



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 820 OF 2016

KEFAH OGECHI.....CLAIMANT

VERSUS

SOS CHILDREN'S VILLAGES (KENYA).....RESPONDENT

JUDGMENT

Introduction

1. Kefah Ogechi, the Claimant in this case was an employee of the Respondent, SOS Children's Village (Kenya). He brought this claim alleging unlawful and unfair termination of his employment.
2. The claim is contained in a Memorandum of Claim dated 1st March 2016 and filed in court on 10th May 2016. The Respondent's defence is by way of a Memorandum of Response dated 15th August 2016 and filed in court on 16th August 2016.
3. The matter went to full trial where the Claimant testified on his own behalf and the Respondent called its Human Resource Officer, Elizabeth Mwangi. The parties further filed written submissions.

The Claimant's Case

4. The Claimant states that he was employed by the Respondent on a fixed term contract, effective 12th September 2011. He earned a monthly salary of Kshs. 30,459.00, which was increased over time to Kshs. 69,395.60.
5. The Claimant further states that before expiry of the fixed term contract, the Respondent confirmed him to permanent employment, in the position of Accountant.
6. The Claimant avers that on 31st December 2015, the Respondent terminated his employment orally, without giving him notice or a hearing.
7. The Claimant further avers that on 6th October 2015, he had attended an interview for the position of Accountant, in which he was successful but was not offered the job. He claims to have been discriminated against on account of his tribe
8. The Claimant therefore makes a claim for unlawful and unfair termination and seeks the following:
 - a. General damages
 - b. 12 months' salary in compensation.....Kshs. 832,747.20
 - c. Costs plus interest

The Respondent's Case

9. In its Memorandum of Response dated 15th August 2016 and filed in court on 16th August 2016, the Respondent states that the Claimant was employed on a four year fixed term contract running from 12th September 2011 to 31st December 2015, subject to successful completion of his probation period.

10. Upon successful completion of probation, the Claimant was confirmed by letter dated 14th March 2013.
11. In the course of his employment, the Claimant was allowed to appear for an interview for the position of Senior Accountant in the National Office. The Respondent states that the Claimant was not successful in the said interview.
12. On 2nd November 2015, the Claimant was notified that his contract would lapse on 31st December 2015. The Respondent denies that the Claimant's fixed term contract was altered to permanent terms of employment.
13. On 4th November 2015, the Respondent notified the Claimant of a temporary transfer from his Marsabit base to the National Office, the temporary transfer was to take effect from the date of the letter to the end of the Claimant's contract.
14. The Respondent states that the said temporary transfer was to enable the Claimant to support the National Finance Office, in the absence of another staff who was proceeding on leave.
15. The Respondent avers that by his letter of 15th November 2015, the Claimant raised extraneous issues in relation to the transfer and it became apparent that he was not prepared to report to the Respondent's National Office as he had been directed.
16. By 30th November 2015, the Claimant had not reported to the National Office as directed by letter dated 4th November 2015.
17. The Respondent avers that upon being informed that he was not successful at the interview, the Claimant, in a brazen act of defiance, informed the Respondent by his email of 2nd December 2015, that he would not report for the temporary transfer at the National Office.
18. By letter dated 3rd December 2015, the Claimant was asked to show cause why disciplinary action should not be taken against him for misconduct and insubordination.
19. The Respondent states that by the time his contract ended on 31st December 2015, the Claimant had not responded to the show cause letter.
20. The Respondent further states that it did not take any disciplinary action against the Claimant for the reason that such action had been overtaken by events.

Findings and Determination

21. There are two (2) issues for determination in this case:
 - a. Whether the Claimant has made out a case of unlawful termination of employment;
 - b. Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

22. The Claimant makes a claim that his employment was unlawfully and unfairly terminated and in response, the Respondent states that the Claimant's employment contract came to an end by effluxion of time.
23. The Claimant told the Court that the confirmation letter issued to him on 14th March 2013 translated his employment from fixed term contract terms to permanent terms. I have looked at both the confirmation letter and the fixed term contract and find that the two documents are intrinsically intertwined.
24. Article (b) of the fixed term employment contract states as follows:

“The Employee shall be contracted to SOS CV KE for a period of 4 (four) years, as an Accountant (MSF II) at the Family Strengthening Program, Marsabit, commencing on 12th Sept 2011. You will be on probation for a period of six months after which you shall then be appraised to determine suitability for the Job and your employment be confirmed by the National Director. During this period one month's notice or pay in lieu will be required by either side in case this contract is terminated.”
25. The confirmation letter dated 14th March 2013 makes reference to the Claimant's appointment, which was evidently by the aforesaid contract. The confirmation therefore could only have been with reference to this initial appointment. If it was the intention of the parties to abrogate the initial terms of employment, they would have stated so expressly. The phrase '*permanently appointed*' appearing in the confirmation letter must therefore be read within the wider context of the fixed term employment contract.
26. That said, I have reached the conclusion that the Claimant's employment with the Respondent was on the basis of a fixed term contract, which he fully served.
27. The law is well established that an employee serving on the basis of a fixed term contract has no expectation beyond the terms codified in the contract (see **Margaret A. Ochieng v National Water Conservation and Pipeline Corporation [2014] eKLR**).

28. The Claimant confirmed having received notification from the Respondent that his fixed term contract was due to lapse on 31st December 2015. Significantly, the Claimant did not raise any objection to this notice.

29. What is more, the Claimant's conduct in the last days of his contract had all the marks of an employee on transit; he failed to take up a temporary transfer to the National Office and did not bother to respond to a show cause letter issued to him by his employer. This conduct can only be explained by the fact that the Claimant was well aware that his contract was due to lapse on 31st December 2015.

30. In my view, the introduction of the interview for the position of Senior Accountant at the National Office and the allegations of discrimination on the basis of tribe constitute a red herring that is not helpful to the Claimant's case.

31. In the end, I find and hold that the Claimant has failed to prove a case of unlawful termination of employment. His entire claim therefore fails and is dismissed.

32. Each party will bear their own costs.

DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JANUARY, 2022

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JUDGE

Appearance:

Mr. Onwonga for the Claimant

Mr. Masese for the Respondent