



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO. 208 OF 2013**

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS,  
HOSPITALS AND ALLIED WORKERS.....CLAIMANT**

**-VERSUS-**

**EGERTON UNIVERSITY..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 25<sup>th</sup> July, 2014)

**JUDGMENT**

The claimant is a union having concluded recognition and collective agreements with the respondent with respect to the respondent's employees in grades I to IV. The respondent is a public university whose core business is teaching and research.

During the 2006 to 2007 financial year, the respondent decided to out-source security services as a non-core undertaking of the respondent. A security services provider was sourced in accordance with the provisions of the Public Procurement and Disposal Act, 2005 and the successful bidder was contracted to provide the services for one year. Before the lapsing of the one year, the respondent invited bidders for provision of the services for the following one year term and an unsuccessful bidder challenged the award at the Public Procurement Review Board. Consequently, the out-sourcing project was disrupted compelling the respondent to make alternative measures for security services pending the outcome of the proceedings challenging the award to the successful bidder.

The alternative measures entailed the employment of 106 security personnel on fixed term contracts as per the letters of fixed term contract being appendix 2 on the verifying affidavit filed on 5.07.2013 together with the memorandum of claim commencing this cause. Sixty two (62) of the employees who were hired on the fixed term contracts and being members of the respondent are the grievants in this case.

The grievants' fixed term contracts were initially from 1.09.2009 to 31.08.2010, and then renewed for one year from 30.09.2010 to 30.09.2011, then renewed from 1.10.2011 to 30.09.2012, renewed for three months to 31.12.2012 and finally renewed for six months from 1.01.2013 to 30.06.2013.

In the meantime, the dispute challenging the out-sourcing of the security services was determined and the respondent on 14.03.2013 awarded Intercity Secure Homes Limited to provide security services to the respondent at Kshs.2, 566,500.00 per month. Thus, upon lapsing of the grievants' six months fixed contracts on 30.06.2013, their respective contracts were not renewed to pave way for the out-sourced provider to take over as contracted by the respondent. The provider started providing the services on 1.07.2013 and this fact is not disputed. The grievants were dissatisfied and aggrieved by the turn of events.

Thus, on 5.07.2013 the claimant on behalf of the grievants filed the memorandum of claim. The claimant prayed for judgment against the respondent for:

1. A declaration that the rights of the grievants was violated as provided for under Article 41 of the Constitution of Kenya 2010.
2. A declaration that the termination of the grievants was unlawful and wrongful.
3. That the grievants be reinstated without loss of earnings, benefits, positions and continuity of service.
4. A declaration that the respondent violated the collective bargaining agreement-CBA.
5. That the claimant is compelled to comply with all the clauses of the CBA.

In alternative, the claimant prayed that the respondent is compelled to pay grievants all the benefits as provided for in the CBA including:

- a. Notice as provided in clause 6 of the CBA.
- b. Salary for the month of June 2013.
- c. Severance as provided for in the CBA.
- d. Overtime as provided for in the CBA.
- e. All allowances which were not given by the respondent to the grievants.
- f. The computation of the payments be supervised by the County Labour Officer.
- g. The respondent to pay costs of the proceedings.
- h. The respondent to pay interest at court rates.
- i. The respondent to pay the grievants 12 months' salary compensation for unlawful termination.
- j. The court to award an order or any other award that it would deem fit towards the end of justice.

The claimant filed a supplementary memorandum of claim on 22.07.2013 increasing the number of grievants from 55 to 62 and further praying for payment of annual leave from 1.08.2008 to 30.06.2013.

The respondent filed on 20.07.2013 the reply to the memorandum of claim and the claimant's supplementary memorandum of claim through Gekonga & Company Advocates. The respondent prayed that the claimant's cause be dismissed and the claimant is condemned to pay costs of the suit.

The claimant's witnesses included Francis Onyango Akula (CW1); Simon Kimutai Keter (CW2); and Sigilai David Kosgei (CW3). The respondent's witnesses included Joseph Okemwa Onserio, the respondent's human resource department (RW1); and Hillary Chebii, respondent's acting chief security officer (RW2).

The issues for determination include:

1. Whether the grievants were employed in 2008 or 2009.
2. Whether the grievants' employment was guided and subject to provisions of the CBA.
3. Whether the minimum terms and conditions of employment under the Employment Act, 2007 applied to the grievants' employment.
4. Whether the claimant is entitled to remedies as prayed for.

For the **1<sup>st</sup> issue**, the claimant submitted that RW1 and RW2 testified that the grievants were employed in 2008. For the respondent it was submitted that the court should not take into account exhibit 5 on the supplementary memorandum of claim because the duty roster is not signed and is not done on the respondent's letterhead. Further, even if the grievants were initially employed in 2008 to 2009, any claim based on that service would be time barred under section 90 of the Employment Act, 2007 which prescribes 3 years as the limitation period to file claims based on the contract of service. The court has revisited the evidence. RW2 testified that the grievants served commencing 2008 and others beginning 2009. The court finds that some of the claimants started to serve the respondent in 2008 and others in 2009 but evidence was not provided for each grievant. The court further finds that after emplacement on fixed term contracts, the grievants accepted the fixed term contracts, the claims with respect to 2008 to 2009 would be time barred as afterthought and as submitted for the respondent. The court finds

accordingly.

The **2<sup>nd</sup> issue** is whether the grievants' employment was guided and subject to provisions of the CBA. The claimant submitted that the CBA applied to staff in grades I to IV and the preamble to the CBA further stated that no employee covered by the CBA would receive terms and conditions of service less favourable than what was contained in the CBA. The claimant further relied on section 59 of the Labour Relations Act, 2007 that a CBA binds the parties for the agreed period; and the terms of the CBA are incorporated into the contract of employment for every employee covered by the CBA. The respondent submitted that the 2008 to 2012 CBA did not provide for contract employment and the new CBA of 2012 is the one which provided for such employment. The terms of the fixed term contract were therefore, for the respondent's case, governed by the contract itself.

As submitted for the claimant, the court finds that the relevant CBA which became effective on 1.07.2008 to run for 2 years provided in the preamble that employees covered by the CBA would not be given less favourable terms and conditions of service than what was contained in the CBA. The court finds that the CBA applied to the grievants. The court further finds that the grievants' fixed term contracts was subject to provisions of clause 3 on temporary employment which provided thus:

- a. The employer may employ persons on temporary basis for a period to be specifically defined to the employee. Such period should not exceed three months.
- b. Temporary employment may only be offered for genuinely temporary purposes or projects. Such employees will be subject to the same terms and conditions of service as other employees in accordance with provisions of the Employment Act, 2007.
- c. Should it become necessary to prolong the project, temporary employees shall not be replaced by new ones, and shall be allowed to continue in employment subject to provisions of the Employment Act, 2007.

The lapsing of the grievants' six months fixed contracts was on 30.06.2013. The CBA in force at that time was the one executed on 1.07.2012 to run for 2 years effective that date. The preamble of that CBA like the earlier one applied to the grievants. Provisions of clause 3 of the earlier 2008 CBA were retained and the 2012 CBA in clause 4 further provided thus:

**“The employer may employ staff on contract for a period or a number of working days which amount in the aggregate to the equivalent of three months or more or which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to equivalent of three months.”**

The court finds that both clauses 3 and 4 of the 2012 CBA applied to the grievants as at 30.06.2013 and the fixed term contracts were concluded under those CBA provisions.

The **3<sup>rd</sup> issue** for determination is whether the provisions of the Employment Act, 2007 applied. First, the court finds that clause 3 of the CBA was clear that the Act applied. Secondly, it was submitted for both parties that the Act applied. The court finds as much.

The **4<sup>th</sup> issue** for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows.

First, the court has carefully considered the fixed term contract against the provisions of clauses 3 and 4 of the 2012 CBA which was in force at time of the lapsing of the last contract. The court finds that the reason for fixed term contracts was genuine namely that the security services provided by the grievants were temporary pending the crystallization of the outsourcing arrangement. Secondly, the fixed term contract provided that:

- a. it was for the period 1.01.2013 to 30.06.2013, the date it lapsed; and
- b. the monthly pay was a consolidated pay with no other benefits attached.

The court finds that the failure to renew or extend the fixed term contract, in absence of any agreement to extend, did not amount to unfair termination as was held by Radido J. in **Isaiah Makhoha –Versus- Basco Products (K) Limited [2014]eKLR**. As held by Rika J. in **Margaret A. Ochieng –Versus- National Water Conservation & Pipeline Corporation [2014] eKLR**, fixed term contracts are not automatically renewable and such contracts do not carry automatic expectation to be renewed. The court finds that in the present case, the expiring contracts did not contain a clause giving expectancy of renewal as was the case in **Ruth Gathoni Ngotho- Kariuki –Versus- The Presbyterian Church of East Africa [2012]eKLR**. Accordingly the court finds that the grievants' respective contracts lapsed by reason of effluxion of the agreed period and there was no unfair termination on the part of the respondent. The court makes the following further findings on the prayers made by the claimant:

- a. The claimant prayed for notice pay as provided in clause 6 of the CBA. Clause 6 of the CBA refers to those employed on probationary term and terminated after the probationary service. The court finds that the grievants were employed on fixed term contracts and never served on probationary service. They knew the contracts would terminate upon the lapsing of the fixed term. The prayer will therefore fail.
- b. The claimant prayed that the grievants are paid salary for the month of June 2013. There is no dispute that the grievants worked up to 30.06.2013. The claimant did not submit on this point. RW1 testified all salaries were paid and the respondent submitted that the relevant pay slips had been filed. The court finds that the claimant abandoned the prayer and on the balance of probability, the grievants were paid the June 2013 salaries.
- c. The claimant prayed for severance as provided for in the CBA. The court finds that under the CBA and section 40 of the Employment Act, 2007 severance pay would be available in cases of termination on account of redundancy. In the present case the court has found that the termination was on account of the lapsing of the term as agreed between the parties so that the prayer will fail.
- d. The claimant prayed for overtime as provided for in the CBA. CW1 testified that overtime was not well recorded. RW2 testified grievants were given off duty or rest days to set off the overtime worked. In the circumstances, the court finds that the claimant has not established the claim and it will fail.
- e. The parties agreed to consolidated pay. In the circumstances, the court finds that the claimant is not entitled to any of the monthly remunerative allowances as stipulated in the CBA. In making that finding the court has considered that in absence of evidence that the consolidated pay was disadvantageous, it would not be justified for the grievants to have the consolidated pay and to also have the other remunerative allowances paid to regular or permanent staff.
- f. The evidence by the claimant's witnesses and the respondent's witnesses is that the grievants were initially employed without written contracts in 2008. There was no evidence that the grievants took annual leave or were paid in lieu of the annual leave. The evidence shows that the grievants served continuously without a break. The court finds that the claimant is entitled to the relief that the grievants be paid annual leave for every year served and thereafter prorate pay at the rate of the last monthly pay for each annual leave and for the period 1.08.2008 to 30.06.2013. The court further finds that the grievants are not entitled to leave travelling allowance as per the CBA because they never travelled to take up their annual leave. Further, clause 8 of 2012 CBA states that baggage allowance at Kshs.5000.00 is payable at termination of the employment and the court finds that each grievant is entitled.
- g. The court finds that grievants are each entitled to a certificate of service.
- h. The claimant has partially succeeded in its claims and the court considers that the respondent will pay half costs of the proceedings.

In conclusion, judgment is entered for the claimant against the respondent for orders:

1. The respondent to pay each grievant baggage allowance Kshs.5, 000.00; and annual leave for every year served and thereafter prorate pay at the rate of the last monthly pay for each annual leave and for the period 1.08.2008 to 30.06.2013.
2. The payment in 1 to be made by 1.09.2014 failing interest to be payable at court rates from the date of the suit being 5.05.2013 till full payment.
3. The respondent to deliver to each grievant a certificate of service by 1.09.2014.

4. The respondent to pay the claimant's half costs of the suit.

**Signed, dated and delivered** in court at **Nakuru** this **Friday, 25<sup>th</sup> July, 2014**.

**BYRAM ONGAYA**

**JUDGE**