



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 240 OF 2019

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

PAUL KIPLANGAT KIRUI.....CLAIMANT

VERSUS

NAIROBI CITY WATER AND SEWERAGE

COMPANY LIMITED.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The Claimant brought his claim vide his further amended memorandum of claim dated 24th September, 2019.
2. The Respondent put a response vide his memorandum of response dated 14th November, 2019.

CLAIMANT'S EVIDENCE

3. The claimant in his further amended memorandum of claim states he will refer to his witness statement dated 11th April, 2019.

He says that he was initially employed by Nairobi City Council in the Water Department from 1980 to 2004. He says that when Respondent Company was formed the functions of the Nairobi City Council were transferred to the Respondent including the Claimant.

4. He says in the year 2005 he was appointed to the position of Business Development Advisor by the Respondent at a salary of Kshs.26,979/= per month.

He says in 2008 he successfully completed a Bachelor of Degree Course and submitted it to the Respondent. He says he was entitled to automatic increment of his salary but the same was not effected.

5. He says in 2009 he was promoted to the position of acting Customer Care Officer and the said position was confirmed in 2010. In 2013 he was promoted to monitoring and evaluation Coordinator at a salary of Kshs.116,934/= and in December, 2013 he received a gift voucher in recognition of his deduction.

6. Claimant says in 9th October, 2015 he was given a contract of 3 years 6 months which contract was in breach of Section 4.3.2 of the Respondents Human Resource Manual which provide for a contract of five years.

The said contract according to the Claimant did not provide for retirement age as 60 years.

He says in 2016 his salary was increased to Kshs.151,932/=.

7. On 3rd January, 2018 the Claimant received a letter of notice of retirement whereby he was advised he was to retire by 16th April, 2019.

8. He says if he is forced to retire by that date he will loose two years of his contract and attendant benefits.

He says the contract of 3 years and 6 months issued to him was therefore discriminatory.

RESPONDENT'S CASE

9. The Respondent states he issued the Claimant with a letter of offer dated 16th September, 2005 at a gross monthly salary of Kshs.26,979/=.

He says their terms of employment were governed by the Human Resource Manual of 2005 which provided their terms of employment would be permanent, on contract or project contract.

That Clause 3.3 of the 2005 Human Resource Manual provided Nairobi Council Water Sewerage will engage most of their management staff on contract basis. The said clause did not provide exact period, it however provided on the retirement period that the same will be after 55 years.

10. The Respondent states the Claimant updated his date of birth as 16th April, 1959.

11. The Respondent affirms that the Claimant was promoted to the position of Planning, Monitoring and Evaluation on 27th February, 2013 and this promotion was based on 2005 Human Resource Manual. The 2013 manual came into existence on 14th April, 2013.

The Claimants contract was then renewed to commence in October, 2015 for 3 years 6 months.

The Claimant says the said contract was governed by 2013 Human Resource Manual.

12. The Claimant did not challenge the new contract and continued to work but the Respondent notified him of his retirement on 3rd January, 2018 and he was to retire by April 2019.

13. The Respondent prays the Claimants claim against it be dismissed with costs.

EVIDENCE

14. The parties did not call witnesses and they agreed to dispose of the suit by way of written submissions and the witness statements on record.

DETERMINATION

15. I have considered pleadings and evidence on record as well as submissions by the parties and the authorities cited as well as other case laws.

The following are the issues for determination.

- (1) What was the nature of Claimant's engagement with the Respondent.
- (2) Was the termination of the Claimant's employment within the terms of their contract.
- (3) Is Claimant entitled to the remedies sought?

CLAIMANT'S TERMS OF CONTRACT

16. The Claimant from the evidence on record was initially employed by Nairobi City Council in 1980 but was transferred to the Respondent in 2004. The Claimant was then engaged and promoted to various positions by the Respondent until 9th October, 2015 when he was issued with a contract of 3 years and 6 months.

He was given position of Monitoring and Evaluation Manager.

17. Now this contract is the bone of contention in this case

as the Claimant says it was contrary to the Nairobi Council Water Sewerage, Human Resource Manual 2013 which provided that Managing Directors, Functional Directors and Managers, Coordinators and officers would be issued with a contract of five years. The contracts may be renewed for a period of four terms based on performance for coordinators and officers. Human Resource Manual paragraphs 4.3.2.

18. The same Human Resource Manual provided that mandatory retirement age for company staff is 60 years.

An employee who is due to retirement on attaining the mandatory age shall be given one year notice before retirement age.

19. On 3rd January, 2018 the Claimant was served with a notice of retirement and was advised the retirement date was 16th April, 2019. He had appraised his date of birth to be 16th April, 1959.

20. The Claimant was given a contract which was to be effective from 11th October, 2015 and he avers was in contravention of the Human Resource Manual which provided for a 5 year contract for the Senior Management.

21. The Claimant no doubt accented to the contract and continued to work and to receive all his dues. There is no evidence on record or in the pleadings that he ever objected to the term of the contract from October, 2015 to April, 2019 when he retired and only in 2019 when he filed suit against the Respondent.

22. In the case of **MOMBASA APPARELS EPZ LIMITED VS TAILOR AND TEXTILES WORKERS UNION (2016) eKLR** the court held that fixed contracts are meant to lapse automatically unless parties agreed to extend them. The court held that there was no evidence that the parties intended to extend the contract.

23. In the case of **EMILY MIGWA VS SEVENTH DAY ADVENTIST CHURCH AND ANOTHER CAUSE NO.716 OF 2012** the court held that Claimant failed to prove on a balance of probability that her contract was terminated prematurely. It was a fact that the Claimant knew all the time she was a temporary employee and her contract terminated automatically on 31st January, 2012 by effluxion of time.

The Respondent merely informed the Claimant she would not continue serving.

24. Similarly in the present case the Claimant knew from October, 2015 that he was on a contract of 3 years and 6 months which contract as substantiated by the Respondent in their pleadings was to coincide with the period of his retirement. He did not raise the issue of the difference of the period in his contract and the period in the Company's Human Resource Manual. He no doubt conceded to serve for that period and never raised any objection to a fundamental covenant of a contract being the term of the contract. He is estopped from raising the same at the end of the contract.

25. The Respondent says he issued the contract of 3 years and 6 months to coincide with the time of the Claimant's retirement. The time of retirement is provided in the Human Resource Manual of the Respondent Company as 60 years – paragraph 8.2.7.4.

The Public Service Regulations also provide the employee's retirement age as 60 years.

26. The Human Resource Manual require the retiring employee to be given one year notice.

The Respondent served the Claimant with a notice on 3rd January, 2018 and advised him he was due to retire on 16th April, 2019.

27. Just as the Claimant sat pretty and did nothing after receiving the contract of October, 2015 he as well did nothing after receiving the retirement notice on 3rd January 2018.

28. He cannot claim he had legitimate expectation that he would serve for five years since at no time did the Respondent promise or indicate to him that he would serve for 5 years. The doctrine of legitimate expectation does not fit in this case. He is also claiming a further 4 terms of 5 years in his prayers. This is a proviso that coordinators can have their contracts renewed for 4 terms but now he cannot claim this as his entitlement.

29. The Claimant claims he was forced to retire but retirement is provided for all staff in any organization. There is no negotiation on that unless the employer agrees to extend the terms in form of contracts. The court does not find the claim can be supported by any evidence as the Human Resource Manual and civil service manual provide the retirement age.

Furthermore the Claimant was notified a year before the retirement of the pending retirement.

30. The other issue raised by the Claimant is the principle of estoppel. The Claimant states that the Respondent is estopped from denying the import of management to renew Claimants contract for five years.

31. This principle of estoppel is defined in Section 120 of Evidence Act as when one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such a belief, neither he/nor his representation shall be allowed in any suit or proceeding between himself and such a person on his representative to deny the truth of that thing.

32. Doctrine of estoppel can also be said to be a promise or set of promises which the law will enforce.

In the case of **SERAH NJERI MWOBI VS JOHN KIMANI NJOROGE (2013) eKLR** the court held that the doctrine of estoppel operates as a principle of law which precludes a person asserting something contrary to what is implied by a previous action or statement of that person.

33. The Respondent issued a contract to the Claimant in October, 2015 and the Claimant accepted the contract and raised no objection or any issues till four years later.

The doctrine of estoppel does not apply in this particular case whichever way I try to consider the evidence on record.

34. Actually Section 4.5 of the Respondent's Human Resource Manual as well provide that once an employee is given a letter of appointment, it will set out the terms and conditions upon which an employee's employment contract is based.

It further provides that by accepting the appointment the staff member acknowledges that he/she has read and accepted conditions laid down in the letter of appointment.

35 Looking at that clause it is actually the Claimant who is estopped from rejecting the contract he received and did not object to it. It cannot be the other way round.

36 It is important to note further that the principle of estoppel does not apply in this case as the Respondent made no promise or assurance that the Claimant's contract would be renewed for five years. The fact that a manager made observation that after appraisal the contract should be renewed for five years was not binding agreement that can be used to retract the contract that was subsequently issued to the claimant and he accepted it by continuing with his work without raising an eyebrow. As already observed the Claimant would have taken the appraisal document and confronted the management before he signed the contract.

In any case the Claimant also was to retire at the mandatory age of 60 years as well as the lapse of his contract by the effluxion of time.

37 From the foregoing I can only find that the Claimant's separation from the Respondent's employment was by mandatory retirement and lapse of his contract. The separation herein was in accordance to the law. The respondent did not unlawfully terminate the claimant's employment and so his claim is dismissed.

REMEDIES

38 Having found that the Claimants separation was in accordance to his contract and Respondent's Human Resource Manual he is not entitled to basic pay for 16 ½ years as the same were not his entitlement in the first place since his contract expired around April, 2019.

All the other prayers from I - XV amounting to Kshs.94,775,194.54/= are not proved and are not merited and so are denied.

39 If there are terminal dues not paid by the Respondent according to the Respondent Human Resource Manual and Contract the same to be calculated and remitted to the Claimant within 60 days from today's date.

COSTS

The Claimant have worked for the Respondent for a long period of time and being in retirement, I am inclined not to give costs to the Respondent. I will order each party to meet their costs.

Order accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 10TH DAY OF FEBRUARY 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 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 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