



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NUMBER 352 OF 2015

ZAPHANIA YORE BISIERI.....CLAIMANT

VERSUS

EASTERN PROCUDE (K) LTD.....RESPONDENT

JUDGMENT.

Introduction.

1. The Claimant's suit is carried in a Memorandum of Claim dated 17th August, 2015, and filed on 24th September, 2015. The Claimant seeks a declaration that his termination is unfair, and subsequently payment of 12 months' salary as compensation for unfair termination, one month's salary in lieu of notice, unpaid leave, service pay and the costs of the suit.
2. The Respondent entered appearance on 14th October, 2015, and filed a response to the Claimant's claim on even date through the Firm of **Kibichy & Co. Advocates.**
3. During the hearing, the Claimant testified in support of his case, he adopted his witness statement and produced a bundle of documents filed in the matter. The Respondent presented one **Mr. Emmanuel Masika**, a supervisor in the Respondent's Company to testify on her behalf.
4. Both parties filed submissions in the matter.

The Claimant's Case

5. The Claimant's case is that he was employed by the Respondent in 1981. He states that he was not given a contract or letter of appointment.
6. The Claimant states that he was employed on permanent and pensionable terms of service after completing three months in the service of the Respondent.
7. It is the Claimant's case that he was terminated on 7th December, 2014. He avers that his union was not informed of the intension to terminate his services, and nor was he accorded an opportunity to be heard prior to the termination.
8. On cross examination, the Claimant stated that he was employed on short term contracts which were renewed when they expired. He further states that he did not have a copy of his contract of service because they were kept at the Respondent's offices.
9. It is the Claimant's case that at about 1 O'clock, on the day he was terminated, he was asked to vacate the Respondent's premises and hand over properties in his possession that belonged to the Respondent.
10. The Claimant states that he was not issued with a termination letter upon his termination. The Claimant further states that he filed suit against the Respondent in the year 2013, but continued working for the Respondent
11. It is the Claimant's further testimony on cross-examination, that he had a contract that lapsed on 31st December, 2014. He further states that he was told verbally by his supervisor that his contract was to come to the end in two months' time.

The Respondent's Case

12. The Respondent's case is that the Claimant was their employee under a fixed term contract commencing on 27th October, 2014 to 31st December, 2014. It is the Respondent's case that the contract between her and the Claimant, was duly executed by both parties and that the claimant was fully aware of when his contract was to lapse.

13. It is the Respondent's case that the Claimant absconded duty and that she waited for his term to lapse as per his contract, and declined to renew the same as a result of the Claimant's absconding duty.

14. It is the Respondent's case that their employees were always paid for leave when due, and therefore the Claimant was no exception.

15. It is the Respondent's case that the Claimant was notified of when his contract was to come to the end. It is the Respondent's further case that the Claimant only completed two months of his contract and when the three months contract lapsed, the Claimant's contract was not renewed.

16. The Respondent avers that her employees were all put on fixed term contracts which were renewed depending on the availability of work, especially during the tea picking season.

17. On cross-examination, the Respondent's witness stated that the Claimant could have been employed by the Respondent earlier than indicated in his contract. He states that he did not know the claimant and only got to know him on 27th October, 2014, when he went to him to ask for a job.

The Claimant's Submissions

18. It is submitted that the Claimant was a casual worker at the Respondent's company from the year 2009 to 7th December, 2014, when he was terminated.

19. It is submitted for the claimant that the documents produced in evidence by the Respondent as a fixed term contract and the termination notice, is a fraudulent scheme to defeat the Claimant's claim. It is further submitted that the Claimant's contract is deemed a term contract per Section 37 of the Employment Act for reason that he was engaged as a casual labourer from 2009 to 2014.

20. It is submitted that the Claimant's termination was procedurally unlawful as the same was based on the suit he filed against the Respondent for injuries sustained at the work place.

The Respondent's Submissions

21. It is the Respondent's submission that the Claimant was employed on various fixed term contracts, the last being the one terminating on 31/12/2014. It is the Respondent's submission that the Claimant should not be allowed to disown a contract of service duly signed by him in a bid to unduly claim unwarranted damages.

22. It is submitted for the Respondent that the Claimant has not established a case against the Respondent. The Respondent further submitted that no evidence has been tendered to show that she was under obligation to renew the claimant's contract. The Respondent cited the case of *Isaiah Makhola V Basco Products Ltd (2014) eKLR* where *Justice Radido* held that where a fixed contract term is involved, and in the absence of any agreement to renew, it did not amount to unfair termination.

23. It is the Respondent's submission that the Claimant has not proved any of the claims as is required by law. It is further submitted that the Claimant was aware that his contract was to lapse and hence did not required to be given termination notice, but nonetheless, he was issued with the notice, and which he signed for. She sought to rely on the court decision in *Theuri v Kadet Limited (Industrial Cause No. 368 of 2009)*, where the court held that termination of an employee on a fixed term contract would not benefit notice pay as he was aware that the contract had come to an end, and there was no legitimate expectation of renewal of the contract.

24. It is further submitted for the Respondent that the claim for leave pay is not merited as the claimant did not specify the period in respect of which the leave pay is sought. The Respondent further submitted that the Claimant was registered under the National Social Security Fund (NSSF), hence not entitled to service pay. The Respondent sought to rely on the holding in *Philip Waweru Gitu v Straight Security Services Limited (2009) eKLR*, where the court emphasized that an employee who is a member of the NSSF as evidenced by his pay slip, is not entitled to service pay.

Analysis and Determination

25. I have considered the pleading, the parties' oral testimonies and the submissions filed in the matter. The issues that call for determination are:

- i. Whether the Claimant was unfairly terminated; and
- ii. Whether the Claimant is deserving of the remedies sought

Whether the Claimant was unfairly terminated

26. The question of fairness or lack thereof, is one that is deduced from the procedure the employer adopts when effecting a termination, and the substantive justification of the termination, whose building blocks are mainly the reasons as to why the employer arrived at the decision

to terminate.

27. The Claimant's case is that he was employed on permanent basis from the year 1981. The Respondent on her part stated that the Claimant was on a three months' fixed term contract from 27th October, 2014 to 31st December, 2014. The Claimant admitted on cross-examination, that he was put on short term fixed contracts and which were renewed from time to time.

28. During the hearing, it became apparent to this court that the Claimant did not know the nature of his contract with the Respondent. At one point, he told the court that he was a permanent employee of the Respondent having been confirmed after three months of service, at cross-examination, he admitted having been on a fixed term contract and lastly, his counsel submitted that he was actually a casual labourer whose contract ought to be deemed to have been a term contract due to the duration for which he was in casual service.

29. The Claimant disowned the contract produced in evidence by the Respondent. This leaves the court at a cross-road as to what the employment relationship between the parties herein really was.

30. The Respondent's witness (RW1) admitted that the Claimant could have worked for the Respondent earlier than 2014, when the last contract was executed. The pay slips indicate payment to be based on the quantity of tea picked in a given month. The Claimant did not have a constant monthly pay.

31. The Claimant claimed to belong to a union which was not notified of the intention to terminate his services. The Claimant did not produce a CBA between his union and the Respondent which in my view, would have clearly indicated to this court the nature of the employment relationship between the parties and the terms and conditions of his employment.

32. In the absence of contrary evidence, I will deem the Claimant to have been on a renewable fixed term contract, premised on the contract produced in evidence before this court.

33. The next issue then become whether or not the Claimant was fairly terminated from the service of the Respondent. The Respondent told this court that the Claimant was notified that his contract was to lapse on 31/12/2014. The Claimant admitted in his testimony before this court that he was indeed informed that his contract was to lapse two months from the time of the notice.

34. Having determined that the Claimant's was a fixed term contract, the issue become whether the separation amounted to a termination of the Claimant. In *Mombasa Apparels (EPZ) Limited v Tailor and Textiles Workers Union (2016) eKLR*, it was held that fixed term contracts are meant to lapse automatically unless parties mutually agree to extend them, and that there is no legitimate expectation for an employee under a fixed term contract that he would continue serving after the expiry of the contract.

35. A fixed term contract is given for a definite period and does not ordinarily imply automatic renewal, as an automatic renewal would undermine the essence for which the contract period was defined in the very first place. Courts have however held that a fixed term contract may have conditions for renewal at the discretion of the parties. The renewal in such a scenario, would be subject to the terms agreed by the parties in the contract (*See Wilberforce Ojiambo Oundo v Regent Management Limited ELRC Cause No. 200 of 2011*)

36. In the circumstance, I find and hold that the employment relationship between the parties herein was fixed term, and that the same ended automatically on the day the contract lapsed (31.12.2014) and did not require either termination notice, nor carry legitimate expectation for renewal.

Whether the Claimant is deserving of the remedies sought

37. The Claimant sought the following reliefs:

- i. A declaration that his termination is unfair,
- ii. Payment of 12 months' salary as compensation for unfair termination
- iii. One month's salary in lieu of notice
- iv. Unpaid leave dues,
- v. Service pay;
- vi. Costs of the suit.

Payment of 12 months' Salary as compensation for unfair termination

38. The Claimant was not terminated. His contract lapsed. This prayer would only hold where the court makes a declaration of unfair termination. The claim fails and is dismissed.

One month's salary in lieu of notice

39. Common practice is that an employee in a fixed term contract is not, or ought not to be given termination notice as his contract is for a

definite period, and is aware of the time the contract would lapse. The Claimant herein was in a renewable fixed term contract, which in my view, would require or entitle the Claimant to notice in the event of non-renewal of the contract.

40. The evidence before court is that the Claimant was informed of the non-renewal, and thus the lapse of his contract did not take him by surprise.

41. I find and hold that the Claimant was aware of the actual date when his contract would end, and that having worked during the notice period, he is not entitled to pay in lieu of notice. The claim fails and is dismissed.

Unpaid leave dues

42. The Claimant did not indicate how many days of leave he had earned in total so as to enable the court make an award in this respect. For this reason, the claim fails and is dismissed.

Service Pay

43. As correctly submitted by the Respondent, the Claimant admitted being registered with the NSSF, and further that deductions were made in this respect as shown by the pay slips produced in evidence by both parties. In the case of *Philip Waweru Gitu v Straight Security Services Limited (2009) eKLR* cited by the Respondent, the court emphasized that an employee who is a member of the NSSF as evidenced by his pay slip, is not entitled to service pay.

44. The Claimant having been a member of NSSF is not entitled to service pay per Section 35(6)(d) of the Employment Act, 2007. The claim is dismissed.

45. In whole, the Claimant's Memorandum of Claim dated 17th August, 2015, and filed on 24th September, 2015, is dismissed with no orders as to costs.

46. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 17TH DAY OF MARCH, 2022.

CHRISTINE N. BAARI

JUDGE

APPEARANCE:

MR. CHEPKWONY PRESENT FOR THE CLAIMANT

MR. OSEWE PRESENT FOR THE RESPONDENT

MS. CHRISTINE OMOLLO - C/A