



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. 1 OF 2020

OCHIENG KENEDY ODHIAMBO

APPELLANT

v

COCA COLA EQUATOR BOTTLERS LTD

RESPONDENT

(Being an Appeal from the decision of the Honourable J.K. Ng'arng'ar given at the Chief Magistrate Court of Kenya at Kisumu on 11th December 2019 in Chief Magistrates Court Civil Case No. 30 of 2018)

BETWEEN

OCHIENG KENNEDY ODHIAMBO

CLAIMANT

v

COCA COLA EQUATOR BOTTLERS LTD

RESPONDENT

JUDGMENT

1. Ochieng Kennedy Odhiambo (the Appellant) instituted legal proceedings against Coca Cola Equator Bottlers Ltd (the Respondent) before the Chief Magistrates Court on 7 December 2018 and he stated the Issue in Dispute as **Unfair dismissal from employment and unlawful withholding of terminal benefits.**
2. In its Defence, the Respondent denied that there was unfair termination of employment and it pleaded that the contract expired by effluxion of time and was not renewed.
3. In a Judgment delivered on 10 December 2019, the trial Court found that the contract was fixed and expired by effluxion of time and therefore unfair termination of contract did not arise.
4. The Appellant was aggrieved and he filed a Memorandum of Appeal on 6 January 2020 with a whopping and needlessly verbose 20 Grounds contending that
 1. The Learned Magistrate erred in law and fact in failing to appreciate sufficiently or at all consider the general pleadings and submissions of the Claimant.
 2. The Learned Magistrate erred in law and fact in disregarding the evidence presented by the appellant orally and the evidence on record.
 3. The Learned Magistrate misdirected himself in failing to appreciate that the Respondent, in her Witness Statement and oral evidence, expressly admitted that no notice had been issued or reasons given prior to the abrupt termination and or failure to renew the employment contract and in proceeding to dismiss the Claimant's claim on the ground that the he had not proved his case on a balance of probabilities.
 4. The Learned Magistrate misdirected himself in failing to appreciate that the Respondent, in her Witness Statement and oral evidence, expressly admitted that they had not followed due process before issuing the Claimant with warning letters.
 5. The Learned Magistrate misdirected himself in failing to appreciate that the Respondent, in her Witness Statement and oral evidence, expressly admitted that breached a clause of the employment contract on issuing notice before terminating the employment contract.

6. The Learned Magistrate erred in law and fact by dismissing the appellant's claim by failing to consider the doctrine of legitimate expectation regarding renewal and termination of employment contracts.
7. The learned magistrate erred in law and fact by dismissing the appellant's claim based on the circumstantial evidence which was not corroborated by any and or independent witnesses.
8. The Learned Magistrate erred in fact and in law by failing to appreciate that the Claimant led evidence showing that the sham hearing consisted of the very same personnel that accused the Claimant thereby grossly violating the rules of natural justice principles, tentatively the Respondent did not rebut this evidence at trial.
9. The Learned Magistrate erred in fact and in law by failing to appreciate that the Respondent has the onus of producing records in their possession.
10. The Learned Magistrate failed to appreciate that the evidence regarding the Claimant's medical records were in possession of the Respondent.
11. The Learned Magistrate erred in law by making findings that were inconsistent with the evidence adduced and placed on record by the Claimant.
12. The Learned Magistrate misdirected himself by disregarding and failing to place due weight to the evidence adduced as well as to the written submissions filed on behalf of the Claimant.
13. The Learned Magistrate misdirected himself by the Claimant's claim when the Respondent failed to issue the Claimant with a certificate of service contrary to the provisions of the law.
14. The Learned Magistrate erred in law and fact in finding that the Claimant's termination was fair as no proof of proper procedure, as set out in the Employment Act was followed by the Respondent as they terminated the Claimant's employment services.
15. The Learned Magistrate misdirected himself by disregarding and failing to place due weight to the fact that the Respondent never issued reasons before failing to renew the claimant's employment contract.
16. The Learned Magistrate erred in fact and in law by failing to appreciate the salient provisions of the Constitution and the Employment Act on termination of employment
17. The Learned Magistrate erred in law by making findings that were inconsistent with the evidence adduced and placed on record by the Claimant.
18. The Learned Magistrate misdirected himself by disregarding and failing to place due weight to the evidence adduced as well as to the general pleadings filed on behalf of the Claimant.
19. All in all the Learned Magistrate erred in law and fact in applying a standard that is clearly higher than one of balance of probability
20. The Learned Magistrate erred in law and fact in dismissing the Claim based on hear-say evidence presented by the Respondent.
21. In light of the above, the Learned Magistrate failed to do justice to the Claimant

4. Pursuant to Court directives on 10 November 2020, the Appellant filed his submissions on 11 December 2020 while the Respondent filed its submissions on 7 January 2021.

5. The Appellant identified 5 Issues in his submissions, to wit:

- (i) Whether the Claimant's employment was unfairly terminated.
- (ii) Whether the Claimant concluded his contract term.
- (iii) The doctrine of legitimate expectation.
- (iv) Whether a certificate of service was issued and whether failure of which is a contravention of the provisions of the Employment Act and
- (v) Whether the Claimant is entitled to the reliefs sought.

6. On its part, the Respondent raised the following Issues in its submissions

- (i) What was the nature of the Claimant's employment contract?

- (ii) Whether an employer is bound to retain a poorly-performing employee, with cases of misconduct but who is under a fixed term contract.
- (iii) Whether the termination of the Claimant's employment was unfair.
- (iv) Whether the Respondent violated the doctrine of legitimate expectation by terminating the Claimant's employment.
- (v) Whether failure of an employer to issue a certificate of service amounts to unfair termination of employment.
- (vi) Whether the Claimant is entitled to the reliefs sought.

7. The Court has considered the record and submissions.

Role of the Court on first appeal

8. The role of a first appellate Court was discussed in *Kamau v Mungai* (2006) 1 KLR 150 where it was held that this being a first appeal, it was the duty of the Court.... To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.

9. The Court will bear the caution in mind.

Nature of the contract

10. Issue (i) as identified by the Respondent is mirrored in Issue (ii) as raised by the Appellant.

11. The Appellant produced before the trial Court copies of contracts dated June 2016 and 1 October 2018. The contract dated 1 October 2018 indicated that it was a renewal of contract and it was to lapse on 31 December 2018.

12. The Respondent produced copies of contracts dated 21 June 2016 and renewals dated 1 September 2016, 1 December 2016, 25 February 2017, 5 June 2017, 30 August 2017, 30 November 2017, 1 June 2018, 1 July 2018 and 1 October 2018.

13. The substantive contract between the parties produced in Court was the one dated 21 June 2016 as it set out the terms and conditions of service. The contract and the renewals all were clear that the nature of engagement was fixed-term(s).

14. The last contract was to lapse on 31 December 2018.

15. The Court in effect finds that the Appellant was always on contracts of a definite duration (fixed-term) and which type of contract is envisaged by section 9 and 10(2) of the Employment Act, 2007.

Unfair termination of contract

16. Issues (i) as identified by the Appellant and Issues (ii) and (iii) as addressed by the Respondent spoke to whether there was unfair termination of contract.

17. The Appellant's last contract was to lapse on 31 December 2018.

18. On 2 October 2018, the Respondent issued a *show-cause* notice to the Appellant (there were previous *show-cause* notice(s)). The allegation was leaving work without permission.

19. The Appellant was issued with a written warning dated 12 October 2018 as the Respondent had heard him on the allegation.

20. In terms of section 47(5) of the Employment Act, 2007, the Appellant had a statutory duty of demonstrating that an unfair termination of employment had occurred.

21. The Appellant did not set out the exact date he alleged the Respondent terminated his employment but in paragraphs 7 and 8 of the Statement of Claim, suggested it was on 2 October 2018.

22. In his witness statement which was adopted as part of the evidence, the Appellant stated that he was issued with a letter dated 24 December 2016 (?) dismissing him.

23. On the assumption that the year 2016 should read 2018, the Court has scoured through the Record of Appeal. The Appellant did not produce the letter as part of his documents nor highlight that fact during his oral testimony.

24. Despite the sanction, the Appellant appeared to suggest that he was dismissed on account of the allegation of leaving work without

permission. The assertion cannot be correct as a warning was issued and the matter left to rest.

25. The Court has also looked at clause 8 of the contract dated 21 June 2016, it had a termination clause.

26. Termination could be initiated by the Respondent by the giving of 1-month written notice.

27. In the view of the Court, the clause would only kick-in where the Respondent intended to terminate the contract during its currency.

28. When the Appellant's contract lapsed on 31 December 2018, it was not renewed.

29. The question is, if the failure by an employer to renew a fixed-term contract would amount to unfair termination of employment.

30. In the case at hand, the Appellant failed in the first instance to prove that there was in fact a termination of employment, nay an unfair termination of employment either on 2 October 2018 or 24 December 2018.

Legitimate expectation

31. Citing *Ruth Gathoni Ngotho-Kariuki v Presbyterian Church of East Africa & Ar* (2012) eKLR, the Appellant submitted that he should have been given notice of the expiry of his contract and because such notice was not given, his legitimate expectation to renewal was violated entitling him to a remedy.

32. The Appellant also sought to rely on *Teresa Carlo Omondi v Transparency International-Kenya* (2017) eKLR.

33. The Respondent in resisting the applicability of legitimate expectation in the Appellant's case cited *Joseph Maina Theuri v Gitonga Kabugi & 3 Ors* (2017) eKLR to advance the argument that the mere existence of a renewal clause does not create a legitimate expectation of renewal of an employment contract.

34. The Court has considered the parties arguments.

35. The decision in the *Ruth Gathoni* was overturned by the Court of Appeal (see *Registered Trustees of the Presbyterian Church of East Africa & another v Ruth Gathoni Ngotho-Kariuki* (2017) eKLR). It, therefore, cannot be of any assistance to the Appellant.

36. While vacating the decision, the Court of Appeal had this to say at paragraph 22

We concur with the trial Judge to the extent that as per the contract of service the appellants' were required to inform the respondent of their intention of whether they would renew her contract 3 months prior to the expiry of the same. However, we respectfully disagree that the failure to do so amounted to an automatic renewal. Why do we say so? It is clear from the wording of the above clauses as well the hospital's human resource manual that the renewal was subject to the mutual consent of the respondent as the employee and the appellants' as the employer. To hold otherwise would be tantamount to holding at servitude a party who wishes to exercise his/her right of termination in terms of the contract as observed by this Court in *Minnie Mbue vs. Jamii Bora Bank Limited* (2017) eKLR

37. And at paragraph 29

We note that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry..... Similarly, since the respondent's contract came to an end by effluxion of time any claim for wrongful termination could not be maintained.

38. The contract between the parties herein expressly provided that renewal would be upon mutual agreement and that unless renewed in writing, it would automatically cease.

39. It did not place any obligation on either party to signify in advance a desire to renew.

40. The Court is, therefore, unable to agree with the preposition by the Appellant that he had a legitimate expectation of renewal of his contract and that the failure to renew could have amounted to an unfair termination of employment.

Certificate of Service

41. A certificate of service is a statutory entitlement to each employee by virtue of section 51 of the Employment Act and the Appellant is entitled to one.

42. The record shows that the Appellant admitted that he had not cleared with the Respondent. The process of clearance logically has a bearing with the issuance of a certificate of service.

43. The Appellant should clear with the Respondent in order to be issued with a certificate of service.

Service pay

44. The Appellant had sought *service pay* at the rate of 15 days' pay for each year served.

45. *Service pay* becomes due after consideration of the conditions outlined in section 35(5) & (6) of the Employment Act, 2007.

46. None of the parties led evidence as to the existence of a registered pension scheme or entitlement to gratuity or membership of the National Social Security Fund and the trial Court did not fall into error in not making any award under the head of the claim.

Conclusion and Orders

47. From the foregoing the Court finds no merit in the Appeal and it is dismissed with costs to the Respondent.

48. Despite the dismissal, the Court directs the Respondent to issue a certificate of service to the Appellant upon clearing.

Delivered through Microsoft teams, dated and signed in Kisumu on this 3rd day of February 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Appellant Ms. Ochieng instructed by E.A. Ochieng & Co. Advocates

For Respondent Kiragu Wathuta & Co. Advocates

Court Assistant Chrispo Aura