



Respondent came to an end as per terms of the contract. It avers that the certificate of service is ready for the claimant's collection.

The Respondent denies that the claimant is entitled to pay in lieu of notice contending that he was on a fixed term contract with a start and end date. That the claimant is not entitled to service gratuity as he was a contributing member of NSSF. That salary for September 2016 was paid in the sum of Kshs.3,338 which the claimant signed for as per annexure DEC 1 of Reply.

It denied the claim for unremitted NSSF in the sum of Kshs.6,800/-. It further denied the claim for annual leave for 2 years from 2014 to 2016 in the sum of Kshs.34,882/- as claimed. It further denied that the claimant is entitled to maximum compensation in the sum of Kshs.209,292/- as claimed on the grounds that the termination was justified and fair.

It states that the claimant was employed on successive fixed term contracts as per documents annexed as DEL 3. It denies that it was erratic in paying salary as alleged.

The Respondent filed a witness statement of GILBERT MEO, the Human Resource Manager, together with the Reply. He states in the witness statement that the Claimant was employed on successive 3 month contracts from 15<sup>th</sup> September 2014 which were renewable on mutual need and agreement. That the Respondent exercised its right not to renew the contract when it no longer needed the services of the claimant after 6<sup>th</sup> September 2016, upon expiry of his contract.

The witness further reiterated the averments in the Memorandum of Reply.

At the hearing, the claimant adopted his witness statement. Under cross examination he stated that sometimes he worked up to one year without a signed contract. That at the time his employment was terminated the last contract had lapsed. He denied that he was paid salary for days worked in September 2016, pointing out that salary was paid through his Equity Bank Account which does not reflect the payment.

Under re-examination he stated that he started working for the Respondent in 2012 as a casual but was issued with a contract in 2014.

He testified that on the date his contract was terminated, he reported to work and changed to his work overall as usual. He and others were then told to report to the Human Resource office where they were told to go home and wait until they were called back. That he was never called back and was never allowed back into the premises.

For the Respondent GILBERT MEO testified that he knew the claimant who was employed as semi-skilled fitter, having been trained in the Respondent's workshop and promoted.

Adopting his witness statement, he testified that the claimant's

last contract expired in August 2016 and that the claimant worked as a casual in September 2016. He stated that the claimant was paid in cash in September.

Under cross examination he stated that the Respondent did not provide the contracts signed by the claimant in the list of documents. He further stated the claimant used to go on leave but did not take all the 26 leave days' entitlement per year, which were paid as reflected in the pay slips. He further stated the claimant was not given notice of termination as the notice was in the contract.

### **Submissions**

The claimant's Counsel filed written submissions in which it summarised the contents of the pleadings and the evidence adduced in court.

It is further submitted that the termination of the claimant's employment was not justifiable and amounts to unfair dismissal contrary to Section 45 of the Employment Act.

The Respondent did not file written submissions.

### **Analysis and Determination**

I have considered the pleadings, evidence and claimant's submissions. The issues arising for determination are whether the claimant's employment was on fixed term contract or "*permanent*", whether the termination was unfair and if he is entitled to the remedies sought.

#### **1. Terms of Engagement**

The Respondent's case is that the claimant was on fixed term contract. The claimant however stated that he was issued with only a few contracts and for most of the time he worked without any signed contract.

From the evidence on record, it is clear that the claimant was issued with only a handful of contracts whose term was not uniform. The Respondent attached only one contract as Exhibit DEL 3 for the period 1<sup>st</sup> October to 18<sup>th</sup> December 2015. The claimant also produced the same contract and another one for the period 1<sup>st</sup> July 2016 to 31<sup>st</sup> July 2016. There is no evidence of any other contract.

From the foregoing, I find that for the two years the Claimant worked for the Respondent he was not on fixed term contract. He was

therefore a regular month to month employee.

### **Termination**

The claimant testified that on the last day of employment he arrived at work as usual and changed into his work overall. He was thereafter told to report to the Human Resource Office together with others where he was verbally instructed to go back home and wait until he is called. He was however never called. The Respondent's averment that his contract had expired and he was therefore a casual employee is not therefore tenable. This means that the termination which was without notice, without reasons and without payment of terminal benefits was contrary to the provisions of Sections 41, 43 and 45 of the Employment Act. Termination of employment is only valid if the employee is given valid reasons for the termination and an opportunity to defend himself before the termination is effected if it is on grounds of gross misconduct, poor performance or physical incapacity. Section 41(2) further requires that the employee is given an opportunity to be accompanied by a fellow employee or union official of his choice at the time he is heard, and that the person accompanying him is also given an opportunity to be heard.

From the foregoing, the termination of the claimant's employment was unfair, and I declare accordingly.

### **Remedies**

The claimant is entitled to pay in lieu of notice which I award him at **Kshs.17,441** being his gross salary per month as per contract.

He is further entitled to pay in lieu of annual leave for two years at 26 days per year as stated by Respondent's witness being 52 days **Kshs.34,882/-** as the claimant did not go on leave during the period he worked. The Respondent did not adduce any evidence of payment in lieu of annual leave through payslips as alleged by the Respondent's witness. The forms produced were one for sick leave which is different from annual leave, and one for a day off to attend a funeral.

The claimant is not entitled to service gratuity as it was not provided for in his contract and further because he was a member of NSSF. This is by virtue of Section 35(6) of the Employment Act as read with Section 35(5) thereof.

The claimant is further not entitled to NSSF deductions as the NSSF statement on record reflects that payments were remitted for the entire period he worked for the Respondent.

There is no evidence that the claimant was paid salary for days, worked in September 2016 and I award him the same at **Kshs.4,651** as claimed. The document at Respondent's Annexure DEC 1 which it states is pay for September 2016 is titled "*casual pay*" and does not refer to the year of payment.

I further award the claimant compensation of 5 months' salary in the sum of **Kshs.87,205** taking into account the relevant factors under Section 49(4) of the Employment Act, specifically the length of service, the manner in which the termination of his employment was handled and manner in which the Respondent handled the whole employment contract. The Respondent is further directed to issue a certificate of service to the claimant in terms of Section 51 of the Employment Act.

In summary I award the claimant the following –

- (i) Pay in lieu of notice Kshs.17,441
- (ii) Pay in lieu of annual leave Kshs.34,882
- (iii) Pay for days worked in September 2016 Kshs.4,651
- (iv) Compensation Kshs.87,205

**Total 144,179.00**

- (v) Certificate of service.
- (vi) Costs
- (vii) Interest at court rates from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29<sup>TH</sup> DAY OF JANUARY 2021**

**MAUREEN ONYANGO**

**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.

**MAUREEN ONYANGO**

**JUDGE**