



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 2178 OF 2015**

**ESTHER MUTHONI WACHIRA.....CLAIMANT**

**VERSUS**

**THE VICE CHANCELOR UNIVERSITY OF NAIROBI.....1<sup>ST</sup> RESPONDENT**

**UNIVERSITY OF NAIROBI.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The claimant is a former employee of the 2<sup>nd</sup> Respondent University. She filed the memorandum of claim dated the 7<sup>th</sup> December 2015 on the 09<sup>th</sup> December 2015. She alleges unfair termination/dismissal against the provisions of sections 18(5) (a), 40(1), 45(1) and (2) of the Employment Act 2007 and the collective bargaining agreement between the Respondent and KUDHEIHA workers union. Unfair labour practices against the claimant in violation of Article 41(1), (2), (a) and (b) of the Constitution. Sections 7, 8, 26 (1) and (2), 35, 37, 40 and 51 of the Employment Act 2007 and the provisions of the collective Bargaining Agreement between the Respondent and Kudheihwa workers union.

**THE CLAIM**

2. It is said that the claimant was employed by the Respondent on the 2<sup>nd</sup> June 2002 as a cleaner at the 2<sup>nd</sup> Respondent's College of Health Sciences, Kenyatta National Hospital, Department of Obstetrics and Gynaecology. She was paid at daily rate but which was accumulated and paid at the end of the month. The said rates were reviewed in accordance with the Government regulations on minimum wages from time to time. At the time of her termination, she was earning Kshs.799/= daily rates.

3. She served the 2<sup>nd</sup> Respondent for 12 years and 8 eight months during which period the 2<sup>nd</sup> Respondent never paid her for weekly rest days and public holidays as she was only paid for the days worked. She was not paid any annual leave, travelling allowance despite the fact that other employees were enjoying the same. The employees of the 2<sup>nd</sup> Respondent were enjoying Kshs.10,000/= each month as commuter allowance while she was not paid any. She took maternity leave without pay.

4. Despite the fact that she was working at a risky and hazardous areas she was only given protective clothing once and without any new ones for eleven (11) years and eight (8) months. Her expectations were sustainable employment i.e., permanent and pensionable terms with terms and conditions as provided for by the law and CBA. She was terminated/dismissed without notice or payment of her terminal dues. The only reason she was given to her verbally was that there was no money to continue employing her.

5. The claimant prays for the following;

- a. That the Honourable Court do find that her treatment by the Respondents right from the time of her employment was unfair and unlawful and enter judgment against the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.
- b. That the honourable court do find that her termination was unfair, unlawful and inhuman and issue orders directing the Respondents to pay to her all terminal benefits as tabulated herein.
- c. That the honourable court do issue orders directing the Respondents to pay her interests of the sum claimed
- d. The honourable court do issue orders directing the Respondents to issue her with certificate of service.

e. That the honourable court do issue orders directing the Respondents to pay 12 months wages as full compensation for unlawful loss of employment.

f. Costs of the claim.

## **RESPONSE**

6. The Respondent avers that the claimant was aware that her mode of engagement was on temporary basis. She was engaged on casual basis and occasionally on a fixed term contract for a period of 3 months renewable subject to the availability of work and/or funds at the Respondents College of Health Science, Kenyatta National Hospital, Department of Obstetrics and Gynaecology.

7. The claimant would be paid the applicable minimum wages as prescribed by the Ministry of Labour & Human Development per day for days worked whilst engaged as a casual labourer. The contract was renewed by the Respondent subject to the availability of funds on a need basis, the same was not automatic and/ or guaranteed as of right. The claimant's mode of employment was on a casual and or temporary basis and at no given time did the claimant work continuously for 12 years and 8 months as claimed.

8. The Respondent says that the CBA did not apply to the claimant by virtue of her temporary and/or casual mode of engagement with the Respondent. The CBA between the Respondent and Kudheihia only applies to permanent and pensionable employees. The Respondent further says that at all time it has purchased the working gear for its workers including the claimant. The Respondent urged that the claim be dismissed.

## **CLAIMANT'S CASE**

**9. Claimant Witness 1 (CW1) Esther Muthoni Wachira** testified on oath and said that she used to work at the University of Nairobi as a cleaner from 2/6/2002 and got no letter of appointment. She adopted the witness statement dated the 24/11/2019 and filed on the 4/4/2019 as her evidence in chief. She also produced the list of documents dated the 7/12/2019 as exhibits. She says that she worked throughout and her salary was Kshs.799/= per day. She would usually be paid at the end of the month. She used to sign attendance register towards the end.

10. She says that about her termination she was just told that there was no work but was not invited to the disciplinary hearing. She was not paid anything and had worked for 12 years and 8 months. She was not paid house allowance or any other benefits. She says she never went on leave and was not paid commuter allowance. When she went on maternity leave she says she was not paid salary that period.

11. She was working continuously for all those 12 years and 8 months but was not given maternity leave of 2 months. She says she was a member of KUDHEIHA. She had an agreement with the University and she was of the view that she deserved to be given 4 months' notice. She was simply told that there was no work. She prayed for leave and travel allowance and total compensation amounting to Kshs.4,011,037/=. She also prayed to be given costs of the claim and interests.

12. Upon cross-examination she said that she was engaged on a 3 months temporary contract with the Respondent. She said she read her appointment letter before signing. Upon being referred to page 12 on the list of her documents she said that there were no other benefits provided except her wages. She said she used to complain to her employer but they never did anything. She had not complained about her salary. She was working in a risky environment and had no uniform.

13. She says she was given uniform once but they stopped giving thereafter. There is no letter to show that she was not given uniform. She has no letter from the doctor showing that she was injured as a result of having no uniform. She did serve the contract from 14/10/2014 to 31<sup>st</sup> January 2015. She was discriminated but had no document to show and was not paid when she went on maternity leave. She was paid for the July 2005 but not when she was on the maternity leave. She did not complain during the tenure of her employment.

14. The Kudheihia CBA was applicable to her and her claims are based on the CBA for period 2012-2013 and was a member of KUDHEIHA. The union was for members of grades I-IV and clause 2 says that the union was for the permanent and pensionable members. She had no other CBA from 2013-2014 going forward.

15. Upon re-examination she said that she was working at the University of Nairobi when the CBA was signed. She was in Grade 1. They used to get a voucher and were paid in cash. The University was supposed to give pay slips but it did not give her. She never signed the letter of 14<sup>th</sup> October 2014 as it was addressed to the principal but was not copied to her. She was not given a letter to show that her contract expired on the 31<sup>st</sup> January 2015. The letters did not show her grade and was written by the Principal of the University

## **RESPONDENT'S CASE**

**16. Respondent Witness 1 (RW1) Kenneth Kibisi Mbali** gave sworn testimony and said that he works at the University of Nairobi. He is the Registrar in the Faculty of Agriculture. He is familiar with the facts of the case. He said he had worked for the health Department in the year 2018 July to July 2019. He adopted the witness statement dated 17<sup>th</sup> June 2019 as evidence in the case. He also produced the list of documents dated the 17 June 2019 as evidence in the case.

17. The witness says that the claimant was employed on casual basis dependent on work availability and she did not work continuously. The last time she worked was from 1<sup>st</sup> November 2014 to 31<sup>st</sup> January 2015. She was paid her dues for the period she worked and was not unfairly treated or terminated. The claimant based her claim on the CBA but she was not a member of the CBA having been a casual employee. She was not on permanent basis.

18. The claimant was a casual employee and was not given leave because she never worked continuously. Commuter allowance was for permanent members and it was also not her terms of engagement. She was not eligible for maternity leave as per the terms of engagement she signed for.

19. She went for maternity leave in June to July 2015 but never gave evidence of having given birth. On weekly rest days he said that they were considered during breaks and there is no evidence she worked on public holidays as she never signed attendance notes for the holidays. The uniforms were given to her and she never demanded the same. She was not eligible for gratuity. The contract was dependent on the availability of funds and work.

20. Upon cross-examination he said that he was transferred to the health department in July 2018. By then the claimant had left employment. He got the information from the University records and the person he took over from. The person he took over from is still working at the University. There are letters to show the claimant used to be given 3 months contract. There is no evidence to show the breaks. He cannot give a specific period of breaks after 3 months contract. There is no evidence to show the breaks. He did not bring the attendance register and it is not true the records would show the claimant worked continuously for 12 years.

21. Cleaning is a daily activity but some days she did not work like when the students were not in session. The claimant was not entitled to annual leave as per her letter of engagement which she always signed. She was okay with the terms as she signed the same. The claimant was not paid house allowance. The letter of 14<sup>th</sup> October 2014 was addressed to the Principal not the claimant.

22. He has a voucher of payment of that period. There are several letters of 3 months contracts. There is a CBA between the University and Kudheihia which does not cover the claimant. The preamble to the CBA states that no employee shall receive terms less favourable but does not cover her. He said that the claimant's work ended and as she was a casual worker she is not entitled to any other benefits. Upon re-examination he said that page 41 of the claimant's documents shows that she was paid. She was not called to the disciplinary hearing as she had not committed any wrong. The contract expired and they did not renew the contract.

### **CLAIMANT'S SUBMISSIONS**

23. The claimant drawing upon section 37 of the Employment Act 2007 contends that the claimant having worked for the Respondent for more than 13 years under the tag of casual employee, the terms of employment were deemed to be of permanent nature.

24. Reliance is placed on the authority of **Silas Mutwiri versus Haggai Multi-Cargo Handling Services Limited 2013 eklr** where Lady Justice Monica Mbaru stated that *this kind of employment where the employee is not terminated at the end of the day and continues to work continuously for over a month up to and until after 3 months, then the law converts the same into a contract of employment.*

25. It is argued that the claimant served the Respondent for 13 years, and it therefore follows that in light of section 37 the alleged casual terms automatically converted to term employment after the lapse of 3 months hence requiring the Respondent to abide by the provisions of section 37(1), (3), Sections 35 and section 45 of the Employment Act 2007 when contemplating any termination which included having a justifiable reason for terminating the contract of employment and observing fair procedure. The Claimant submits that the Respondent had no justifiable reason to terminate the claimant. The purported letters of contract were merely instruments used by the Respondent to oppress the claimant.

26. The Claimant further submits that the procedural requirements in termination were not adhered to as there was no notice to show cause nor was she called to a disciplinary hearing. The claimant relied on the authority of **Elizabeth Washeke and Others versus Airtel k Ltd and Another Cause No 1972 of 2012** for the proposition that the provisions of section 41 are mandatory and any decision reached in disregard of the said provisions is ultimately unfair. The claimant also made submissions on the reliefs.

### **RESPONDENT'S SUBMISSIONS**

27. The Respondent submits that the claimant was not engaged on a continuous basis and as such her employment never converted from a casual contract of service under section 37 of the Employment Act. The contracts were not continuous and the claimant would go on breaks upon expiry of each contract.

28. The CBA with KUDHEIHA notes that it was only applicable to the 2<sup>nd</sup> Respondent's employees in Grades I-VI on permanent and pensionable terms and the terms were to be incorporated in the contracts of the employees as per clause 4. The claimant was engaged on a temporary basis and the sample contracts did not incorporate the terms and conditions under clause 2 (b) and 4 (a) of the CBA

29. The Respondent contends that the contract was on temporary basis and there was no obligation on the part of the Respondent to give reasons for non-renewable of the contract. The Respondents relied on the case of **BENARD WANJOHI MURIUKI VERSUS KIRINYAGA WATER AND SANITATION COMPANY LTD 2012 EKLr** where it is said that James Rika J held that there is no obligation on the part of the employer to give reasons to an employee why the contract should not be renewed. To require an employer to give reasons is the same thing as requiring the employer to give reasons why a potential employee should not be employed. The only reason that should be given is that the contract has ended and no more.

30. The Respondent also relied on the case of **JOHNSTONE LUVISA VERSUS ALL PACK INDUSTRIES LIMITED (2019) EKLr** where Lady Justice Maureen Onyango held that it was within the Respondent's ability to inform the claimant of the non-renewable beforehand as the Respondent was in control of the same. I would, however, not find this unlawful termination, just untidy for failing to manage the claimant's expectations. Having found thus, the claimant is not entitled to a declaration that his dismissal was unfair as there was no dismissal. He is not entitled to compensation other than the management of his expectation.

31. The Respondent also relied on the authority of **PETER KINGANGI NJERU VERSUS UNIVERSITY OF NAIROBI 2021 EKLr**

where the court cited with authority the case of **Teresa Carlo Omondi versus Transparency International Kenya Ltd** for the proposition that *a fixed term contract carries no rights, obligations, or expectations beyond the date of expiry. There is no case of unfair termination of employment where the employer does not renew the contract which has expired on its due date*

32. The Respondent urged the court to be guided by the above authorities and find that the claimant's contract expired by the effluxion of time and that the KUDHEIHA CBA does not apply to her. The Respondent also submitted on the remedies. I have heard an opportunity of going through the same.

### **ISSUES FOR DETERMINATION**

33. The issues which fall for determination are;

- a. What were the terms of engagement of the Claimant?
- b. Was it on fixed or permanent basis?
- c. Whether the subject of KUDHEIHA CBA is applicable to the claimant.
- d. The reliefs, if any, the claimant is entitled to.

### **DECISION**

34. The rights and obligations of an employee and employer generally flows from the contract of service. Accordingly, the true construction of such a contract is to ascertain the terms thereto and the legal effect of the same. The general rule is that the intention of the parties to an agreement should be ascertained from the document as it is deemed that what is stated is what the parties intended. See the Court of Appeal's decision in **REGISTERED TRUSTEES OF THE PRESBYTERIAN CHURCH OF EAST AFRICA & ANOTHER VERSUS RUTH GATHONI NGOTHO KARIUKI 2017 ECLR**

35. In the instant case as is evident from the documents filed in court the claimant was being offered various short-term contracts of 3 months. Though only one of the short-term contracts is signed by the claimant, I am satisfied that the terms thereto were accepted by the claimant who proceeded to carry out her duties upon being issued with the contracts. The letter of 14<sup>th</sup> October 2014 to the Principal of College shows that upon expiry of one short term contract the said contract had to be renewed before she could resume work for the 2<sup>nd</sup> Respondent. The last contract expired on the 31<sup>st</sup> January 2015. The claimant in cross-examination confirmed this was the last day she worked. There were no further instructions from the University that she continues working. It is also noteworthy that at times the short-term contract would be offered after the passage of some months, meaning there was no continuous engagement with the 2<sup>nd</sup> Respondent.

36. In **REGISTERED TRUSTEES OF THE PRESBYTERIAN CHURCH OF EAST AFRICA AND ANOTHER VERSUS RUTH GATHONI NGOTHO KARIUKI** supra the Court of Appeal held that 'Bearing the foregoing in mind, we note that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry. Accordingly, any claim based after the expiry of the respondent's contract ought not to have been maintained. This is in relation to the salary for the months of April up to 5th May, 2010. Similarly, since the respondent's contract came to an end by effluxion of time any claim for wrongful termination could not be maintained'

37. I find that the claimant was hired for a fixed period which was renewable upon expiry. In this occasion, the contract expired on the 31<sup>st</sup> January 2015. The claimant herself confirmed that she left the University on 31<sup>st</sup> January 2015. There was no obligation on the 2<sup>nd</sup> Respondent to continue the employment in my view once the claimant's contract came to an end. It is therefore not apt to allege unfair termination of the contract which upon the facts was terminated by the effluxion of time.

38. Contrary to the Claimant's averment that the Claimant was a casual worker and that her employment converted to a contract of service under Section 37(b) of the Employment Act 2007 the court finds to the contrary.

In fact the Claimant was issued with various 3 months contract from time to time i.e 17<sup>th</sup> October, 2007 and 26<sup>th</sup> May, 2014 and final one on 1<sup>st</sup> November, 2014 to 31<sup>st</sup> January, 2015.

It is clear from the contract documents that the Claimant worked and accepted to work on temporary contracts of 3 months from time to time. There is no evidence that she worked continually as a casual worker such that her employment would then have converted to a contract of service. The Claimant simply had worked under short fixed contracts.

39. In support of this my findings in the case of **MARGARET A. OCHEING VS NAIROBI WATER CONSERVATION AND PIPELINE CO-OPERATION (2014) eKLR** where the learned Judge stated:

“courts have upheld the principle that fixed term contracts carry no expectation of renewal in a catena of authorities”.

40. Such fixed term contracts are self-terminating and requires no intervention by either party.

41. In my considered opinion therefore there is no question of the contract which was understood by the parties to be fixed being converted to permanent contract as she on the facts could not work after expiry of one fixed term contract and before there was renewal. The contract

stipulates that aside from the money which was paid daily to the claimant, there was no other benefit like travelling allowance, and the commuter allowance. She was not to work during the weekends and public holidays.

42. Furthermore as per the true construction of the CBA between KUDHEIHA and the 2<sup>nd</sup> Respondent, I would agree with the 2<sup>nd</sup> Respondent that the claimant was not in permanent employment within the meaning of clause 2 (b) of the bargaining agreement and as such was not entitled to the benefits thereto only provided for members of Kudheihia.

43. The upshot of the foregoing is that the Claimant was not unfairly terminated and as such not entitled to the reliefs sought from court as her contract simply terminated by affluxion of time.

44. In conclusion the Claimants case is dismissed and the court having considered the terms under which the Claimant worked for the Respondent finds it fail to order parties to each bear their costs of the suit.

45. Orders accordingly.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 13<sup>TH</sup> DAY OF APRIL, 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

A signed copy will be availed to each party upon payment of court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**