



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 537 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

BENARD ARII EKIDOR.....CLAIMANT

VERSUS

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

JUDGEMENT

1. The Claimant instituted the Claim herein vide a Memorandum of claim dated **1st March 2016** and filed in court on **21st April 2016**. The Claimant avers that he was underpaid for a total of 38 months. He therefore seeks compensation for underpayment with interest and costs of the suit.

2. The Respondent filed its Memorandum of Response dated **17th May 2016** where it denies the allegations by the Claimant in toto. The Respondent avers that being a Non-Governmental Organization, its operations were based on securing donor funds and as such the Claimant herein was employed on various fixed term contracts as and when the Respondent had secured donor funding. That the Claimant was first employed by the Respondent as a **National Emergency Relief Program Coordinator** on a three month contract that ran between 18th June 2012 to 15th September 2012. The Claimant was earning a consolidated pay of Kshs.110,000/-. Upon lapse of the contract, he was engaged on a verbal understanding that he would continue working for the Respondent under the same terms until the closure of the project and utilization of the balance of funds on the project. The project ended in early 2012.

3. The Respondent further avers that on 12th November, 2012 the Claimant was given a new three (3) year contract under a completely new contract in a completely new position under a completely new project. He was engaged as the **Family Strengthening Program Coordinator** and accepted the terms therein with a consolidated pay of Kshs.58,676/-. Upon lapse of this contract, he was offered an extension but he declined to accept the extension offer. He never raised the issue of underpayment throughout the contract and was very positive in his final communication to the Respondent. That the claim herein is therefore an afterthought that should be dismissed with costs.

4. By consent, parties converted their witness statements into witness affidavits and disposed of the suit by way of pleadings, documents, witness affidavits and written submissions.

Evidence

5. The Claimant in his Witness Affidavit stated that he was employed by the Respondent as a National Emergency Relief Programme Co-ordinator on 15th June 2012 where he was earning Kshs.110,000/- per month. On 3rd November 2012 he was presented with another contract as a Program Coordinator earning Kshs.58,676/- per month. That he raised the issue of underpayment from Kshs.110,000/- to Kshs.58,676/- and the management orally told him that it was an error and would be adjusted to Kshs110,000/-. By the time the contract ended the said error had not been rectified. Further that the Respondent dishonestly made him not accept a contract extension. The Claimant relied on his list of documents dated 1st March 2016.

6. The Respondent did not file any affidavit or sworn witness statement.

Submissions

7. The Claimant through his counsel on record submits that since the Respondent failed to file its witness statement, the Claim should be allowed as prayed. That the entire claim is based on three important documents: limited contract dated 15th June 2012 that prescribed a salary of Kshs.110,000/-, undated contract of employment for salary of Kshs.56,676/- and employment extension dated 18th December 2015. Counsel reiterates that the Claimant immediately informed the Respondent of the underpayment and was assured that the same was an error that would be rectified. That reduction of the Claimant's salary from Kshs.110,000/- to Kshs.56,676/- was arbitral or unilaterally fixed without the Claimant's consent and should thus not be allowed.

8. Counsel further submits that on the evidence on record, it is evident that the Respondent did not pay the Claimant the 13th Cheque from the year 2012 and therefore owes him Kshs.205,296. Based on the above, counsel submits that the Claimant has proved his case and is entitled to the prayers as prayed.

9. The Respondent through its counsel on record submits that the Claimant was issued with a new contract under a new 3 year contract where he accepted a pay of Kshs.58,676. Upon lapse of the said contract, he was offered an extension but he declined the offer. That as stipulated under Section 10(3) of the Employment Act, the contract was a fixed contract that ended via lapse of time. The Claimant was paid his terminal benefits and left without raising an issue.

10. Counsel in support of his case relies on the case of **Anne Theuri v Kadet Limited** where Rika J. held that the Claimant therein was not entitled to notice pay as he knew all along that his contract was coming to an end. Counsel further relies on the case of **KUDHEIHA v Holy Rosary Boarding School** where Wasilwa J. observed as follows:

“Given that Claimants had previously been on contract, their refusal to sign fresh contracts was detrimental to them and they cannot lay blame to the respondents. I therefore find that the 2nd, 3rd, and 4th Claimants cooked their own goose by refusing to sign fresh contracts and therefore they were the authors of their own misfortune.”

11. The Respondent through its counsel on record submits that the Claim does not disclose any cause of action and should be dismissed with costs.

Analysis and determination

12. Upon consideration of the issues arising from the pleadings, the evidence on record and the submissions on record, this court is being called upon to determine the following:

- a) Whether the Claimant was unlawfully underpaid;
- b) Whether the Claimant was paid the 1 month salary (13th Cheque);
- c) Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant was unlawfully underpaid

13. While the Claimant avers that he was underpaid for the entire contractual period, the Respondent is of the view that the impugned contract is distinct from the first contract and that the Claimant accepted the terms of the later contract. In order to get a proper appreciation of terms that bound the parties herein, the court must analyze the two contracts. The Contract dated 15th June 2012 stated inter alia:

“Nature of Contract

The employee will be contracted to the employer for a period of three months, from 18th June until 15th September 2012. The position and allowance details will be:

Position: National Emergency Relief Program Coordinator

Reporting to: Deputy National Director

Allowance: Kshs.110,000 per month (consolidated)

No other benefits and allowances shall be made to the employee.

Renewal of Contract

The employment contract may be extended upon the mutual agreement of both parties. In the event that SOS children is interested in renewing the contract, it shall make this known to the employee within 30 days before the expiration date. The renewal of this contract is further dependent on continued donor funding. Any additions or alterations to this contract shall be in writing.”

14. The impugned contract of employment on the other hand stated as follows:

“Nature & Duration of Contract

The employee shall be contracted to SOS CV KE for a period of 3.2 (three years and two months), as a programme coordinator at the family strengthening Programme (MFS 11) Marsabit, commencing on 12th November 2012. 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.”

Salary

Your position and allowance details will be:

Position: Program Coordinator

Grade/Step: O 1

Basic Salary 58,676

The Employee will receive his salary on or before the last working day each month.

13th Cheque

The employee is entitled to one month's additional basic salary subject to normal taxation and other statutory deductions, payable in December of each year and prorated for periods of service less than 12 months

Amendments

Any additions or alterations to this contract will be made in writing

Employee Acceptance

I, Mr Benard Aarii Ekidor, hereby accept the terms and conditions of employment as outlined in this fixed period Contract of Employment

Signed.”

15. The Claimant's case is that the Respondent made an oral promise that the Claimant's salary would be reviewed to Kshs.110,000/- from the Kshs.58,676/- indicated in the contract. This was never done. The Court of Appeal in **Commercial Bank Limited v Kenya Grange Vehicle Industries Limited [2017] eKLR** observed as follows:

“So that where the intention of parties has in fact been reduced to writing, under the so called parol evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms. Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it. In **Prudential Assurance Company of Kenya Limited v Sukhwender Singh Jutney and Another, Civil Appeal No. 23 of 2005** the Court citing a passage in *Odgers Construction of Deeds and Statutes (5th edn.)* at p.106 emphasized that in construing the terms of a written contract; It is a familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence. The supporting rationale for this rule is that, since the contracting parties have reduced their agreement to a single and final writing, extrinsic evidence of past agreements or terms should not be considered when interpreting that written contract agreement, as the parties had consciously decided to ultimately leave them out of the contract. In other words, one may not use evidence made prior to the written contract to contradict the ultimate contract that has been reduced into writing.”

16. It is clear from the four corners of the agreement signed freely and voluntarily by the parties that the Claimant was entitled to a monthly salary of Kshs.58,676. Though the Claimant avers that there was a verbal promise to “rectify the apparent error” the same was not done. Further, it is important to note that the Contract dated 15th June 2012 that provided for a salary of Kshs.110,000/- was a fixed term contract that ended via lapse of time. There was no extension of that contract. The positions offered by the Respondent in the two contracts are also distinct as while the first one was for the position of National Emergency Relief Program Coordinator, the second contract had the position of a Program Coordinator. The upshot is that this court finds that the Claimant has not proved on a balance of probabilities that there was underpayment for the 38 months he worked on the second contract.

Whether the Claimant was paid the 1 month salary (13th Cheque)

17. It is not in dispute that the Claimant was entitled to a 13th Cheque. While the Claimant claims that he never received the same, the Respondent maintains that the same was paid to him. The Pay slips attached by the Respondent in its list of documents confirm that the Claimant received the same as follows:

“Pay slip for December 2012 Claimant received Kshs.9,779 as the 13th Cheque (pro rated)

Pay slip for December 2013 Claimant received Kshs.60,436 as the 13th Cheque

Pay slip for December 2014 Claimant received Kshs.60,436 as the 13th Cheque

Pay slip for December 2015 Claimant received Kshs.60,436 as the 13th Cheque”

18. Having not succeeded in any of the prayers sought, the suit is without merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23RD DAY OF FEBRUARY 2022

MAUREEN ONYANGO

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 15th March 2020 and subsequent directions of 21st 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 Civil 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.

MAUREEN ONYANGO

JUDGE