



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT MOMBASA**

**APPEAL NO. E013 OF 2021**

**(Being an appeal from the judgment of Hon. Nabibya, Principal Magistrate,**

**delivered on 11.02.2021i in Mombasa Chief Magistrate ELRC No. 338 of 2019)**

**S S MEHTA & SONS LIMITED.....APPELLANT**

**- VERSUS -**

**SAIDI ABEDI MWANYENGA.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 10<sup>th</sup> December, 2021)**

**JUDGMENT**

The appellant filed the memorandum of appeal on 11.03.2021 through Mumia & Njiru Advocates. The appellant states that the learned trial Principal Magistrate erred in law and fact by:

- a) Arriving at a decision against the weight of evidence before him.
- b) Failing to consider the appellant's oral submissions.
- c) Failing to consider the appellant's submissions that the respondent was not dismissed but his contract came to an end by effluxion of time.
- d) Awarding the claimant unpaid leave yet the appellant's witness during hearing testified having allowed the respondent to proceed on leave which evidence was not opposed or rebutted.
- e) Awarding one-month compensation yet the contract had lapsed by effluxion of time.
- f) Awarding damages that were manifestly excessive to the detriment of the appellant.
- g) Failing to give due consideration to the contents of the respondent's submissions and evidence on record.
- h) Failing to analyse the evidence and submissions on record therefore arriving at an incorrect conclusion.

The appellant filed a notice of change of advocates to Daniel Henry & Company Advocates. The respondent submits that the change of advocates was irregular because leave to change advocates was not obtained after judgment by the trial Court and as required in Order 9 Rule 9 of the Civil Procedure Rules. However, the Court considers that the appeal is a fresh suit independent of the suit before the trial Court and so far as there was no judgment on the appeal, the appellant was entitled to change advocates in the manner it was done. Further, as submitted for the respondent, the memorandum of appeal was filed by appellant's counsel who had acted at the trial Court and the change of advocates, if at all, would only impact the submissions filed by the appellant's subsequent advocates – and the Court finds that the preliminary point raised belatedly in submissions is an ambush to the appellant and as it does not impair the appeal, the submissions as filed for the appellant cannot be struck out as submitted for the respondent without a formal application as appropriate.

The appellant prayed for orders:

- a) The appeal be allowed in whole.

b) The judgment by Hon. Nabibya delivered on 11.02.2021 in Mombasa Chief Magistrate ELRC No. 338 of 2019 and subsequent decree thereof be varied or set aside.

c) The appellant be awarded costs of the appeal and costs in the subordinate Court.

The appellant's counsel filed submissions on the appeal and the respondent filed submissions through Chamwada & Company Advocates.

This being a first appeal, the role of the Court is to review the evidence before the trial Court and make conclusions bearing in mind that unlike the trial Court, this Court exercising the appellate jurisdiction has not by itself seen the witnesses and taken the evidence as was given by those witnesses.

The **1<sup>st</sup> main** issue for determination is whether the contract of service between the parties lapsed by effluxion of time or the termination was unfair. The respondent pleaded that he was terminated from employment on 31.01.2019 without prior notice or payment in lieu thereof, he was not accorded a hearing, and the termination breached sections 41, 43, 45 and 49 of the Employment Act, 2007, ILO convention on termination of employment 1982, and, Article 41 of the Constitution of Kenya, 2010. The appellant pleaded that the respondent was employed in February 2007 as an Operator on a one year fixed term contract. Subsequently, the respondent engaged the respondent in various roles all governed by different terms of engagement. Further he was last engaged in 2018 via a contract commencing on 01.02.2018 for a term of one year until 31.01.2019. The respondent signed the contract on 12.03.2018. As pleaded for the respondent, the appellant admitted that the last pay was Kshs. 37, 585.00 per month. The appellant denied terminating the contract of service and stated that the contract lapsed on 31.01.2019 when the one-year fixed term lapsed.

Now, the evidence was that indeed the claimant signed the contract on 12.03.2018 commencing on 01.02.2018 and ending on 31.01.2019. It was express that it was a fixed term contract for one year. On 28.10.2020 parties agreed the suit be determined on the basis of the pleadings and documents on record, as well as, the final submissions which parties filed.

In the judgment delivered on 11.02.2021 the trial Court found, **"Whereas the respondents submitted that the contract was fixed, I find that before such aping, a month notice was mandatory from any of the two parties. I find fault at the respondent's action of terminating the contract or rather failing to issue to notice and/or paying the one-month salary to pay. I proceed to order that the respondent pays 1-month salary in lieu of notice as prayed by the claimant."**

And further, **"Whereas the contracts given to him were clear and for one year, most of the time or rather, from the year 2007 they were automatically renewed, the more than 10 years working relationship to me was sufficient for the claimant to have a legitimate expectation that the contract would automatically be renewed. Be it as it may, I find that the expectation would not be taken cautiously and with some degree of any uncertainty. The claimant was aware that he worked on a 1-year basis and anything could happen first like there was no automatic renewal in the year 2015. Whereas I find the respondent to have been unfair when it failed to renew/ issue notice to the claimant as already noted. The claimant need not take it as a matter of right. For this therefore, I proceed to award equivalent of one-month salary as compensation for unfair termination."**

The Court finds that as submitted for the appellant, the trial Court erred in arriving at findings at variance with the clear evidence that the employment relationship lapsed when the agreed one year fixed tenure lapsed. The appellant was not terminating the respondent's employment under the clause on termination by giving a one-month notice or pay in lieu thereof. The Court finds that as urged for the appellant the contract being silent on renewal, such as not providing that renewal would be automatic or occur within agreed parameters or conditions and shown to have been duly satisfied by the parties, there arose no legitimate expectation for renewal. Thus as urged for the appellant the award of one-month pay in lieu of notice and one-month pay for compensation for unfair termination were both not justified at all in view of the evidence on record that the contract of service had lapsed upon effluxion of the agreed tenure on 31.01.2019.

The Court has considered the submission for the respondent that refusal to renew amounted to breach of legitimate expectation to renew as there had been a practice of automatic renewal. However, the evidence was that for every renewal parties signed a contract for the next one-year tenure and without which, the Court finds that the relationship would automatically end. The Court further finds that a refusal to renew a lapsed contract does not amount to unfair termination for the reason that once the agreed contractual term lapses, there is no subsisting contract capable of being subject of termination. In the Court's opinion, where there are agreed terms for renewal which are satisfied by the employee but the employer refuses to renew, the cause of action can only be for constructive renewal or an order to renew but not unfair termination. In the instant case there was no evidence that the appellant breached any contractual term to renew and the alleged legitimate expectation for renewal is found not to have existed at all.

The **2<sup>nd</sup> issue** is whether the claimant established the claim and prayer for leave pay. The respondent claimed leave pay for one year 21 days' x 131/12 years making Kshs.287, 250.00. It would appear that the claim was for the various years 12 one-year fixed term contracts. The respondent never testified to provide evidence on that claim. On the other hand, the appellant filed leave forms showing that the respondent had applied and obtained leave. The appellant further filed the settlement of terminal dues dated 11.02.2019 showing that the claimant's leave days had been computed as 69 days at Kshs. 37, 085 and calculated at Kshs. 86, 460.00. The appellant had pleaded that the respondent was paid all leave days not taken during service. The trial Court found thus, **"There is evidence that the claimant proceeded on leave for one year according to the leave or presented by the defence. I will therefore allow for 10 years."** The Court finds that as submitted for the appellant, the trial Court erred in awarding leave days. Had the trial Court considered the payment for 69 days it would be clearer that the respondent had no valid claim. If for previous years he had not been paid, it would have amounted to a continuing injury lapsing with each of the ending annual contracts and save for the 69 days paid, the claim for the other years would be time barred if taken as continuing injury lapsing at least more than two years prior to filing of the suit and thus time barred under section 90 of the Employment Act, 2007 fixing time of limitation at 12 months from cessation of such continuing injury. Further, the Court finds that on a balance of probability and the respondent not having provided evidence on the claim for leave pay, the claimant took leave or was paid in lieu of leave.

To answer the **3<sup>rd</sup> issue**, the Court returns that the appellant did not attack the award of certificate of service. Upon that consideration the appeal partially fails. Thus, each party will bear own costs of the appeal and the Court below.

In conclusion the appeal is hereby determined with orders:

1) The judgment by Hon. Nabibya delivered on 11.02.2021 in Mombasa Chief Magistrate ELRC No. 338 of 2019 and subsequent decree thereof is hereby set aside save for the award of the certificate of service and to be delivered within 30 days from the date of this judgment.

2) Each party to bear own costs of the appeal and costs in the subordinate Court.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 10<sup>TH</sup> DECEMBER, 2021.**

**BYRAM ONGAYA**

**JUDGE**