



**Khayanje v Royal Tulip Canaan Nairobi (Cause 602 of 2019)  
[2024] KEELRC 2053 (KLR) (23 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2053 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 602 OF 2019  
NZIOKI WA MAKAU, J  
JULY 23, 2024**

**BETWEEN**

**MICHAEL KHAYANJE ..... CLAIMANT**

**AND**

**ROYAL TULIP CANAAN NAIROBI ..... RESPONDENT**

**JUDGMENT**

1. Through a Memorandum of Claim dated 30<sup>th</sup> August 2019, the Claimant filed this suit against the Respondent Company for failing to pay him his terminal benefits and alleging constructive unfair and unlawful dismissal from employment. He prays for an award against the Respondent as follows:
  - a. That the Respondent be ordered to pay the Claimant his terminal and contractual dues amounting to ksh 2,339,700/-
  - b. Costs of this claim and interest thereon at court rates.
  - c. A declaration that termination of the Claimant's employment was unfair, unjust and wrongful.
  - d. Any other relief that this Honourable Court may deem just and fit to grant.
2. The Claimant averred that he was an employee of the Respondent working as an IT Manager, having been employed on 1<sup>st</sup> February 2017 earning a salary of ksh 110,604/-. That his employment was confirmed on 1<sup>st</sup> May 2017 and he was later given a one-year employment contract with the option of renewal. He noted that his duties involved managing the ICT infrastructure, telephoning networks, websites, the hotel management system among others and also provided support to a subsidiary company of the Respondent since January 2019. That however, he was never paid for the said additional work until the time of his termination of employment.



3. The Claimant's case was that on 24<sup>th</sup> May 2019, he was asked to fill leave forms and proceed on leave for 19 days and was to resume duties on 19<sup>th</sup> June 2019. He averred that based on the fact he was asked to resume duties on 19<sup>th</sup> June 2019, it was implied that his contract that was to expire on 2<sup>nd</sup> June 2019 had been extended for a further one year. That when he resumed duties, he went to see the Respondent's General Manager as had been requested of him on 13<sup>th</sup> June 2019 and was informed that his Contract had not yet been signed by the General Manager, who had to wait for the approval of the directors. That he was also informed that the said directors were at that time not available to give the said approval and he was therefore directed to follow up in a week. According to the Claimant, he made several attempts to reach the directors but none of them confirmed to him his position and that he has never heard from the Respondent, its manager or HR department regarding his employment. It was the Claimant's averment that he was unfairly and without justifiable cause dismissed from the employ of the Respondent. That the lack of information as to the status of his employment status amounts to constructive dismissal. The Claimant therefore claims salary for June 2019, notice pay, leave pay, compensation for unfair termination of employment, and payment for the additional work done for the Respondent's subsidiary company for six (6) months.
4. In response, the Respondent filed a Reply to the Memorandum of Claim dated 28<sup>th</sup> October 2019. It averred that upon appointment, the Claimant was issued with an Appointment Letter dated 1<sup>st</sup> February 2019 for a fixed term period of three (3) months ending 31<sup>st</sup> April 2017. That the Claimant's Contract had an option of renewal at the Respondent's option in writing, upon satisfactory performance of duties by the Claimant. The Respondent asserted that when the Claimant's Contract came to an end, it renewed the same in writing and issued him another fixed term Contract commencing 1<sup>st</sup> May 2017 to 31<sup>st</sup> May 2018. It further averred that on 30<sup>th</sup> May 2018, before expiry of the Contract dated 1<sup>st</sup> May 2017 and upon conducting the performance appraisal, it issued the Claimant a Letter of Appointment dated 2<sup>nd</sup> June 2018 that extended his employment by a further one year ending 1<sup>st</sup> June 2019.
5. The Respondent's stance is that the Claimant was aware that his contract would only be renewed in writing upon successful performance evaluation and that in the absence of a written confirmation of its extension, the contract was deemed to have terminated as under clause 1 of the Letter of Appointment. The Respondent noted that in a meeting on 19<sup>th</sup> February 2019, it was pointed out to every staff member, including the Claimant, that every employee with a fixed term contract should treat their contract as terminated upon expiry and should not report to duty unless the contract is extended in writing. It argued that since there was no intimation to the Claimant in writing that his contract had been renewed, no expectation of renewal arose. That it is trite that fixed term contracts carry no rights, obligations or expectations beyond the date of expiry. It averred that the Letter of Appointment dated 2<sup>nd</sup> June 2018 did not put an obligation to either of the parties to give notice of non-renewal of the contract and that as such, parties had legitimate expectation that the contract would end on the date specified therein.
6. The Respondent averred that the emails annexed to the Claim were not addressed to the Claimant and were not in any way related to his employment with the Respondent. It contended that the Claimant accessed the said emails by virtue of his position as an IT Manager and that his conduct is therefore in breach of his confidentiality obligation. On the assertion that the Claimant was given additional duties he was not compensated for, the Respondent submitted that the roles assigned to him were in accordance with his contract of employment. It further averred that it was a fundamental term of the Contract that the Claimant was entitled to 21 days leave for every 12 months worked but the leave days were not to be accumulated without prior written approval of the employer. That since the Claimant failed to adhere to the said guideline as per his contract, he was asked to proceed on leave in order to



exercise his statutory rights and obligations under employment contract and in accordance with the Company's policies. The Respondent further averred that the Claimant was advised to clear with the HR department to facilitate payment of his dues being the unpaid leave days for the duration of the Contract and/or for the days worked in June 2019. Further, the Respondent asserted that service pay is only payable to an employee that has been declared redundant and that the claim should fail as the Claimant's contract was terminated due to effluxion of time. That nonetheless, it dutifully remitted the Claimant's NSSF deductions as evinced in the payslips before Court. The Respondent thus prayed that the Claim herein be dismissed with costs to the Respondent.

## 7. Claimant's Submissions

The Claimant submitted that he developed a legitimate expectation that the Respondent had renewed his contract when he was instructed to resume duty on 19<sup>th</sup> June 2019. That the Respondent did not convey its refusal to renew his contract as it normally does and to prove this, he provided emails of communication from the Respondent to other employees on refusal to renew contracts (see Exhibit 6 in the Claimant's List and Bundle of documents). He argued that there therefore existed an employment contract between the parties by conduct of the Respondent and that his legal expectation is protected. The Claimant cited the case of [Teresa Carlo Omondi v Transparency International- Kenya](#) [2017] eKLR, in which the Court held that:

“The burden of proof, in legitimate expectation claims, is always on the Employee. It must be shown that the Employer, through regular practice, or through an express promise, leads the Employee to legitimately expect there would be renewal. The expectation becomes legally protected, and ought not to be ignored by the Employer, when managerial prerogative on the subject is exercised. Legitimate expectation is not the same thing as anticipation, desire or hope. It is a principle based on a right, grounded on the larger principles of reasonableness and fair dealing between Employers and Employees. The Employee must demonstrate some rational and objective reason, for her expectation. The representation underlying the expectation must be clear and unambiguous.”

8. The Claimant cited the case of [Walter Ogal Anuro v Teachers Service Commission](#) 120131 eKLR where it was established that for a termination to pass the fairness test, it ought to be shown that there was both substantive justification and procedural fairness. It was the Claimant's submission that there was no substantive justification for the Claimant's dismissal from employment as obligated of the Respondent employer under section 43 of the [Employment Act](#). That termination of his employment also lacked procedural fairness as he was not notified of his dismissal from employment and never heard from the Respondent on the status of his employment; he was never accorded a chance to defend himself; and he never made any representation for the Respondent to consider before terminating his employment. In this regard, he cited the case of [Godfrey Barasa Ochieng v Security Guards Services Limited](#) [2022] eKLR wherein the Court identified that the mandatory elaborate procedure set up under section 41 of the [Employment Act](#), requires notification, a hearing and consideration of the employee's representations and his co-workers before termination of an employment.
9. Regarding his claim for payment for additional work done for the Respondent's subsidiary company, the Claimant cited sections 10(6)(7) and 74 of the [Employment Act](#) and section 112 of the [Evidence Act](#), which place the burden of keeping employment records on the employer, and to be produced where there arises a dispute as held by the Court of Appeal in the case of [Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune](#) [2021] eKLR. He argued that it is the Respondent's duty to produce his work records for the additional work done but since it did not produce any such evidence in this case, he is entitled to six (6) months' salary pay from January 2019 to June 2019.



10. The Claimant further submitted that having established that there was no substantive justification or procedural fairness in the termination of his employment, the Honourable Court should make a declaration that the termination of the Claimant's employment was unfair, unjust and wrongful. He urged the Court to grant the reliefs sought in the Claim in the interest of justice.

### 11. Respondent's Submissions

According to the Respondent, the Claimant conflates the doctrine of legitimate expectation with reasonable expectation. That the doctrine of legitimate expectation is inapplicable in private law proceedings as was concisely explained by the Court of Appeal in *Heineken East Africa Import Company Limited & another v Maxam Limited* (Civil Appeal E403 & E404 of 2020 (Consolidated)) [2024] KECA 625 (KLR) (24 May 2024) (Judgment). The Respondent submitted that the Court of Appeal has aptly determined that no obligation exists among parties to a fixed-term contract once it lapses as held in *Oshwal Academy (Nairobi) & another v Indu Vishwanath* [2015] eKLR, *Amatsi Water Services Company Limited v Francis Shire Chachi* [2018] eKLR, and *Registered Trustees of the Presbyterian Church of East Africa & another v Ruth Gathoni Ngotbo-Kariuki* [2017] eKLR. It was the Respondent's submission that in this case, it should be noted that parties only entered into the subject Contract after a performance appraisal recommended the renewal of the original 2017 Contract. That the Claimant's performance appraisal during the pendency of the subject contract recommended for non-renewal and all employees were informed that as per the Respondent company's policy, all fixed-term contracts are deemed terminated on the sunset date unless advised otherwise. It argued that the Claimant was instructed to proceed on leave because he had accumulated leave days without authorization and contrary to the subject contract and that no reasonable expectation existed for renewal of the subject Contract.

12. The Respondent submitted that Document no 6 in the Claimant's List and Bundle of Documents being emails by officials of the Respondent, constitute illegally obtained evidence produced contrary to clause 10 of the subject Contract. It noted that Article 50(4) of the *Constitution* of Kenya states that evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice. It asked the Court to consider the case of *Njenga v DIB Bank Kenya Limited* (Cause E400 of 2020) [2023] KEELRC 1549 (KLR) (15 June 2023) (Ruling) in which the Court dealt with a similar issue. The Respondent further noted that the emails in question relate to third parties and the Respondent and since the third parties have not consented to production of those emails, the Claimant has infringed on their rights to privacy under Article 31(c) and (d) of the *Constitution*. The Respondent thus asserted that the said Document 6 ought to be expunged from the record.
13. It was the Respondent's submission that the Claimant is not entitled to one month's salary, and salary for June 2019 or compensation for unfair termination of employment as his fixed term contract lapsed by effluxion of time. That the Claimant has also not provided any evidence that he was instructed to perform additional duties outside of his duties outlined in the subject Contract and that the said prayer must thus fail. It further submitted that the Claimant is not entitled to service pay as the Respondent remitted his NSSF deductions monthly. In conclusion, the Respondent asked the Court to note that it incurred costs in retaining legal counsel to defend the suit and that it therefore ought to be indemnified for costs incurred.
14. The Claimant herein suffered the ignominy of a dismissal that evokes memories of intrigues in the Roman courts in the days of Caligula. He was serving the ultimate month when he was asked to proceed on 'leave'. The Respondent did not indicate this was terminal leave, neither did it indicate the Claimant was to clear with the Respondent as he proceeded on this 'leave' that he was given. The Claimant ended



up finding he was dismissed after being taken around in circles for a while by the management of the Respondent. The Respondent was surreptitious and was even misusing the Claimant to perform tasks that were not within his mandate for the other company which was a subsidiary of the Respondent. Having abused its position as the more powerful partner in the relationship, it is impossible for the Respondent to escape unscathed. The Claimant cannot be entitled to service pay on the grounds that he was not declared redundant. He also was in the category of employees whose salary was subject to statutory deductions to NSSF. He did not demonstrate that the Respondent never remitted the dues and as such he cannot recover any claim on service pay.

15. In the final analysis, the Respondent will be liable to the Claimant as follows:
- a. Pay for services rendered to the Respondent's subsidiary – ksh 165,906/- being  $\frac{1}{4}$  of his monthly salary multiplied by 6 months.
  - b. Notice pay – ksh 110,604/-.
  - c. 2 months salary as compensation for unlawful termination – ksh 221,208/-.
  - d. Costs of the suit.
  - e. Interest at court rates on the sums in (a), (b) and (c) above from the date of judgment till payment in full.
  - f. Certificate of service.

It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 23<sup>RD</sup> DAY OF JULY 2024**

**NZIOKI WA MAKAU**

**JUDGE**

