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Court:	Employment and Labour Relations Court at Nairobi
Case Action:	Judgment
Judge:	Maureen Atieno Onyango
Citation:	Stephen M. Kitheka v Kevita International Limited [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Employment and Labour Relations
History Magistrates:	-
County:	Nairobi
Docket Number:	-
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Case Outcome:	claim dismissed
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Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 382 OF 2013**

*(Before Hon. Lady Justice Maureen Onyango)*

**STEPHEN M. KITHEKA.....CLAIMANT**

**VERSUS**

**KEVITA INTERNATIONAL LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimant, Stephen M. Kitheka, instituted this claim by a Memorandum of Claim dated 21<sup>st</sup> March 2013 seeking compensation for wrongful, unfair and/or unlawful termination of his employment and payment of his dues against the Respondent, Kevita International Limited.

He avers that he was lawfully employed by the Respondent as a Driver on a renewed contract of 3 months earning a monthly basic salary of Kshs.17,000/= from 23<sup>rd</sup> October 2012 running up to 23<sup>rd</sup> January 2013 where after the contract would be renewed automatically. That after the said 23<sup>rd</sup> January 2013, he continued performing his duties as a driver knowing the Respondent had renewed his second term contract. That on 1<sup>st</sup> February 2013, he was informed orally in the evening by another employee called Miriam that his employment had been terminated by the director and that he was not to report on duty the following Monday. That he sought to find out the reasons for his termination but was never given any audience and when he demanded to be paid his terminal benefits, the Respondent refused to pay him hence this cause. His claim is as follows:-

*a)...* One month's salary in lieu of notice..... Kshs.17,000/=

*b)...* Unpaid Salary for February 2013..... Kshs.17,000/=

*c)...* Leave Allowance for the period worked

(3/12 x 17,000)..... Kshs.4,250/=

*d)...* Compensation for unfair termination

equivalent to 12 months' salary..... Kshs.204,000/=

*e)...* Prorata gratuity..... Kshs.3,000/=

*f)....* House Allowance..... Kshs.5,500/=

*g)...* Payment for the remaining 2 month

of the contract..... Kshs. 34,000/=

*h)...* Certificate of Service

He avers that he had a written contract with clear employment terms including those on termination of employment by either party. That the Respondent did not serve him with a 30 days' notice of termination as per his contract and has failed and/or refused to pay him salary in lieu of notice. That he performed his duties as a driver professionally, faithfully and diligently and his termination of employment was unfair and without justification and that since the Respondent breached the terms of their contract, it should be made to also pay for the remaining months of the contract. He prays that this Honourable Court enters judgment in his favour against the Respondent as claimed together with costs of this claim, interest at court rate and any other relief this Honourable Court deems just to grant.

### **Respondent's Case**

The Respondent filed its Statement of Response dated 30<sup>th</sup> April 2013 admitting it employed the Claimant as a driver on a 3 months contract renewable based on performance and that during the period between 23<sup>rd</sup> October 2012 and 23<sup>rd</sup> January 2013, it paid him his salary every month without fail. That it did not renew its contract with the Claimant and therefore as of 23<sup>rd</sup> January 2013, he ceased to be its employee by effluxion of time. That the Claimant however continued to report to its premises despite knowing his contract had terminated and it then informed him on 1<sup>st</sup> February 2013 that his contract had already lapsed a week earlier. That despite him reporting to work, he was never assigned any duties after his contract had lapsed and he is therefore not entitled to the claims as tabulated in his memorandum of claim.

It avers that a renewal of contract would have happened after 23<sup>rd</sup> January 2013 in which event the Claimant would have been given a new contract but which he was not given and he was duly informed of his status. That there was no breach of law and each of the prayers the Claimant seeks are not sustainable. That in view of its averments, it prays that this Honourable Court enters judgment in its favour and the Claimant's claim be dismissed with costs together with any other relief the court deems just to grant.

On 10<sup>th</sup> July 2018, the parties filed a list of agreed issues signed by their advocates as follows:

- 1) Whether the Claimant was employed by the Respondent
- 2) Whether the Claimant was employed on a fixed term contract
- 3) Whether the Contract was renewed
- 4) Whether the termination was unfair
- 5) Whether the Claimant is entitled to the orders sought

### **Evidence**

The Claimant testified in court that his contract with the Respondent provided for notice or payment in lieu of notice and that he worked for 4 months including the whole day on 1<sup>st</sup> February 2013 when the transport manager told him not to report to work until he was called back. That he waited for one week then went to find out the position but was not allowed to see the Managing Director. That there was no warning or disciplinary meeting and that he was never given rest days during the period he worked, and was paid House Allowance. In cross-examination, he stated that when he was allowed to work after 23<sup>rd</sup> January 2013, he had not asked for renewal of contract and that he was expecting a salary at the end of the month.

RW1, **Maurice Otieno Oyugi**, a Manager with the Respondent testified that in 2012/ 2013 he was working for the Respondent as the Accountant. That the Claimant has no claim because he was paid all his dues after his contract was not renewed upon expiry. That before expiry of the contract, the Claimant together with several others were informed of the non-renewal in the company's meeting room during one of their monthly meetings but he could not recall the date of the said meeting. He stated that the Claimant was paid at the end of every month which is why he was to collect his salary at the end of January or on 1<sup>st</sup> February. That the Respondent paid by use of payment vouchers and he was the one who paid the Claimant on 1<sup>st</sup> February 2013. He also stated that the Claimant's employment was not terminated but that what they did was not to renew his contract. He stated that the Claimant was not paid any other benefits separately. In cross-examination, he testified that he knew what was in the contract and that there was no written notice. That there is no salary voucher on record for 1<sup>st</sup> February 2013 but that he had a pay sheet for February 2013.

### Claimant's Submissions

The Claimant submits that the Respondent in terminating his employment, failed to follow the laid down procedure under Section 10(1), (3) (a) (b) & (c) of the Employment Act 2007 which provides that:

*(1) A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection (3) be given in instalments and shall be given not later than 2 months after the beginning of the employment.*

*(3) The statement required under this section shall also contain particulars as at a specified date not more than seven days before the statement, or the instalment containing them, is given of -*

*a) Any terms and conditions relating to any of the following:*

*i) entitlement to annual leave, including public holidays and holiday pay (the particulars given being sufficient to enable the employee's entitlement including any entitlement to accrued holiday pay on the termination of employment to be precisely calculated);*

*b) The length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment.*

*c) Where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end*

That he was doing his second term of contract when the Respondent unlawfully terminated his services and that the evidence adduced by the Respondent's witness cannot be relied on since it does not disclose what really happened and what date the Claimant was terminated from service. That the Respondent should pay him House Allowance because it never paid him during the period of contract as per Section 31(1) of the Employment Act which provides that "an employer shall at all times at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum as rent in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation".

He further submits that his termination was unfair because he was never called to attend any meeting between him and the Respondent for them to explain to him the reason for his termination of employment as per Section 45(2) of the Employment Act which provides that:

"a termination of employment by an employer is unfair if the employer fails to prove:

a) That the reason for the termination is valid

b) That the reason for the termination is a fair reason

(i) Related to the employees conduct, capacity or compatibility or

(ii) Based on the operational requirements of the employer and

c) That the employment was terminated in accordance with fair procedure."

That since the Respondent has failed to prove the reasons for terminating his employment as per section 45(2) of the Act, this court should find him liable to pay salary for unfair termination. He relies on Cause No. 24 of 2017 Charles Onchoke v Kisii University [2018] eKLR.

### Respondent's Submissions

The Respondent submits that a fixed term contract with a start and end date is a lawful mode of employment as per Section 10(3)(c) of the Employment Act and that the Claimant's contract was not renewed automatically. It cites the case of **George Onyango vs the Board of Directors of Numerical Machining Limited & Others [2014] eKLR** where it was held that:

*"The Petitioner nonetheless has no reason to consider himself as the Managing Director to-date. His contract was for a fixed term of three years, which lapsed on 9<sup>th</sup> November 2012. He should have expected the contract to lapse on 9<sup>th</sup> November 2012, in equal measure to his expectation that he would be granted, a renewal. Legitimate expectation went both ways. There was nothing in the expired contract to suggest that the Petitioner would in any event continue holding over after 9<sup>th</sup> November 2012, even if the Board, whatever its legitimacy, failed to answer his requests for renewal. The terms that were frustrated were the exit terms, and in particular, the renewal clause. It is not possible that he would go on being the Managing Director by default. The Court would be making him a beneficiary of the violations he has ably brought to the fore, by upholding his submission that he is still the legitimate Managing Director of the Company. Even without the letter communicating non-renewal, the Petitioner was aware of the expiry date of his fixed term contract. There was reasonable chance he would not have a second term. The illegal Board did not make a decision to terminate the contract of employment; they decided, not to renew a lapsed contract. To direct the 1st Respondent is restrained from interfering with the Petitioner's role as the Managing Director would result in the Court renewing the Petitioner's contract, or giving him the benefit of holding over. His recourse is in damages for violation of his fundamental rights and breach of the terms that governed the end of his contract. He also is not barred from returning to the Managing Director's role, but only through the mode set out under the Articles of Association of the Company. The Petition is upheld, and the following prayers granted."*

Further, that as held by Rika J in **Margaret A. Ochieng v National Water Conservation and Pipeline Corporation [2014] eKLR**, Courts have upheld the principle that fixed-term contracts carry no expectation of renewal, in a catena of judicial authorities. That this Court has done so in **Industrial Court Petition No. 35 of 2012, George Onyango vs The Board of Directors Numerical Machining Complex Limited & Others, [2014] e-KLR** and in **Industrial Court Cause No. 1541 of 2010, Bernard Wanjohi Muriuki v. Kirinyaga Water and Sanitation Company Limited & Others**.

The Respondent submits that the Claimant is therefore not entitled to one month's notice or pay in lieu as he was aware the contract was coming to an end. That there was no legitimate expectation for renewal of the contract. That since he ceased being its employee as of 23<sup>rd</sup> January 2013, he is not owed any salary for February. For leave, it is the submission of the respondent that as, the same is only payable upon successful completion of 12 months of service and since the Claimant only worked for 3 months, he is not entitled to leave allowance as per **Section 28 of the Employment Act**. That since the Claimant was registered with the NSSF and NHIF, he is not entitled to the claim of *prorata gratuity* as per **Section 35(6) of the Employment Act** and because the contract was never renewed, the claim for payment for the remaining 2 months is a ghost prayer. That a contract terminating by lapse of time is not unlawful termination and the Claimant is not entitled to compensation for unlawful termination. It finally submits that it discharged all its obligations and therefore calls for the dismissal of the Claimant's claim with orders as to costs to the Respondent.

## **Determination**

The first issue for determination is whether the Claimant's employment was renewed after expiry of the fixed term contract. The second issue for determination is whether the termination of employment of the Claimant was unfair. The third issue is whether the Claimant is entitled to the orders sought.

While the Claimant has submitted that his was a renewable contract, the Respondent has averred that the contract it had with him was on a fixed-term of 3 months and renewable based on performance and that it simply lapsed. In **Rajab Barasa & 4 Others v. Kenya Meat Commission 2016] eKLR**, it was held that a fixed term contract will not be renewed automatically even when there exists a clause allowing for such renewal.

The Respondent's evidence before court was that it communicated its intention of not renewing the Claimant's contract in a monthly meeting while the Claimant has submitted that he was unfairly terminated because he was not given notice nor paid in lieu of notice.

In his testimony during cross examination the claimant stated he was aware that his contract was for three months and renewal was based on performance. He further conceded that he was aware his contract was expiring on 23<sup>rd</sup> January 2012. He stated that he was on safari on 23<sup>rd</sup> January 2012 and that he did not ask for renewal when he came back from safari. He further stated that he worked up to 1<sup>st</sup> February 2013.

RW1 stated that the claimant was paid at the end of every month and that is why he was asked to collect his money at the end of January which was on 1<sup>st</sup> February 2012. RW1 further testified that besides being paid salary on 1<sup>st</sup> February 2012 the claimant was not assigned any duties after expiry of his contract.

It is my finding that the claimant having worked for only one term of a three months contract did not have any legitimate expectation for renewal, and as admitted by him, did not ask for renewal.

The claimant having been on a fixed term contract with an ascertained date of expiry, is not entitled to notice of termination. He is further not entitled to salary for February 2013 as he did not work, or to compensation as his employment was not terminated unfairly. He is further not entitled to gratuity as his contract did not provide for the same or to house allowance as his contract provided for a fixed wage of Kshs.17,000 per month and he has not demonstrated that it did not include the element of house allowance.

The claimant is further not entitled to payment for the remaining two months of the contract as his contract was not renewed.

The only prayers he is entitled to is prorated annual leave at 1.75 days per month being 5.25 days at Kshs.3,433.50 and certificate of service as provided under Section 51 of the Employment Act.

I accordingly enter judgment for the claimant against the respondent as follows–

1. Pay in lieu of leave earned but not taken (5.25 days) Kshs.3,433.50
2. Respondent to issue the claimant with certificate of service.

The rest of the claim is dismissed.

There shall be no orders for costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20<sup>TH</sup> DAY OF DECEMBER 2018**

**MAUREEN ONYANGO**

**JUDGE**



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