

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 303 OF 2017

MARTIN KURIA MWAI CLAIMANT

VERSUS

SHREE LOGIC MANAGEMENT CONSULTANTS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent seeking damages for his alleged illegal, unfair, unlawful termination of his employment and the Respondent's alleged refusal to pay his terminal dues. The Claimant averred that he was employed as The Claimant therefore prays for Judgment be entered against the Respondent for general damages for unfair and illegal termination, one month's salary in lieu of notice – Kshs. 19,154/-, twelve months' salary compensation for unfair termination – Kshs. 229,848/-, unpaid leave days for 3.5 years – Kshs. 67,744.95, underpayment of salary – Kshs. 172,010.40, severance pay – Kshs.48,389.25, transport allowance for April, May and June 2017 – Kshs. 7,800/- and an order for the Respondent to issue him with a certificate of service. He also seeks the costs of the suit.

2. The Respondent admits having engaged the Claimant on a fixed term contractual basis as a merchandiser through the employment contracts it entered into with the Claimant. The Respondent averred that the contract dated 1st January 2017 did not have any provision for an automatic renewal and their notice for non-renewal was only out of courtesy. The Respondent averred that the Claimant was paid a monthly salary of Kshs. 16,000/- which was way above the minimum wage. The Respondent averred that the fixed term contract had no provision for carrying over leave days. The Respondent averred that the Claimant earned his leave days on a pro rata basis which he took during his engagement periods. The Respondent averred that there was no dismissal since the contract automatically lapsed.

3. The Claimant testified that he was employed on contract basis by the Respondent as a merchandiser for the Respondent's client known as Kronex Limited. He stated that the first contract dated 13th January 2014 was effective from that date to 31st March 2014 and upon expiry, the Respondent continued to engage his services and subsequently renewed his contract for further periods commencing on 1st May 2014 to 31st December 2014, 1st July 2015 to 31st December 2015, 1st January 2016 to 30th June 2016, 1st July 2016 to 31st December 2016, and the final contract dated 1st January 2017 which was effective from that date to 30th June 2017. He testified that vide a letter to show cause dated 2nd May 2017, he was urged to explain the drastic drop in sales performance for the first quarter of the year and through his letter dated 26th May 2017, he responded. He stated that however, the Respondent did not reply until 3rd July 2017 when it informed him of the non-renewal of his contract for the reason that Kronex Chemicals Limited was facing financial challenges. The Claimant stated that his dismissal was unfair, unlawful and unjustified since the Respondent failed to give him reasons for termination, a fair hearing and the prerequisite one month notice or salary in lieu thereof. He testified that he was underpaid throughout his engagement with the Respondent and upon his termination the Respondent declined to pay his terminal dues which he calculated at Kshs. 544,946.60 despite demand and notice of intention to sue.

4. The Claimant filed his submissions in which he submitted that the provisions of the Employment Act were disregarded by the Respondent. He submitted that it was in breach of Sections 43(1), 44, 45(1) and 45(2) of the Employment Act, 2007. He submitted that Kronex Limited was not his employer and as such its financial challenges ought not to have affected his employment. He submitted that terminating his contract for the reasons stated was ultimately unfair and in the circumstances it was immaterial that the termination procedure was followed by the employer. The Claimant submitted that the Respondent failed to adhere to the Regulation of Wages (General) (Amendment) Orders of 2013 and 2015 which provide for a daily minimum wage for a salesperson at Kshs. 822.95. He submitted that he was paid a daily wage of Kshs. 600/- contrary to the Regulations. The Claimant submitted that he had a legitimate expectation for a renewal of contract and asserted that the general principle is that a fixed term contract carries no expectation of renewal but however there were exceptions to this rule like in the instant case. He cited the case of **Ruth Gathoni Ngotho Kariuki v The Presbytery Church of East Africa & Another [2012] eKLR** as well as the cases of **Trocaire v Catherine Wambui Karuno [2018] eKLR**, and **Pravin Bowry v Ethics and Anti-Corruption Commission [2013] eKLR** where the various courts upheld the doctrine of legitimate expectations. He urged the court to grant the reliefs sought in his claim.

5. The Respondent submitted that the issues for determination were whether the expiry of a fixed term contract amounts to unlawful, illegal and unfair termination; and secondly, whether the Respondent owes the Claimant any terminal benefits. The Respondent submitted that the Claimant ceased to be its employee by effluxion of time as a fixed term contract is a lawful mode of employment as per Section 10(3)(c) of the Employment Act. The Respondent submitted that a fixed term contract carried no expectation for renewal and cited the cases of **George Onyango v the Board of Directors of Numerical Machining Limited & Others [2014] eKLR**, **Margaret A. Ochieng v National Water Conservation and Pipeline Corporation [2014] eKLR**, **Bernard Wanjohi Muriuki v Kirinyaga Water and Sanitation Company Limited & Another [2012] eKLR**, **National Water Conservation & Pipeline Corporation v Jayne Kanini Mwanza [2014] eKLR**, and **Rajab Barasa & 4 Others v Kenya Meat Commission [2016] eKLR**. The Respondent submitted that the Claimant was not entitled to any transport allowance since the same was not provided for in his engagement terms and cited the decision in **Stephen M. Kitheka v Kevita International Limited [2018] eKLR**. The Respondent submitted that since there was no legitimate expectation for renewal, the Claimant was not entitled to any notice or salary in lieu of notice as he was aware of the date the contract was expected to lapse. It was submitted that according to the Legal Notices No. 197 of 2013 and No. 117 of 2015 the Claimant was not underpaid in any way. The Respondent submitted

that on damages for unfair termination, the same was unfounded and aimed at unjust enrichment since there was no termination as the contract simply lapsed. The decisions in **Stephen M. Kitheka v Kevita International** (*supra*) and **D.K. Marete v Teachers Service Commission [2013] eKLR** were cited in support of this proposition. The Respondent submitted that the Claimant could not be entitled to severance pay since he was not terminated on account of redundancy and further, being a member of NSSF he was not entitled to service pay as provided for under Section 35 of the Employment Act. The Respondent urged that the Claimant's suit be dismissed with costs.

6. The Claimant's contract for all intents and purposes ran out and was not renewed. He relies on the doctrine of legitimate expectation to assert that he anticipated renewal of contract ergo unlawful termination. The Claimant cites the case of **Ruth Gathoni Ngotho Kariuki v The Presbytery Church of East Africa & Another** (*supra*) and that of **Pravin Bowry v Ethics and Anti-Corruption Commission** (*supra*) for the assertion that the doctrine of legitimate expectation applied to him. In the case of **Pravin Bowry v Ethics and Anti-Corruption Commission** (*supra*) Mr. Bowry was an Assistant Director of the Respondent in his case and had a term that was unexpired as at the time of its termination and it was held by the learned Judge that Mr. Bowry was entitled to recover for the unexpired term and the winding up allowance he was to forego. In this case, the Claimant's last contract was not renewed and he asserts the doctrine as a shield against the Respondent's refusal to offer a new contract. Applying the doctrine of legitimate expectation to the circumstance inherent in the Claimant's case would be stretching the doctrine too far. If every finite contract has a renewal clause then each of the parties asserting the doctrine would insist on the renewal at the expiry of the contract relying on the doctrine. The Claimant was perhaps unapologetically optimistic the contract would be renewed but alas it was not. There was no fault in the non-renewal. As regards the underpayment, as this was a continuing injury, the Claimant ought to have moved the court within 12 months of the default occurring in terms of Section 90 of the Employment Act. It would only be the part of the contract from 1st July 2016 – December 2016 and the contract of January 2017-June 2017 that would be covered. He proved that he earned Kshs. 16,000/- a month. The Regulation of Wages Order provided the monthly wage for 'other areas' to be Kshs. 15,434.70 which clearly demonstrates that he was not underpaid. Though the sum was not way above the minimum wage as asserted by the Respondent it was not below the minimum wage. As no termination took place much less unlawful or unfair termination, the orders sought in the suit are not for grant and I accordingly dismiss the suit as it has no merit. Each party to bear their own costs.

7. Before I pen off this judgment, I would be remiss if I did not point out that the manner of citation of cases was not in accord with practice. Cases are to be cited as reported not as filed. In the submissions, one party did not even bother to attach the decisions it referred to in the submissions. This is not acceptable practice. Yet again the dwindling fortunes of the profession were, sadly, in full display.

It is so ordered.

Dated and delivered at Nyeri this 10th day of December 2019

Nzioki wa Makau

JUDGE