gross salary payable to the 2nd Respondent at the time of termination, the award will remain at Ksh 14,421 as awarded by the trial Court.
 28. The award of ten months' salary is, however set aside, and is substituted with an award of the equivalent of eight months' salary as compensation for unfair termination of employment, to be calculated at the rate of Ksh 14,421 per month as there is no cross appeal on the issue of the 2nd Respondent's gross salary at the time of termination of employment. That is $Ksh\ 14,421 \times 8 = 115,368$. I have taken into account the circumstances in which the 2nd Respondent's employment was terminated.
 29. On the issue of Certificate of service, I uphold the trial Court's finding that the 2nd Respondent be issued with a Certificate of Service indicating his period of service as October 1, 2010 to November 30, 2018 as opposed to the three months that the Appellant had indicated on the Certificate of service issued on December 3, 2018.
 30. The appeal against the 1st Respondent is dismissed.
 31. The appeal partly succeeds to the extend set out in paragraph 28 herein. Each party will bear its own costs of the appeal.
 32. The 2nd Respondent will have costs of proceedings in the lower Court and interest. Interest shall be calculated from the date of the lower Court's judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 1ST DAY OF DECEMBER 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Miss Chege. for Appellant

Miss Memia Respondent

