



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 293 OF 2017**

**(Before Hon. Lady Justice Anna Ngibuini Mwaure)**

**ENOCK JAMES ONGITI.....CLAIMANT**

**VERSUS**

**GAS & DIESELS LIMITED.....RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The Claimant has brought a claim under a memorandum of claim dated 28<sup>th</sup> November, 2016. The Respondent put in a response by his statement of defence dated 15<sup>th</sup> June, 2017.

**CLAIMANT'S EVIDENCE**

2. The Claimant's states he was employed by the Respondent in 2014 at a salary of Kshs.10,300/= per month. He says he worked through 2015 without being subjected to review his contract.

He says he then received a letter from the Respondent on 30<sup>th</sup> September, 2016 terminating his employment and the reason given was that he refused to apply for the renewal of his contract.

3. He says his employment was terminated unlawfully and wrongfully.

4. (a) He now claims he is entitled to one month salary in lieu of notice.

(b) Outstanding dues

© 12 months compensation amounting Kshs.123,600/= (d) Punitive and aggravated damages for breach of Claimant's constitutional rights.

(e) costs of this suit.

**RESPONDENT'S EVIDENCE**

5. The Respondent says he had employed the Claimant on a short-fixed term of 2 years form 9/10/2014 to 30/9/2016 at a salary of Kshs.10,300/= inclusive house salary.

He says he was being deducted NSSF and NHIF.

6. He says Claimant received his contract which was to expire on 30/9/2016 and he signed it.

7. The Respondent says he requested Claimant to indicate if he wanted to review his contract but Claimant did not respond. So he says he informed the Claimant that at the expiry of his contract his employment was to come to an end.

8. He says there was no expectation of employment after expiry of the Claimant's contract.

He says he paid Claimant until his last day.

9. The Respondent says that the law does not prohibit employment relationship as per Section 10 (3) © of the Employment Act 2007 and such arrangement is not unconstitutional. He says for that reason the arguments of the Claimant are irrelevant.

#### **DETERMINATION**

10. The Claimant claims he had been working for the Respondent from 2014 September and on 30<sup>th</sup> September, 2016 he received a letter terminating his employment effective that date for failure to apply for renewal of his contract.

11. Obviously as the Respondent says in his submissions an employer has liberty to employ on fixed terms. Section 10(3) of the Employment Act refers to the said fixed term contracts.

He says the contract ended by lapse of time.

He says that Claimant was not terminated by the Respondent.

12. The case of **ANN THEURI VS KADET LIMITED CAUSE NO. 368 OF 2009** the court held that in a case of fixed term the Claimant cannot benefit from notice pay as he was aware contract was coming to an end.

In the case of **SAMUEL CHACHA VS KENYA MEDICAL RESEARCH INSTITUTE 1901 OF 2013** the Judge held that contracts are made by parties and the court cannot vary the terms and can only interpret the same.

13. However, what is intriguing in this case is that even though the Respondent claims there is a contract it is not a clear contract.

Indeed the contract availed to the court dated 13<sup>th</sup> June, 2016 and reads that the effective date of contract is 9<sup>th</sup> October, 2014 and was to end on 30<sup>th</sup> September, 2016. This clearly raises eyebrows if it was dated on 30<sup>th</sup> June, 2016 and was to commence on 9<sup>th</sup> October, 2014.

I find that very confusing.

14. Furthermore the Respondent wrote a letter to the Claimant dated 2<sup>nd</sup> June, 2016 indicating the Claimant contract was to terminate on 30<sup>th</sup> July, 2016 and asked him to apply for renewal by 20<sup>th</sup> June, 2016.

A further undated letter by the Respondent again indicated that the contract was to expire on 30<sup>th</sup> September, 2016.

15. The Claimant does not seem to have a fixed contract. A contract should have definite start date and expiry date and both parties should be party to the same. Section 9 (2) of the Employment Act refers to contract of service by the employer and provides the same should be consented by the employee.

16. The court finds the referred contracts are not clear evidence that the employee or the Claimant was quite aware of the implications of the same and in particular that he was supposed to apply for renewal of the same.

17. In the circumstances the court can only find that the Claimant was not employed under a fixed contract. He therefore deserved to be given a valid reason as to why his employment was terminated and to be accorded a fair hearing as well as provided in Section 41 of the Employment Act.

In the absence of the above the court finds that the Claimant was not on a fixed contract and that he therefore deserved to undergo the procedure in Section 41 of the Employment Act before terminating his employment.

18. In the case of **WALTER OGAL VS TEACHERS SERVICE COMMISSION CAUSE NO.955 OF 2011** the court noted that for any termination to pass the fairness test it ought to be shown that there was not only substantive justification for termination but also procedural fairness.

Further that Section 43 of the Employment Act obligated employer to prove the reason for termination of employment and where he failed to do so, the termination was deemed to have been unfair.

19. In this particular case I have considered very deliberately the pleadings by the respective parties as well as the submissions and have come to a conclusion that the termination of his employment was wrongful and unfair and so I proceed to enter judgement in favour of the Claimant.

20. Having entered Judgment in favour of the Claimant, I give the following reliefs: -

- (1) One month salary in lieu of notice Kshs.10,300/=

(2) Outstanding salary.....Kshs.10300/=

(3) I will award 3 months equivalent of salary as the Claimant worked for the Respondent for about two years.....Kshs...30,90

(4) Costs follow the event and I award costs to the Claimant.

(5) I find no reason to award aggravated damages having awarded 3 months equivalent of salary.

21. The effect of my award therefore is Kshs.51,500/= plus costs and interest.

It is so ordered.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 20TH DAY OF JANUARY 2022.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**