



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. E064 OF 2021**

**LOUIS NYAMBU MWANYALO.....CLAIMANT**

**- VERSUS -**

**TAITA TAVETA COUNTY PUBLIC SERVICE BOARD.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 25<sup>th</sup> February, 2022)

**JUDGMENT**

The claimant filed the memorandum of claim on 01.07.2021 through A.N. Kamau & Company Advocates. The claimant pleaded the case as follows. The claimant was employed by the respondent since 24.08.2015 on a 4-years contract as Director Revenue Management and worked until the contract lapsed on 23.08.2019. The monthly salary was Kshs. 172, 820.00. The claimant's case is that on 28.08.2018 the contract which had expired was extended by a further 6 months and the claimant continued to work as usual. Further, on 24.02.2019 the contract was further extended for 6 months and during that 2<sup>nd</sup> extension period, the claimant was not paid a single cent for his work which he had performed religiously per the terms of service. Further, he wrote to inquire about the failure to be paid. Further, even before the contractual extension period lapsed, he saw an advertisement of a vacancy in the position he held and he says he was constructively terminated.

The claimant prayed for judgment against the respondent for:

- 1) Salary for the period 24.02.2019 and 23.08.2019 Kshs. 172, 820.00 x 6 = Kshs. 1, 036, 920.00.
- 2) Gratuity or service pay for the period ending 23.08.2019 at 172, 820 x 15-days x 6 months Kshs. 254, 485.00.
- 3) Encashment for leave Kshs. 118, 577.00.

Total claim **Kshs. 1, 409, 982.00.**

- 4) Any other entitlement or order that the Honourable Court may deem fit to grant or that may be proved at the hearing of the cause hereof and which counsel for the claimant submits on in his final filed submissions.
- 5) Costs of the cause.
- 6) Interest from the date of filing the cause till payment in full.
- 7) Certificate of service.

Despite service of the summons to enter appearance, the memorandum of claim, mention notice or hearing notice, the respondent failed to enter appearance, to file a response to the claim, and to attend Court. The case proceeded for hearing when the claimant testified to support his case. The claimant file submissions belatedly.

The **1<sup>st</sup> issue** for determination is whether the claimant was employed by the respondent as alleged. The claimant has pleaded at paragraph II (b) that the respondent employed him since 24.08.2015 on the basis of a contract for 4 years as Director Revenue Management. In a contradictory manner he has stated in his witness statement that he was employed by the respondent on 24.08.2015 as a Director Revenue Management on 3-years renewable contract. Now in a further contradictory manner, he has exhibited a copy of the letter CPSB/TTC/ST.6/VOL.1/109 dated 19.08.2015 by the respondent titled "LETTER OF APPOINTMENT" stating that following the

claimant's acceptance of terms in the letter of offer, the claimant was thereby appointed to the position of Director Revenue Management effective 19.08.2015 with a basic salary of Kshs. 109, 089 pm – 144, 928 pm, house allowance Kshs. 20, 000.00pm and other allowances Kshs.14, 000.00 (which when added at entry point is Kshs. 143, 089 pm and at maximum point is Kshs. 178, 928 pm both at variance with Kshs. 172, 820 pm in the memorandum of claim and the witness statement –and no pay slip was exhibited). The letter further stated that the appointment was for probationary period of 6 months and if the claimant failed to perform satisfactorily, the same would be terminated and if satisfactorily, he would be confirmed in appointment. He was to be subject to the terms and conditions of the public service in the county. The claimant has not exhibited the letter confirming him in the appointment. While the letter of offer exhibited is dated 10.08.2015, it states that the claimant was being offered appointment to Director Revenue Management J.G R on a 3 years' renewable contract effective the date he reported. The date the claimant might have reported is not clear or disclosed. The Court observes that with such gaps and contradictions about the monthly pay, whether the employment was for 3 years or for three-years subject to probationary service, or for 4- years fixed tenure, whether probationary service was served successfully and the claimant confirmed or not, and whatever was the effective date (19.08.2015 or 24.08.2015) the Court finds that the claimant has failed to establish the contract of service as pleaded. In any event the pleading by itself is contradictory when at paragraph II(b) is stated that the contract was for four years then at paragraph III(c) is stated the contract was expiring on or about 23.08.2018.

The claimant has exhibited a letter Ref. No. CPBS/TTC/ST.25/VOL3/42 dated 27.08.2018 purportedly extending the claimant's employment for a period of 6 months effective 24.08.2018. The Court has already identified gaps in the purported contract that was being extended therein and in absence of any other material, the letter of extension as exhibited does not by itself cure the gaps and contradictions the Court has already found to show that the claimant has failed to establish the employment relationship as pleaded in his memorandum of claim. For the same reasons, the Court finds that the letter exhibited Ref. No. SF/CPSB/TTC/ST.29/VOL.I/ (58) dated 17.06.2019 purporting to extend the claimant's contract for six months effective 24.02.2019 does not cure the claimant's failure to show that he had a contract of service as pleaded in his memorandum of claim. Further, the Court returns that the claimant has not shown the work actually done for the six months he is claiming for payment.

The Court has carefully considered the pleadings and finds that the prayer for salary is for the period 24.02.2019 to 23.08.2019. The Court finds that the alleged failure to be paid monthly salaries was a continuing injury whose cessation was on 23.08.2019. The suit having been filed on 01.07.2021, that claim was time barred under section 90 of the Employment Act, 2007 which prescribes time of limitation as 12 months from the date of cessation of such continuing injury. The prayer for encashment for leave is without due particulars and while alleging in the witness statement that he had 30 pending leave days, no evidence was provided about the period for which the leave days were being claimed. Thus the claim was lacking in particulars and was not strictly proved especially that even the base (monthly salary) for computing the claim remains not established on a balance of probabilities and as already found earlier in this judgment. Similarly, for reasons already given gratuity would fail. The base for computation it is at large and the contractual basis for the claim was not pleaded and was not established at all. In conclusion, the claimant's suit is hereby dismissed with orders the claimant to bear own costs in that regard.

**Signed, dated and delivered by video-link and in court at Mombasa this Friday 25<sup>th</sup> February, 2022.**

**BYRAM ONGAYA**

**JUDGE**