



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 86 OF 2019

TITUS VUTIYA MATSALASIA.....CLAIMANT

VERSUS

KAKAMEGA COUNTY ASSEMBLY SERVICE BOARD.....1ST RESPONDENT

THE CLERK, KAKAMEGA COUNTY ASSEMBLY2ND RESPONDENT

JUDGMENT

Introduction

1. Before court is a Memorandum of Claim dated 2nd October, 2019 and filed on 4th October, 2019. The Claimant's case against the Respondent is for a refund of reduced salary, House Allowance, Commuter allowance, unpaid salaries for the months of July and August, 2018, one month's salary in lieu of notice, compensation for unfair termination and exemplary damages.
2. The Respondent opposed the claim through a Statement of Response dated 5th November, 2019 and filed in court on 6th November, 2019.
3. The court through an order of 4th October, 2021 directed that this file be transferred to ELRC Bungoma, but the order seem not to have been implemented as the file was brought before this court for mention on 12/10/2021, as it already had been allocated a hearing date of 12th October, 2021. Parties requested for a hearing date at Kisumu since the file had not been transferred as earlier directed, and the court fixed the case for hearing on 15/11/2021.
4. The Claimant testified in support of his case, adopted his witness statement and produced his bundle of documents, which were marked as Claimant's Exhibit 1-9.
5. The Respondent presented three witnesses namely; Laban Maloba Atemba, Judith Makhoha and Esther Ariko who testified on its behalf. They all adopted their witness statements and produced various documents.
6. Both parties filed submissions in the matter.

The Claimant's Case

7. The Claimant's case is that he was employed by the Respondent on 1st July, 2013 as a Personal Assistant to the Speaker of the Assembly of the Respondent. He states that his appointment was made vide a letter dated 13th January, 2014.
8. It is the Claimant's case that the remuneration package attached to the position was a basic salary of Kshs. 77,527, a house allowance of Kshs. 40,000 and a commuter allowance of Kshs. 12,000. The Claimant avers that his salary grew to Kshs.81,416 through annual increments.
9. The Claimant states that in September, 2015, his remuneration was altered to a basic salary of Kshs. 50,590, a house allowance of Kshs. 22,334 and commuter allowance to Kshs. 8000. He avers that the alteration was made without his knowledge.
10. The Claimant states that he was not issued with a notice of termination when his contract came to the end. He further states that he did not apply for renewal of his contract.
11. The Claimant on cross examination states that he was employed on contract for 5 years and that he accepted the terms and conditions

listed in the instrument of appointment.

12. The Claimant confirmed on cross examination that he was paid beyond the term of his contract and added that he was issued with a clearance certificate. He further confirmed that he knew that his services had come to the end as his contract was tied to the term of the County Assembly.

13. The Claimant states that he personally did his clearance and avers that the County Assembly should have issued him with notice after which, he be required to clear. He states that the appointment letter issued to him did not give a procedure for exiting the service of the Respondent on expiration of his contract.

14. The Claimant further states that he worked beyond his 5-year term and that he was paid for the extra period worked.

The Respondent's Case

15. The Respondent's case is that the Claimant was their employee from 1st July, 2013 to 30th June, 2018. It is the Respondent's further case, that the Claimant was not terminated, but that his contract came to the end.

16. The Respondent's case is that the Claimant's contract was tied to the life of the County Assembly which came to the end in August, 2017. The Respondent further avers that for reason that the Claimant was a Personal Assistant to the Speaker of the County Assembly, if the Speaker had left office for whatever reason before the end of the term of the Assembly, the Claimant's contract would have also been terminated.

17. The Respondent's witness one (RW1) confirmed to the court that the Claimant's salary had indeed been reduced as stated in his claim. The Respondent further states that the reductions were made pursuant to a Circular issued by the Salaries and Remuneration Commission (SRC) on 19th November, 2014.

18. It is the Respondent's case that when devolved units came into operation, there was no clarity on the remuneration of the different cadres of employees working at the devolved governments, which necessitated that the SRC puts into place salary gradings for the different cadres, and hence the circular.

19. It is the Respondent's position that implementation of the SRC circular was a mandatory requirement of all County Assemblies as a Government directive and not just the Respondent. The Respondent further avers that the new grading and salary structure, affected all the employees in the Devolved Governments.

20. The Respondent states that the Claimant's contract terminated by effluxion of time, hence the claim for compensation for unfair termination is unfounded. The Respondent further states that the Claimant was paid all benefits due to him prior to expiry of his contract.

21. RW2 states that when a contract is fixed term, termination notices are not issued as the date on which the contract terminates is already stated in the appointment letter. She further states that termination notices are only issued when a contract is to be terminated prematurely.

22. RW2 further states that she did prepare and issue the Claimant with a certificate of service as required by law. It is her case that the Claimant's last day of work was 30th June, 2018 and the reason his clearance certificate was issued late, is for reason that he delayed to clear and the certificate can only be issued when an employee fully clears with the institution.

23. RW2 further confirmed to the court that the SRC circular subject of the salary review, was effected in September, 2015. She further confirmed not having received any complaint from the Claimant arising from the salary reductions. It is her evidence that the SRC circular affected thirty (30) employees of the Respondent.

24. It is RW3's testimony that the SRC circular was communicated to the employees of the Respondent through an internal office memorandum as well as through social media.

The Claimant's Submissions

25. It is submitted for the Claimant that the reduction and changes to his remuneration without his consent and without notice, violates the provisions of Section 10(5) of the Employment Act. It is the Claimant's further submission that no changes were made to his contract of appointment to reflect the changes.

26. It is submitted for the Claimant that he was in the service of the Respondent until August, 2018 and not 30th June, 2018, as indicated in his certificate of service. It is further submitted that the Claimant was never issued with a termination notice and that he only got to know of his termination when he did not receive his salary.

27. The Claimant submitted that his letter of appointment did not expressly provide that it is fixed term, and neither did it provide an exit clause.

28. It is further submitted for the Claimant that the appointment letter having only provided **"your employment is on a 5-year contract or up to the life time of the county assembly"** did not stipulate a definite end date and hence the Claimant could not have known that the same terminated by effluxion of time.

29. It is submitted that the Respondent did not adhere to the requirement of Sections 41, 42 and 45 of the Employment Act and hence the termination of the Claimant was unfair, and is deserving of the remedies sought.

The Respondent's Submissions

30. It is submitted for the Respondents, that although the Claimant's contract was tied to the life of the County Assembly which came to the end in August, 2017, the Respondents elected to allow the Claimant to serve until 30th June, 2018, so as to serve his entire contract terms which was five (5) years.

31. It is the Respondents' submission that the Claimant's contract being for a specified period, it was mutually understood that his engagement will cease upon expiry of his five-year term, unless renewed for a further term, but which was not the case. It was further submitted that a fixed term contract carries no expectation of renewal. They sought to rely on the holding in the case of **George Onyango v Board of Directors Numerical Machining Complex Ltd & Others (2014) eKLR** in support of this position.

32. The Respondents further submitted that the contract between the Claimant and the Respondents did not create expectation of renewal or issuance of notice, and hence distinguishing it from the holding in the case of **Ruth Gathoni Ngotho-Kariuki v The Presbyterian Church of East Africa & Another (2012) eKLR**.

33. It is submitted for the Respondents that the Claimant's services were not terminated, instead, his contract terminated by effluxion of time. It is submitted that for reason that no notice is required to terminate a fixed term contract, the Claimant does not deserve the remedies of a one month's salary in lieu of notice and compensation for unfair termination.

34. The Respondents further submitted that for reason that the Claimant's contract terminated on 30th June, 2018 through effluxion of time, he is not entitled to the salaries for the months of July and August, 2018 that he prays for.

Determination

35. I have considered the pleadings in the matter, the Parties' oral testimonies and the submissions filed herein. The issues for determination in the matter are:

- i. Whether the Claimant was unfairly terminated
- ii. Whether the Claimant deserves the remedies sought
- iii. Who bears the costs of the suit.

Whether the Claimant Was Unfairly Terminated

36. The Claimant's case is that he was terminated from the service of the Respondents without notice, reason and without a hearing. He avers that his termination is unfair and unlawful. The Respondents on their part, assert that the Claimant's contract of service was for a specified term and for this reason, they did not require to issue notice.

37. The Claimant's letter of appointment provides as follows:

"Your employment is on contract of five (5) years or up to the life term of the County Assembly." The question for this court is whether the Claimant's contract was a fixed term contract. The Black's Law Dictionary defines a fixed term as under as:-

"Lasting for a stipulated period of time."

38. The Letter of Appointment (contract of service) in issue, was to run for a specific period. It was either 5 years, or the end of the life of the County Assembly. It is common knowledge that the life of a County Assembly terminates upon a general election. This goes to say that the Claimant's contract could have terminated either on the 4th of August, 2017 when elections were held, or on 30th June, 2018, being the last day of his five-year term. The contract was for a term expressly stated in the body of the contract.

39. I find and hold that the Claimant's contract, having expressly provided the point at which it terminates, is for all intents a fixed term contract.

40. The second question then become, whether an employer requires to give notice of termination or go through the motions of an ordinary termination process to end a fixed term contract as suggested by the Claimant? To answer this question, the court is taken back to the rationale for which notice is given or is required. Section 36 of the Employment Act, 2007, provides:

"Either of the parties to a contract of service to which section 35 (5) applies, may terminate the contract without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section."

41. From the provision herein, the purpose for which termination notice is given, is so that a party to a contract of employment is not

surprised by the other's decision to end the employment relationship prematurely. The party ending the contract, pays the other party, the money they would have earned had they continued working.

42. A fixed term contract is self-executing, and for this reason, it lapses automatically. Parties already know or are expected to know, when a fixed term contract is to terminate.

43. The Claimant herein, knew, or ought to have known that his services will no longer be required either at the end of the life of the Assembly or upon completion of his five-year term. His contract was express in this respected, and in the opinion of this court, it needed not be restated. To give notice, is to tell him what he already knew. Notice is only required where the contract is not for a definite period to avoid surprises and breach of a party's legitimate expectation.

44. Ordinarily, a fixed term contract being for a definite period, does not carry expectation of renewal except in very limited circumstances. **(See Mombasa Apparel (EPZ) Limited v Tailor and Textiles Workers Union (2006) eKLR)**. The Claimant's contract did not, either expressly or by implication, suggest the possibility of a renewal, and the claimant confirmed that he did not request for the renewal of his contract.

45. The Claimant herein was a Personal Assistant to the Speaker of the county Assembly, who the court was told, had already left office in the period under which the Claimant claims. He clearly had no work to do; the Speaker was his work.

46. I find and hold that the Claimant's contract having been determined to have been a fixed term contract, terminated automatically at the expiry of its five years term. The Respondents did not require to issue the Claimant with notice of termination.

47. The Claimant's further case is that he was unfairly terminated for not having been given a hearing and reasons for the termination contrary to Sections 41 and 43 of the Employment Act, 2007. The Respondents deny terminating the Claimant and assert that his employ lapsed by effluxion of time.

48. Section 41 of the Employment Act provides as follows in regard to hearing prior to termination:

“(1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity (emphasis mine) explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

49. The procedure in Section 41, is intended for employees for whom termination is being considered on grounds of misconduct, poor performance or physical incapacity. The procedure is not applicable to employees separating with an employer on the basis of expiry of contract.

50. Likewise, Section 43 of the Employment Act provides thus:

“.... The employer must prove the reasons for termination/dismissal...” The Claimant was not undergoing a disciplinary process, and hence the employer had no obligation to give any reasons. The Claimant's contract ended and that was the only reason informing the separation.

51. The Court finds and holds that the termination of the Claimant was neither unlawful nor unfair. the Claimant's contract lapsed by effluxion of time. He was not terminated.

Whether the Claimant is entitled to the Reliefs Sought

52. The Claimant has sought the following reliefs:

- i. a refund of reduced salary;
- ii. House Allowance;
- iii. Commuter allowance;
- iv. unpaid salaries for the months of July and August, 2018;
- v. one month's salary in lieu of notice;
- vi. compensation for unfair termination; and
- vii. exemplary damages.

Reduced Salaries, House Allowance and Commuter Allowance

53. The Claimant's assertion is that his basic salary, house allowance and commuter allowance at the point of employment was of Kshs. 77,527, 40,000 and 12,000 respectively. It is his case that in September, 2015, his remuneration was altered to a basic salary of Kshs. 50,590, a house allowance of Kshs. 22,334 and commuter allowance to Kshs. 8000. He avers that the alteration was made without his knowledge.

54. The Respondents confirmed the downward review of the Claimant's remuneration, and attributed it to a circular issued by the Salaries and Remuneration Commission, and which they stated was a mandatory government directive that had to be implemented.

55. The Circular *Ref.SRC/TS/TA/3/10(86)* dated 19th November,2014, has been produced in evidence before court. It is addressed to All County Secretaries, All Secretaries, County Public Service Boards and all Secretaries, County Assembly Service Boards. Although the subject of the circular is "**Annual Leave Allowance for State Officers and Other Public Officers Serving at the County Government.**", the job group for Personal Assistant, Officer 1, is indicated in the circular, as Job group M. The job group is an indicator of the point in the salary scale that the Claimant falls under.

56. The Constitutional mandate of SRC per Article 230(1), is to set and regularly review the remuneration and benefits of all State Officer and to advise the national and county governments on the remuneration and benefits of all other Public Officers. The Court of Appeal in the case of *Teachers Service Commission v Kenya National Union of Teachers, Civil Appeal No. 196 of 2015* stated as follows in regard to the advice by SRC:-

" if the word 'advise' in Article 230(4)(b), is construed to be not binding, the country will be returned to the pre-Constitution 2010 era which would defeat the purposes, values and principles of the Constitution and of the institutionalization of the SRC under the Constitution. It is conceivable and indeed inevitable that many employers in the public sector would defy SRC advice leading to unimaginable financial crisis in the management of the national wage bill...I hold that the advice of SRC under Article 230(4)(b) on remuneration and benefits of all public officers is binding on national and county governments and any power or function exercised without that power is invalid....."

57. The Respondents told this court that the reason the Claimant was paid higher than he was being paid after September, 2015, is that the county governments having come into being for the first time in 2013, the SRC had not by then given an advisory on the remuneration and benefits applicable to employees in the county government, and the coming into effect of the advisory necessitated the changes.

58. The Court notes that the Claimant was not the only employee affected by the review and cannot thus claim discrimination.

59. I find and hold that the SRC having issued an advisory on the job groups, left the Respondent no latitude to retain the Claimant in his previous salary scale/job group. The Claims for reduced salaries, house allowances and commuter allowance, are without merit and are dismissed.

Unpaid salaries for the months of July and August, 2018

60. The Claimant's Contract has been found to have been fixed term, terminating on 30th June, 2018. The fact that the Claimant continued working after the end of the life of the County Assembly, does not in itself justify payment beyond his contract period, which according to the evidence before court, was to end on 30th June, 2018.

61. The salaries earned after 4th August, 2017 when the life of the Assembly ended, was still within the term of his contract and cannot be construed to have given him legitimate expectation to continue in the service of the Respondent after his five-year term. The claim fails and is dismissed.

One month's salary in lieu of notice, compensation for unfair termination; and exemplary damages.

62. The contract subject herein, being a fixed term, terminated by effluxion of time. Notice has been held to be unnecessary in the circumstances and therefor, the Claimant's claim for one month's salary in lieu of notice has no basis and is dismissed.

63. The Claimant's assertion that he was unfairly terminated, has failed in light of the foregoing reasons and decision of this court. It follows that the claims for compensation for unfair termination and exemplary damages, shall suffer the same fate. They fail, and are dismissed.

64. In whole, the Claimant's suit is dismissed in its entirety.

65. The Respondents shall have the costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 10TH DAY OF FEBRUARY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

N/A for the Claimant

Mr. Maondo h/b for Mr. Mulanya for the Respondent

Christine Omollo- C/A