



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1109 OF 2017

(Before Hon. Justice Dr. Jacob Gakeri)

JACKSON KANIGIA MYAGAH.....CLAIMANT

VERSUS

UNIVERSITY OF NAIROBI.....RESPONDENT

JUDGMENT

1. The Claimant initiated this claim by a statement of claim dated 16th June 2017 filed on the same day claiming that the Respondent terminated his contract of employment prematurely.

2. The Claimant prays for:

- (a) *A declaration that the Claimant is entitled to the payment of the remaining part of the contract.*
- (b) *Certificate of Service.*
- (c) *A declaration that the Claimant was underpaid and he is entitled to the balance of the under payment.*
- (d) *Gratuity for the period worked.*
- (e) *Costs of this suit.*
- (f) *Interest on (a), (c) and (d) above at present court rates.*

3. The Claimant's case is pleaded as follows:

4. On or about 14th January 2008 the Respondent employed the Claimant as a technologist Grade II based at the Kenya Science Campus on one (1) year renewable contract at a gross salary of Kshs.28,382/= comprising:

§ Basic Salary..... Kshs.11,582/=

§ House Allowance..... Kshs.6,800/=

§ Commuter Allowance..... Kshs.10,000/=

§ That he was entitled to 27 days annual leave.

5. That the Respondent renewed the contract regularly with the last one effective 16th January 2016 for one years as follows:

§ Basic Salary..... Kshs.19,019/=

§ House Allowance..... Kshs.11,348/=

§ Transport Allowance..... KSHS.13,300/=

Total..... Kshs.43,667/=

6. It is further averred that on 4th March 2016 the Respondent terminated the contract of employment permanently as it was scheduled to lapse on 31st October 2016.

7. The Claimant's witness statement dated 16th June 2017 is a summary of the statement of claim.

Respondent's Case

8. The Respondent filed a Memorandum of Response on 1st November 2017 by which it denied the contents of paragraph 3 of the statement of claim on the Claimant's monthly pay and leave. It also denies the contents of paragraph 4, 5, 6, 9 and 10 of the statement of claim.

9. The Respondent avers that the Claimant was not terminated from service prematurely but had in fact attained retirement age as provided by the terms of service and was thus not entitled to any salary arrears and benefits since his service to the Respondent came to an end by virtue of retirement on 4th March 2016.

10. The Respondent contends that the suit is scandalous, frivolous, vexatious and discloses no reasonable cause of action in law and should be dismissed with costs.

11. When the suit came up for hearing on 29th November 2021 parties agreed to adopt the documents on record and file written submissions but remained non-compliant until 3rd February 2022.

12. RW1, **Harrison S. Akalla**, a Senior Assistant Registrar testified that the Claimant was employed as a Trainee Technologist – Grade II, Department of Service Workshop on 16th January 2008 for a one (1) year at a salary of Kshs.7,590/=, house allowance Kshs.5,887/= and transport allowance Kshs.1,500/=. The contract was renewed on 1st September 2008 on similar terms. The last renewal took effect on 1st November 2015. It was the witness's testimony that the Claimant had attained retirement age and was serving under a post retirement contract of employment.

13. That circular reference OP/CAB2/7A dated 14th February 2014 on retention of officers in service beyond mandatory retirement age was issued to the Respondent's Council for compliance. The witness does not state what the circular required the Respondent's Council to do and when.

14. The witness states that the Claimant was not prematurely terminated from service but attained retirement age in line with his terms of service and is not entitled to any salary arrears as his services came to an end on 4th March 2016 when the Claimant "*was duly and lawfully retired.*"

15. An identical statement had been recorded earlier by Mr. Peter Mwai Muturi Acting Registrar – Administration Office. Documentary evidence on record show that the Claimant was first employed by the Respondent effective 18th January 2008 on the terms given by the Respondent. The contract was renewed for a further one (1) year from 1st November 2008 to 31st October 2009 and successively renewed. The last renewal was effective 1st November 2015 to 31st October 2016.

16. On 4th October 2014 the Claimant was issued with a warning letter for misconduct. The Claimant was terminated on 4th March 2016.

Claimant's Submissions

17. The Claimant submits that he worked for the Respondent for 8 years and doubts the existence of Circular Ref. OP/CAB2/7A as no copy was availed in the court. That it was the Respondent's duty to avail the circular as he who alleges must prove. It is submitted that the Claimant has proved his case by demonstrating that his contract of employment was terminated before the due date ostensibly on the basis of non-existent circular. That the respondent led no evidence of compliance with the requisite procedure and was therefore entitled to payment for the remainder of the contract for the unfair termination of employment. The Claimant relies on the decisions in **Josephine Mwendu v University of Nairobi [2021] eKLR, Ignas Karingo Mghona & 4 others v Star of Hope International Foundation Cause Number 236 of 2013** as well as **Legal Notice No. 63 dated 10th June 2011**.

Respondent's Submissions

18. The Respondent identifies two issues for determination, namely, whether:

- i. The Claimant's services were terminated prematurely;
- ii. The Claimant is entitled to the reliefs sought.

19. As regards termination, the Respondent relies on Sections 43 and 45 of the Employment Act, 2007. The Respondent submits that it

was constrained to terminate the Claimant's contract of employment on 4th March 2016 pursuant to a government directive in Circular Ref. OP/CAB2/7A dated 14th February 2014. It is submitted that the circular directed the Respondent to terminate post retirement contracts. That the respondent was bound to comply with the circular. The Court of Appeal decision in **Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike [2017] eKLR** is relied upon on the import of Section 43 of the Employment Act on the reason(s) for termination.

20. The Respondent submits that it has demonstrated that it had a valid and fair reason as required by Section 43 of the Employment Act and failure to terminate the Claimant would have been irregular and /or illegal contract.

21. As regards reliefs, it is submitted that the Claimant is not entitled to a declaration of entitlement to payment for the remainder of the contract since the termination was not unfair.

22. The Respondent contends that for special damages to be awarded, they must not only be pleaded but must also be proved. The decision in **Gulthamed Mohamedali Jivanji t/a Jivanji Agencies v Sanyo Electrical Company Ltd [2003] eKLR** is relied upon to reinforce the submission as is the decision in **John Richard Okuku Oloo v South Nyanza Sugar Co Ltd [2013] eKLR**. The Respondent states that the certificate of service is ready for collection.

23. Finally, the Respondent contends that the Claimant is not entitled to gratuity as the letter of appointment had not provided for it.

Analysis and determination

24. From the pleadings, evidence, submissions and the law, the issues for determination are whether:

- i. Termination of the Claimant's contract of employment was unfair.
- ii. The Claimant is entitled to the reliefs sought.

25. As to whether the termination of the Claimant's contract of Employment was unfair, regard is had to the provisions of the Employment Act specifically section 45(2), 43, 47(5) and 41 which provides the statutory framework on termination of employment contracts. Section 45 leads the pack by declaring that:

(1) No employer shall terminate the employment of an employee unfairly.

26. For a termination to pass the fairness test, the employer must prove that it had a valid and fair reason to terminate the employment contract and conducted the termination fairly.

27. Section 43 of the Employment Act, underscores the duty of the employer to prove the reason(s) for termination and justify the grounds for the termination.

28. In a nutshell for a termination of employment to pass as fair, the employer must demonstrate that there was a substantive justification for the termination and it was procedurally fair. See **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR**, **Naima Khamis v Oxford University Press (E.A) Ltd [2017] eKLR** as well as **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**.

29. I will now proceed to apply the foregoing provisions and propositions of law to the facts of the instant case.

30. It is not in dispute that the Claimant was an employee of the Respondent from 18th January 2008 until 4th March 2016 when his employment was terminated by the Respondent ostensibly pursuant to circular OP/CAB2/7A dated 14th February 2014 which the Respondent contends had to be complied with.

31. It is also not in dispute that the Claimant served under one (1) year contract extended from time to time with no change of other terms of employment. Apart from the 1st contract all subsequent renewals were at the instigation of the Claimant in writing.

32. It is also common ground that the Respondent terminated the Claimant's employment contract on 4th March 2016 by letter of even date which stated *inter alia*;

“On behalf of the University of Nairobi Council and further to the circular reference OP/CAB2/7A dated February 14th 2014, on retention in service of officers beyond the mandatory retirement age. It is now the directive of the Council that the circular be fully and firmly complied with.

Consequently, and in compliance with the Government's directive, and reference to the terms of service under which you were serving, the post retirement contract of employment has been terminated with immediate effect.

You will be paid your dues in lieu of notice upon successful handover of all functions of your office to your Head of Department.”

33. It is noteworthy that the Respondent did not avail a copy of the circular for perusal by the court. Relatedly, the circular in question is

dated 14th February 2014. The Respondent was undoubtedly aware of its existence when it renewed the Claimant's contract of employment in 2015. The letter is explicit that the Respondent is aware that its action is unfair which explains the undertaking to pay "dues, in lieu of notice."

34. Puzzlingly, in its evidence, the Respondent stated that the "the Claimant was not prematurely terminated from the service of the Respondent but he attained the age of retirement which was in line with the terms of service."

35. Previously, the Respondent testified that "the Claimant had attained the retirement age and was serving the Respondent under a post retirement contract of employment."

36. The contradiction of the foregoing statements is apparent. On what ground(s) was the Claimant's employment terminated by the Respondent? Was it attainment of retirement age, the alleged Government circular or some undisclosed reason?

37. With regard to Circular Ref. OP/CAB2/7A dated 14th February 2014, the Respondent did not furnish a copy for perusal by the Court as mentioned elsewhere in this judgment.

38. Secondly, it is a 2014 circular and the Claimant last renewal of contract came into existence long after the circular. Thirdly, the contract dated 16th January 2008 had no provision on retirement as it was a post retirement appointment. Finally, the letter of termination makes reference to a directive of the University Council "that the circular be fully and firmly complied with."

39. Instinctively, the Respondent did not furnish the court with a copy of the directive of Council or minutes on how the directive was to be implemented since Council must have been aware of the currency of post-retirement contracts it had entered into which were legally binding agreements between the Respondent and its employees.

40. In the absence of a copy of Circular Ref. OP/CAB 2/7A dated 11th February 2014 or the directive of the Council or minutes, the court is satisfied that the Respondent has on a balance of probabilities failed to demonstrate that it had a valid and fair reason to terminate the Claimant's employment.

41. The Respondent's submission that refusal or failure to terminate the Claimant's employment contract would have rendered the Claimant's contract of employment irregular and or illegal for the remaining period is intriguing for various reasons.

42. First, a government circular cannot amend or alter or overturn statutory provisions nor can it render a contract illegal analogous to a change in law. Second, government circulars are by their nature not designed to be disruptive but facilitative and accommodative particularly in relation to existing arrangements. Finally, as a legal person, the Government is obligated to act in accordance with the law and a public institution cannot escape contractual liability by hiding behind a circular. In the absence of the circular, this Court is not persuaded that the circular required the University and other recipients to implement its contents irrespective of the consequences arising therefrom.

43. In any case, the Respondent had existing contractual obligations, it was obligated to honour and cannot escape for the consequences of its actions otherwise than for lawful cause.

44. For the foregoing reasons, it is the finding of the court that the Respondent had no substantive justification to terminate the Claimant's contract of employment on 4th March 2016 as required by Sections 45 and 47(5) of the Employment Act.

Procedure

45. Section 45(2)(c) of the Employment Act provides that termination of employment must be conducted in accordance with a fair procedure. Section 41 on the other hand sets out the procedural aspects of the termination. These procedural requirements have been aptly captured in legions of decisions of the Court of Appeal and this Court as was the case in **Loice Otieno v Kenya Commercial Bank Ltd [2013] eKLR**.

46. It is not in dispute that the Respondent did not take the Claimant through any form of hearing. This is evident from the evidence on record and the letter of termination which is unequivocal that:

"Consequently, and in compliance with the Government's directive and Terms of Service under which you were serving, the post retirement contract of employment has been terminated with immediate effect."

47. It is clear that the Claimant's employment contract was terminated without notice or compliance with the provisions of Section 41 of the Employment Act. The blatant manner in which the Respondent terminated the Claimant's contract apparently in the name of compliance with a circular released more than two (2) years earlier is confounding.

48. For the foregoing reasons, the court is satisfied that the Claimant has on a balance of probabilities established that termination of his employment contract by the Respondent was unfair and unlawful.

49. Having found that the Respondent terminated the Claimant's contract of employment without a valid and fair reason and without compliance with the procedure prescribed by the provisions of the Employment Act, 2007. I now proceed to determine the reliefs available to the Claimant.

(a) A declaration that the Claimant is entitled to the amount of the remaining part of the contract

50. This is a claim for anticipatory benefits or earnings which courts have been reluctant to award in employment contracts as exemplified by the decisions in **Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR**, **Engineer Francis N. Gachuri v Energy Regulatory Commission [2013] eKLR** as well as **D. K. Njagi Marete v Teachers Service Commission [2020] eKLR**. In the latter case, the Court of Appeal stated as follows:

“Thus, it is clear to us that the claim for anticipatory benefits was not anchored in law, and we therefore decline to review the judgement of the trial court on these terms.”

51. The court in agreement with these sentiments and the decisions arrived at in these cases. These decisions appear to be based on persons employed on permanent and pensionable terms and whose contracts of employment provided for a method of termination at the instance of either party.

52. The instant case relates to a one (1) year contract with no termination clause. The Claimant’s entitlements under the contract were as follows:

- i) Salary per month
- ii) House Allowance
- iii) Transport Allowance
- iv) 27 days annual leave
- v) Outpatient medical facilities at the University Health Services.

53. The letter dated 16th January 2008 was categorical that *“No other benefits are attached to this appointment.”*

54. The contract, though renewed regularly at the instigation of the Claimant had no renewal clause. Paragraph 3 of the appointment letter dated 7th August 2015 (last appointment) states that *“please note that all your leave days should be exhausted within the appointment period.”*

55. Read in its entirety, the one (1) year contracts of employment entered into by the Claimant and the Respondent were strictly for one (1) year and the Claimant must have anticipated that he would remain in employment until 31st March 2016.

56. The Claimant had a reasonable expectation that he would be in employment till the end of the contract as the Respondent had routinely done since 2008. See **Donas Lombom & 7 others v Civicon Limited [2016] eKLR**.

57. For the above reasons, the court is satisfied that the Claimant has on a balance of probabilities demonstrated that he is entitled to payment for the remainder of the contract.

(b) Certificate of Service

58. Claimant is entitled to a certificate of service for the duration served as by dint of Section 51(1) of the Employment Act, 2007.

(c) A declaration that the claimant was underpaid and is entitled to the balance of the underpayment.

59. The Claimant tendered no evidence of underpayment and when it occurred. There is no tabulation of the Claimant’s salary vis-à-vis the minimum salary as prescribed by the Regulation of Wages Orders and how much is due. This is a claim for special damages which must not only be pleaded but proved as well. Although the underpayment is pleaded without any particulars it is not proved.

60. In **Coast Bus Service Ltd v Sisco E. Murunga Ndanyi and 2 others: Nairobi C.A. No. 192 of 1992 (U.R.)** the Court stated that:

*“It is now trite that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required we could cite those of **Kampala City Council v Nakaye (1972) EA 446**, **Peter Mark Gershom Ouma v Nairobi City Council [1976] eKLR** and the latest decision of this Court on this point which appears to be **Eldama Ravine Distributors Limited and another v Chebon Civil Appeal Number 22 of 1991 (UR)**.*

In the latest case, Cockar JA who dealt with the issue of special damages said in his judgement:

“It has time and again been held by the court in Kenya that a claim for each particular type of special damage must be pleaded ...”

61. From the pleadings and the documents relied upon by the Claimant as evidence of underpayment dated 18th March 2015, it is unclear when the underpayment of the Claimant commenced or whether the Respondent acted on the letter from the Ministry of Labour, Social

Security and Services. The claim lacks the certainty and particularity required in a claim for special damages. The claim is **declined**.

(d) Gratuity for the period worked

62. The claim for gratuity by the Claimant is neither pleaded nor proved. None of the contracts entered into by the Claimant and the Respondent contained a provision for payment of gratuity. In **H. Young & Co. EA Ltd v Javan Were Mbango [2016] eKLR** the Court of Appeal pronounced itself as follows on matters gratuity:

*“This Court in **Central Bank of Kenya v Davies Kivioko Moteh [2009] eKLR** emphasized that there is a difference between severance pay and gratuity. Gratuity is correctly enunciated by this Court in **Bamburi Cement Ltd v Farid Aboud Mohammed [2016] eKLR** denotes a gratis payment by an employer in appreciation of service. There is no express provision for gratuity in the Employment Act. It is usually payable under terms set out in a contract of service or Collective Bargaining Agreement.”*

63. The court is in agreement and bound by these sentiments. Consequently, the prayers for gratuity is **disallowed**.

(e) Costs of this suit

64. The Claimant is awarded costs of this suit.

65. In conclusion, judgment is entered for the Claimant against the Respondent in the following terms:

(i) Payment of gross salary for the remainder of the contract period Kshs.282,569/=

(ii) Respondent to issue the Claimant’s Certificate of Service within 30 days of today’s date.

(iii) Costs of this suit.

(iv) Interest at court rates from the date of judgment till payment in full.

66. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF APRIL 2022

DR. JACOB GAKERI

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.

DR. JACOB GAKERI

JUDGE