



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 133 OF 2014

MARK OTIENO OKAKA.....CLAIMANT

VERSUS

CHAIRMAN SECRETARY, BOARD OF GOVERNORS,

HUMA SECONDARY SCHOOL.....RESPONDENT

JUDGMENT

1. Mark Otieno Okaka (the Claimant) was employed as a driver in 2005 by the Board of Governors, Huma Secondary School (the Respondent).
2. On 25 October 2011, the Respondent issued a show-cause notice to the Claimant and asked him to respond within a week to the allegations of insubordination.
3. The Claimant responded on 8 November 2011, and on 24 November 2011, he was invited to appear before the Board for a disciplinary hearing on 2 December 2011.
4. The hearing did not occur, and the Claimant was requested to appear for the hearing on 23 January 2012.
5. The Claimant appeared and was instructed to bring a copy of his original letter of employment during the hearing.
6. The Claimant did not present the letter, and on 10 February 2012, he was issued with a new show-cause notice to submit the letter within two weeks.
7. The Claimant did not comply with the request, and on 8 March 2013, he was notified that his contract had lapsed on 2 January 2012.
8. On 12 June 2014, the Claimant sued the Respondent alleging unfair termination of employment and breach of contract.
9. The Respondent filed a Response on 5 May 2015, and on 24 June 2015, the Claimant filed an Amended Statement of Claim.
10. Consequently, the Respondent filed an Amended Statement of Defence on 8 July 2015.
11. The Cause was heard on 22 March 2017 and 6 December 2021. The Claimant and three witnesses called by the Respondent testified.
12. The Claimant filed his submissions on 27 January 2022, while the Respondent filed its submissions on 17 February 2022.
13. The Court has considered the pleadings, evidence, and submissions and has adopted the Issues for adjudication as set out in the parties' submissions.

Nature of contract

14. The Claimant asserted that he was employed on permanent and pensionable terms.
15. The Claimant produced a copy of a contract dated 2 February 2005. It did not set out the duration of the contract (the Respondent

questioned the authenticity of the document and requested the Claimant to produce the original).

16. Apart from the letter of employment, the Claimant produced a copy of a letter dated 2 January 2010 indicating that his contract had been renewed and run from 2 January 2010 to 2 January 2012.

17. The Claimant also produced a copy of a letter dated 3 November 2010 from the Respondent addressed to Equity Bank Ltd. The letter indicated that he was on a contract lapsing on 2 January 2012.

18. On the basis of the records produced by the Claimant, the Court finds that it is more probable that the Claimant was on a fixed-term contract(s) expiring on 2 January 2012, and that since there was no formal renewal after that date, he was on monthly contracts since he was being paid by the month.

Unfair termination of the contract

19. In the Statement of Claim and the witness statement adopted as part of the evidence, the Claimant stated that he was dismissed on 25 October 2011. The same narrative was maintained in the Amended Statement of Claim.

20. Section 47(5) of the Employment Act, 2007 places a burden on a Claimant to demonstrate at the first instance that an unfair termination of employment occurred before the Respondent is called upon to justify the termination of employment as valid and fair.

21. The records and evidence before the Court is that the Respondent issued a show-cause notice to the Claimant on 25 October 2011. The Claimant responded to the show-cause on 8 November 2011.

22. The Claimant then appeared before the Respondent on 23 January 2012. He confirmed during oral testimony that when asked whether he was still an employee of the Respondent, he confirmed the same.

23. Later on, during examination-in-chief, the Claimant stated that he was dismissed on 8 February 2013.

24. With the inconsistent pleadings and evidence, the Court finds that the Claimant did not discharge the burden expected of him.

25. If the Court is wrong on that conclusion, the Court is still of the view that the Respondent offered the Claimant an opportunity to be heard by serving him with a show-cause setting out the allegations to respond to and affording him an opportunity to respond in writing and orally as contemplated by section 41 of the Employment Act, 2007.

26. On the validity and fairness of the reasons, it is not in dispute that the Claimant was requested to produce a copy of his original letter of appointment, but he did not.

27. During oral testimony, the Claimant stated that he declined to present the original appointment letter because he feared it would not be returned to him.

28. The Claimant did not explain the basis of the fear. The Respondent had expressed misgivings about the authenticity of the copy of the contract and requested for the original contract to confirm the terms.

29. The Claimant had asserted that his contract was open-ended. At the same time, he had records showing he was on fixed-term contracts. The Respondent's misgivings, therefore, had a good foundation.

30. When the Claimant failed to present the original contract, the Respondent informed him that his contract had lapsed.

31. Since the Claimant's documents filed in Court show that he was on a fixed-term contract, the Court cannot find in favour of the Claimant that there was unfair termination of employment.

32. Compensation, damages, and pay in lieu of notice are therefore not available as remedies to the Claimant.

Breach of contract

Underpayments

33. The Claimant contended that he was paid below the wages set out in a collective bargaining agreement between the Kenya Union of Domestic, Hotels and Educational Institutions and Allied Workers and the Respondent. A copy of the agreement was not produced in Court.

34. Instead, the Claimant produced a copy of a letter dated 22 December 2008 from the Union. Without the collective bargaining agreement or Circular from the Ministry of Education, the letter from the Union is of little or no probative value.

35. The Claimant also attempted to rely on a Circular dated 25 June 2012 from the office of the Prime Minister. The Circular was advising on the alignment of salaries for *civil servants*. At the material time, *civil servants* were employees under the ambit of the Public Service Commission.

36. The Claimant did not demonstrate that the Circular applied in his case or that he was a *civil servant*.

Gratuity

37. The Claimant did not produce a copy of any contract or agreement to support the head of the claim for gratuity and relief is declined.

Leave allowance

38. The Employment Act, 2007 does not provide for the payment of leave allowance. It provides for annual leave with full pay. The Claimant filed copies of leave records showing he used to go on annual vacation.

39. The Court finds that the Claimant did not prove that he was entitled to leave allowance.

House allowance

40. Although seeking house allowance, copies of salary slips filed in Court by the Claimant indicate he was earning house allowance. Relief is declined.

Conclusion and Orders

41. From the foregoing, the Court finds no merit in the Cause, and it is dismissed with costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 16th day of March 2022.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant Wasuna & Co. Advocates

For Respondent Amondi & Co. advocates

Court Assistant Chrispo Aura