



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL . 133 OF 2011

CAROLINE NASIMIYU..... APPELLANT

VERSUS

AGRICULTURAL FINANCE CORPORATION.....RESPONDENT

**(Being an appeal from the Judgment of Honorable Senior Resident Magistrate K.L Kandet in
CMCC. No. 8637 of 2007 delivered on 23rd February, 2011)**

JUDGMENT

1. The appellant; **Caroline Nasimiyu** sued the respondent **Agricultural Finance Corporation** for breach of contract where she sought a sum of kshs 264,374.50/= and aggravated damages.
2. The appellant pleaded that she was contracted as a legal officer by the respondent vide a letter of appointment dated 9th March 2005. She averred that the terms of employment included: The contract would be temporary and it would be subject to satisfactory conduct and performance of tasks, and that it would contain salary of K£ 13,104X168- 14112X 174-14634 per annum and a house allowance of kshs 10,000/= per month and finally that the contract could be terminated by either party giving 24 hour notice or one day salary in lieu of notice. She averred that the contract was later renewed but with lower pay. Upon hearing the case, the Magistrate held that there was no breach of contract since the same lapsed by effluxion of the agreed fixed term. He therefore dismissed the suit.
3. The Appellant, being dissatisfied with the judgment filed this appeal on the following grounds:
 1. ***That the Learned trial Magistrate erred in law and fact in failing to appreciate that the respondent varied the terms of her employment to her detriment.***
 2. ***The Learned trial Magistrate erred in law and fact in failing to appreciate and consider the evidence that the respondent made representations and assurances on improvement of employments terms upon which the representations the appellant accepted unfavourable terms of employment.***
 3. ***The learned magistrate misdirected himself in not finding that the unilateral reduction of the appellant's salary by the respondent was illegal considering inter alia that the letter of appointment dated 9th March, 2005 did not provide for such reduction upon subsequent engagement of the appellant and no circumstances had occurred to justify such a gross action against the appellant.***
 4. ***That the learned trial Magistrate erred in law and fact in failing to appreciate that the respondent was bound to account to the appellant the salary underpayment for the duration worked at the reduced pay as computed and as set out in the plaint dated 2nd October, 2007.***

5. *That the learned magistrate misdirected himself in not finding that that the respondent unfairly and unlawfully terminated the appellant's employment.*
6. *That the learned trial Magistrate erred in law and fact in failing to appreciate and consider the period of 17 days that the appellant actually rendered services to the respondent up and until 16th April 2007 and for which service the respondent was bound to compensate the appellant.*
7. *That the learned trial Magistrate erred in law and fact in failing to find that the appellant had made out a case for payment of special and general damages as particularised in the plaint.*
8. *That the learned trial Magistrate erred in law and fact in fact in dismissing the appellant's case.*

3. This being the first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and arrive at an independent conclusion taking into account the fact that I did not have the advantage of hearing the parties. In the case of, **Selle and Another versus Associated Motor Boat Company Ltd & Others 1968 EA 123 at 126** Sir Clement Lestang, V.P said:-

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdulla Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).”

4. I have looked at the lower court record. According to the proceedings, the appellant adduced evidence as PW1, she testified that she was employed in Job group K by the respondent vide an appointment letter dated 9th March 2005 which appointment was a one year contract in the position of a Legal Officer. She averred that she applied for renewal of the contract upon its expiry and through a letter dated 26th April 2006, the contract was renewed with different terms which included lower wages of kshs 455/= per day for a period of 3 months. She further stated that upon inquiring on the reduced pay, she was informed that the corporation was in the process of restructuring and was promised that the difference in her salary would be reimbursed, to prove it she was given a staff rationalisation programme marked as Pexh 7. She further testified that her contract was renewed to 29th January 2007 and on 17th January, 2007 she went on maternity leave. She added that she enquired on filling the maternity leave but was informed that since she was a casual labourer, she was required to write a note to that effect. She claimed that on 30th March 2007, she went back to the office and was given work to do and on 5th April 2007, she was informed that there would be staff selection interviews. She testified that she had already received letter dated 2nd February 2007 stating that her request to renew her contract had been declined at the time that she reported to work. She further stated that she received a letter dated 27th April 2007, where her employers said that they were not aware she had resumed work and informed her that her contract ended on 17th January 2007 when she went on maternity leave.
5. The respondent through its employee **Charles Kimeu** testified that the appellant was a casual labourer, who was paid on a daily basis and was not entitled to leave. He stated that the appellant contract ended on 29th January 2007 and the same was not extended any further. He added that the appellant's work was dissatisfactory and she had not been admitted to the bar, therefore she could not be considered for permanent employment . He concluded that there was no other formal employment contract between the respondent and the appellant thereafter and that he was not aware that the appellant resumed work in March since they had through a letter dated 2nd February 2007 and in response to her letter seeking extension informed her that her contract had expired and that she can re-apply in future.
6. When the matter came up in court for directions parties were directed to file their respective submissions. Only, the respondent filed its submissions. It submitted that the first contract was

terminated when the period it was meant to serve was concluded. It argued that any further contracts created new relationship between the parties which contract was renewed through letters between the parties and which new terms the appellant agreed to. It submitted further that the contracts were fixed contracts that ran for a particular time which were terminated by effluxion. It averred that the appellant was a legal officer in training and that was evident from the exhibits produced and the position was later advertised for a legal officer whose first qualification was an advocate and the appellant would not have been considered since she was not one.

7. I have evaluated the appellants case and I have considered the submissions of the respondent on record, and the grounds of appeal raised. I will deal with the 1,3 and 4 grounds of appeal together since they are interrelated. The appellant claims that the trial Magistrate erred in law and fact in failing to appreciate that the respondent varied the terms of appellants by finding that the unilateral reduction of the appellant's salary by the respondent was illegal especially given that letter of appointment dated 9th March, 2005 did not provide for such reduction and that the respondent ought to have accounted to the appellant the salary underpayment for the duration worked at the reduced pay as computed and as set out in the plaint dated 2nd October, 2007. Looking at the court record, the appellant was offered a temporary employment contract vide letter dated 9th March 2005 which contract was to last for a period of 1 year hence expired on 31st February 2006.
8. The appellant then applied for employment and vide a letter dated 26th April, 2006, the respondent in response offered her employment for 3 months. This employment was contractual and contained new terms contrary to the previous contract. In this particular contract, the terms included wages amounting to kshs 455/= and were payable per working day. The contract was to automatically terminate upon expiry of three months and there were no benefits payable under the new contract.
9. Upon expiry of the second contract, came the third contract which was communicated to the appellant through a letter dated 26th July, 2006. This particular contract contained the same terms and conditions as the second contract and was supposed to expire on 28th October 2006. The appellant sought another renewal of the contract and the same was accepted and communicated to the appellant through a letter dated 14th December 2006. This was the fourth contract which contained the same terms as those of the second and third contracts and it was to run from 30th October 2006 to 29th January 2007.
10. I note that vide a letter dated 2nd February, 2007, the respondent wrote to the appellant where they stated in verbatim:

" We acknowledge receipt of your letters dated 15th October, 2006 and 10th January, 2007 in respect of the above captioned matter. Whereas the contents therein are noted we regret to inform you that your request to renew your service contract has not been considered at the moment. You may therefore wish to reapply for consideration in future." It is clear that the appellant received this letter which was categorical that the respondent was not willing to renew the contract. The receipt of the letter by the appellant prior to applying for a renewal of the contract is evident since the appellant while seeking to renew the contract referred to this letter in her letter dated 30th March 2007. In her response, she stated thus: ***"I have resumed work and pursuant to your letter to me dated 2nd February 2007, I request for renewal of my contract of service with the corporation."***

This letter was responded to by the respondent in its letter dated 16th April 2007, where it turned down the appellants offer for renewal of the contract.

In my view, the letter, dated 2nd February 2007 inferred notice to the appellant that the contract had lapsed by effluxion of time and that the respondent was not willing to renew the contract. It is clear that at the time of termination of contract, the contract governing the employment was for a fixed term that ran from 30th October 2006 to 29th January 2007 and the same ended on 29th January 2007. The appellant claims further that upon resuming work on 30th March 2007, she drafted a letter on the same day requesting for a renewal. Instead of waiting for response before undertaking any duties, she claims that she proceeded to work until 18th April 2007 without a contract in place. I am not convinced that the

appellant proceeded to work after 30th March 2007 seeing that she did not tender proof to that effect in the Lower Court. Even if I was to find that she did, the appellant reported to work yet her contract had not been renewed, a fact that was well within her knowledge, one that she chose to ignore at her own peril. I therefore find that no allowances should be payable to the applicant for the 19 days that she purportedly worked for the respondent.

11. Having said that, I wish to address the issue of the nature of contract entered into by the parties. As I stated above this was clearly a fixed term contract. The appellant produced the various written contracts in court. Each of those contracts contained terms and conditions which included the duration of the contract of service and each contract was exclusive without a clause implying that the contract will automatically be extended. The appellant has appended her signature in each of the contracts and also by conduct accepted the terms contained therein by taking up the job and going to work. When the second contract came along after the one year one expired, she accepted the terms and conditions despite the fact that her pay was reduced from a salary of K£ 13,104 per annum to Kshs 455 per working day. She renewed that contract three times without any official objection to the terms. She clearly agreed to the terms every time she appended her signature on the contracts of service. It therefore beats logic when the appellant turns round and sues her previous employer for outstanding amount of money which arises from the difference between the salary paid in the first contract and that paid in the subsequent contracts. Each contract was a new contract of service which the appellant was at liberty to decline but she accepted. The first contract was independent of the subsequent contracts that varied its terms. The Magistrate was correct in holding each contract independent of the others.
12. I will now deal with grounds 2, 5 and 7 of the memorandum of appeal. The appellant claimed that the learned magistrate misdirected himself in not finding that the respondent had made representations and assurances on improvement of employment terms which the appellant acted on, that he failed to find that the respondent unfairly and unlawfully terminated her employment which necessitated special and general damages.
13. According to the court record, there was no proof tendered by the appellant as far such representations are concerned. The appellant mentioned that there was such conversation and produced memo's to support her case which included one dated 6th November 2006 and another dated 5th April 2007. Both memos are addressed to all staff members with one informing them of staff rationalisation program - mainly on review of staff deployment and placement while the other informs staff of the staff selection interviews. Other than those memos that were addressed to all the staff members, there is no official communication between the parties that shows any representations that the appellant acted on to her detriment. The respondent reserved the right to employ or not as long as he did so in accordance with the Law, which I believe he did.
14. In conclusion therefore, it is evident that this being a fixed term contract the same was terminated within the duration agreed upon by the parties. All the subsequent renewals came with different terms which the appellant accepted and continued to report to work. If she was aggrieved she would have either turned down the employment or communicated officially to her employer to escalate her wages. As I have stated above, each contract was autonomous of the subsequent contract since there was no clause that provided for renewal of the contract. I therefore find that there was no unlawful termination of employment and the appellant is therefore misguided when she claims for general damages and special damages as the same are not payable.
15. It is trite law that a court cannot re-write a contract between the parties. Consequently, the Magistrate rightly dismissed the suit and the total sum of kshs 247,039/= and all other sums prayed by the appellant are not justifiable and no proof has been tendered to justify payment of such sum of money by the respondent.
16. All the tabulated wages, allowances and damages payable relate to a renewed contract which was non-existent. I find that there was no contract hence no outstanding wages are payable neither are any damages payable. The appeal is hereby dismissed with costs to the respondent.

Dated, Signed and Delivered in open court this 12th day of February, 2016

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant.

..... for the Respondent.