



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.1660 OF 2016

PETER KINGANGI NJERU.....CLAIMANT

VERSUS

THE UNIVERSITY OF NAIROBI.....RESPONDENT

JUDGEMENT

By letter and contract dated 8th November, 1995 the respondent employed the claimant as a driver and posted to Kibwezi Irrigation Project, Institute of Dry Land Research Development and Utilisation. He had a consolidated wage of Ksh.4,675 per month and which was reviewed over time and in accordance with government regulations on Basic Minimum Wages and collective bargaining agreement (CBA) between the respondent and KUDHEIHA Workers Union (the Union).

The claim is that the claimant remained on a renewable contract for 21 years even where the nature of his work was not causal or temporary contrary to section 37(a) of the CBA between the respondent and the Union. Retention on contract was meant to deny the claimant fair labour rights and practices.

The claimant wrote to the respondent requesting for a permanent and pensionable confirmation on 24th May, 2005 to which there was a reply and commendation on 21st June, 2006 but without confirmation as requested.

The respondent was aware of the retirement date but failed to pay the claimant the due gratuity at the rate of 31% of the basic pay is against the provisions of clause 40(i), (ii) and (vi) of the CBA.

Aware that the claimant was due for retirement, the respondent gave the claimant a post retirement contract dated 11th September, 2015 covering up to 31st October, 2016. Without any justifiable cause, the respondent terminated the contract on 9th October, 2015 without payment of the terminal benefits and the remainder contractual period. The last wage earned was Ksh.59, 326¹ per month.

The claim is for payment of salary for 6 months from April to October, 2016 under the post retirement contract. At the time the wage was ksh.59, 326 per month.

The claim is also that the claimant was entitled to two pairs of suits, shirts, gumboots, overcoat, ties and shoes as uniform/protective clothing's and which he was never given for 18 years of service. These protective tools were provided for under the CBA between the parties. The prices for the tools were provide for by suppliers and approved by the respondent.

The claimant also claims that he was entitled to leave, travelling allowance of ksh.9, 680 and which the respondent failed to pay under clause 21 of the CBA.

The claimant was entitled to a hardship allowance during 5 years of service at Kibwezi at ksh.5, 700 per month and which was not paid contrary to clause 19 of the CBA.

Upon termination of employment the claimant was not issued with Certificate of Service and there was violation of his constitutional rights to fair labour practice by denial of basic labour rights for a permanent and pensionable employment and violation of CBA terms.

The claimant is seeking the following dues;

a) Retirement gratuity for 21 years = $25,313 \times 31\% \times 21 \times 12 = \text{Ksh.1, 985,263.56}$;

- b) Leave travelling allowance Ksh.6, 194 x 21 = Ksh.130, 074;
- c) Two pairs of men suit Ksh.30, 000 x 18 = Ksh.540, 000;
- d) Two pairs of shirts Ksh.2, 400 x 18 = Ksh.43, 200;
- e) Two pairs of gumboots Ksh.1800 x 18 = Ksh.32, 400;
- f) Two pairs of shoes Ksh.6, 600 x 18 = Ksh.118, 800;
- g) Tie Ksh.360 x 12 x 18 = 77,760;
- h) Overall Ksh.2, 400 x 12 x 18 = Ksh.518, 400;
- i) Hardship allowance for 5 years Ksh.5, 700 x 12 x 5 = Ksh.342, 000;
- j) Passage and baggage allowance Ksh.9, 680
- k) Terminal benefits, prorated leave 14 days Ksh.11, 859;
- l) 6 months term contract ksh.332, 556; and
- m) Certificate of service.

The claimant is also seeking that there be a declaration that his constitutional rights were violated and there be payment of his terminal dues which should be paid with interests and costs.

Defence

In reply, the respondent's case is that the claimant was an employee engaged on contractual terms which was renewed annually depending on availability of funds and work. The terms of contract were binding upon the parties and the claimant is estopped from making any claims outside his contract. The claimant was serving a post retirement contract upon attaining age 60 in the year 2012 and this contract dated 11th September, 2015 was rescinded before it took effect by letter dated 9th October, 2015 as the claimant had served his full term and paid full terminal dues. The contract was not renewed in compliance with government directive, Circular dated 14th February, 2014.

Owing to exigencies of work, the claimant was engaged on a need basis and duly paid up to 30th April, 2016.

The Union CBA 2013-2017 relied upon by the claimant is not applicable to his case as he was serving under a post retirement contract from 2012 and was not at any time a permanent and pensionable employee of the respondent.

The union CBA 2013-2017 cannot apply retrospectively notwithstanding that it came into force once the claimant had retired and the claims under the CBA are not payable. The respondent remitted NSSF contributions for the claimant and he is not entitled to any gratuity. The claimant did not work in any hardship area as alleged and has never lodged any complaint with the respondent in this regard.

The defence is also that the claimant was engaged on separate contracts and cannot be taken cumulatively as 21 years of service and as a basis to institute a cause of action against the respondents as to do so would amount to approbating and reprobating at the same time. Section 90 of the Employment Act provides that to claim shall lie unless commenced within 3 years after the act complained of or in the case of a continuing injury or damage, within 12 months next after the cessation thereof.

The claims made do not constitute continuing injury or damage but the act of termination of employment on 9th October, 2015.

The claimant was offered a performance based contract as a driver at kibwezi Irrigation Project, Institute of Dry Land Research Development and Utilisation for a period of 6 months at a consolidated wage of ksh.4, 675 per month with no other benefits and which he accepted on 8th November, 1995. The claimant cannot claim outside his contract terms.

The claimant was relieved of his duties procedurally pursuant to the national government circular dated 20th March, 2009 on retention in service of officers beyond the mandatory retirement age and the claims made on this basis should be struck out. The claimant was aware of his retirement age as required under section 6 of the Public Service (Values and Principles) Act and article 232(1) (b) of the constitution.

The respondent rescinded other post retirement contracts for other officers before they took effect. There was no discrimination against the claimant or in violation of any of his constitutional rights and the claims made are time barred within the meaning of section 4(1) of the Limitation of Actions Act and no cause of action founded on contract after 6 years from the date on which the cause of action accrued. The claims made are in abuse of the court process and should be dismissed with costs.

Both parties attended court and recorded consent on 2nd February, 2021 to proceed and address the claims made by way of written submissions.

The claimant submitted that the claimant was employed by the respondent for 21 years. The respondent renewed the employment post the retirement age and by letter dated 11th September, 2015 the respondent renewed the claimant's contract as from 1st November, 2015 to end on 31st October, 2016. The renewal of contract was by mutual agreement but the respondent terminated the contract after only one month and without giving notice.

The claimant had a legitimate expectation to serve under his contract. Section 45(2) of the Employment Act (the Act) termination of employment is unfair if the employer fails to prove that it is grounded on a valid and fair reason and that fair procedure was followed. Valid and fair reason must relate to the employee's conduct, capacity and compatibility or based on the employer's operational requirements. Fair procedure requires a fair hearing before termination of employment.

The claimant was issued with a post retirement contract by the respondent and which he accepted and had hoped to serve under the same to the end had it not been frustrated with termination. In the case of **Njai Mutitu v University of Nairobi Cause No.1248 of 2016** the court held that the respondent should have at least allowed the claimant to complete the term of the contract that was expiring on 30th November, 2015 and termination was wrongful. The employee had worked for 13 years and had legitimate expectation that the respondent would continue renewing the contract as it had done over the years.

The respondent failed to observe procedural fairness in terminating the claimant's employment and contrary to section 45(4) (b) of the Act. The claimant attained the retirement age and his contract was renewed post-retirement and was terminated without being completed and without notice or payment of the term contract.

The dues claimed are payment of gratuity for 21 years at 31% pursuant to clause 40(a) (i) and (ii) of the CBA. Travelling allowance s due per clause 20 of the CBA, compensation for uniforms, hardship allowance, passage and baggage allowances, leave days all in accordance with the terms of the CBA and compensation for unfair termination of employment.

The respondent submitted that the claimant has not articulated any constitutional rights violated and there are no submissions on these averments as required in the case of **Anarita Karimi Njeru v Republic [1979] eKLR**. The threshold for a constitutional claim has not been achieved.

The claimant has relied on the case of **Njai Mutitu v University of Nairobi [2020] eKLR** but such case is different as the claimant was not serving under a post retirement contract. Each case should be determined on own facts.

The respondent also submitted that the claim for damages is for unserved 6 months from 1st may, 2016 to 31st October, 2016 and that is the limit set, if any, as the claimant is bound by his pleadings.

The claimant was employed on renewable contract terms depending on availability of funds and work from the year 1995 and until 2012 when he was placed under post retirement contract having attained the age of 60 years. The claims based on the CBA 2013/2017 and relating to claims for the years 1995 to 2016, the CBA was not in force as required under section 59 of the Labour Relations Act (the LRA). The claimant was not a party to the CBA and cannot claim under it. Even where he was, the term of the CBA is outside the claims made. It does not cover the claimant and cannot make claim under it as held in **Teachers Service Commission v Kenya National Union of Teachers & 3 others [2015] eKLR**.

On the claims made gratuity was payable under the CBA and not under the contract of service. The respondent made payment to NSSF covering the claimant s held in

Pathfinder International Kenya Limited v Stephen Ndegwa Mwangi [2019] eKLR that gratuity pay must be provided for under the contract of service/employment.

Where gratuity is to be assessed, such can only be for the period of 1st July, 2013 to 1st July, 2015 at $31/100 \times 25,413 \times 2 = 15,756.06$.

Leave travelling allowance is only payable under the CBA once a year. The claimant did not take leave.

On compensation for uniforms such was under the CBA and while the employee was in service as held in **Lawrence O Moseti & 22 others v County Government of Nakuru [2018] eKLR**.

Hardship allowance is not due. The claimant place of work was Kabete campus with errands to Kibwezi.

Passage and baggage is not applicable to the claimant as not provided for under his contract.

The respondent also submitted that the claims made are time barred pursuant to section 90 of the Employment Act ad any claims from the year 1995 to 2007 fall within the provisions of section 4(1) of the Limitations of action act and ought to have been filed within 6 years and on or before the year 2013 as held in **George Hiram Ndirangu v Equity Bank Limited [2015] eKLR**.

The post retirement contract did not provide for any benefit outside of it save for basic wage, house allowance, commuter allowance and 28 days of leave. The contract was to take effect from 1st November, 2015 but was rescinded on 9th October, 2015 and therefore was not performed. Nothing arises from it. There was no unfair termination. The claims made should be dismissed with costs.

Determination

It is common cause that the claimant was employed by the respondent and issued with a term contract and which were renewed and continued to serve cumulatively for 21 years and until his retirement age of 60 in the year 2015. Upon attaining the retirement age, the claimant was offered a post retirement contract dated 11th September, 2015 and covering up to 31st October, 2016.

The claim is that the post retirement contract was terminated unfairly on 9th October, 2015 without notice or the claimant being allowed to serve its full term and or payment of his dues thereof. The claim is also for dues spread for the 21 years the claimant remained in the service of the respondent pursuant to the CBA applicable between the respondent and KUDHEIHA union.

The defence is that the claimant was not covered under the CBA and the claims made thereof are not applicable to him. That the respondent was directed by circular of the national government dated 14th February, 2014 on retention in service of officers beyond the mandatory retirement age and the contract was rescinded before taking effect and nothing arises from the same.

The employment history is that;

- Employment commenced on 8th November, 1995 on annual term contract;
- Renewable contracts for 21 years;
- On 30th August, 2005; 12th November, 2008 and 17th January, 2012 the claimant applied for permanent contract;
- 2012 the claimant attained retirement age of 60 years;
- 11th September, 2015 post retirement contract issued covering the period of ending 31st October, 2016 and rescinded on 9th October, 2015.
- Claimant worked until 30th April, 2016.

For the period of employment, the claimant was under written contract set in time. Fixed term contracts are a lawful and legitimate process of engaging an employee.

Section 10(3) (c) of the Act allow parties to engage under a fixed term contract;

(c) Where the employment is not intended to be for an indefinite period, The period for which it is expected to continue or, if it is for a fixed Term, the date when it is to end;

Such fixed term contract in employment relations is lawful.

Save, where the employer has unionised employees and covered under a CBA, the employee who is not unionised should not be placed at a disadvantage as a principle in fair labour practices. See **Jonathan Spangler v Centre for African Family Studies (CAFS) [2017] eKLR**.

The claimant was not unionised. He remained under agency. He was under his written and fixed term contract at all material times. He retired in the year 2012 and after such date he was under post retirement contracts the last covering one year from 1st November, 2015 to 31st October, 2016 but which was rescinded on the grounds that by a circular dated 14th February, 2014 the national government gave directions with regard to employees who had attained the retirement age. On this basis the claimant's contract was rescinded before taking effect on 9th October, 2016.

Under fixed term contract, each regulated in time, the employment relationship ended with each contract. Upon renewal of the contract, the relationship is renewed for the period agreed upon by the parties. See **Amatsi Water Services Company Limited v Francis Shire Chachi [2018] eKLR**;

A general principle that a fixed term contract will continue if not terminated would be a contradiction to the very definition of a fixed term. There is a definite start date and an end date. The contract would logically end automatically without more otherwise it would no longer be a fixed term contract ...

And in the case of **Teresa Carlo Omondi v Transparency International- Kenya [2017] eKLR** the court held that a fixed term contracts carry 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. See **Johnstone Luvisia v Allpack Industries Limited [2019] eKLR**.

All claims arising from each employment relationship and under the fixed term contract should be made within the meaning of section 90 of the Act and read together with section 18(5)(a) of the Act;

(5) Upon the termination of a contract of service—

(a) by effluxion of time, it shall be the duty of the employer to ensure

that the employee is paid the entire amount of the wages earned by or payable to the employee and of the allowances due to him as have not been paid;

Therefore, where the employer fails to pay any dues and benefits due under any given contract, the employee should claim the same within the provisions of section 90 of the Act. That is 3 years from the date employment relationship ceased.

In this regard, where the claimant was an employee of the respondent from 8th November, 1995, such period covered under the repealed Employment Act, he was to claim for any unpaid dues and benefits within the meaning of section 4(1) of the Limitation of Actions Act. Each contract ended on its terms. Upon renewal, a new relationship commenced.

The CBA cited and covering members of KUDHEIHA and without placing the claimant at a disadvantage, taking the fixed term into account, the claimant should have lodged his claims based on the repealed Employment Act within 6 years and after the enactment of the Act in the year 2007 any claims thereof should have been lodged within the meaning of section 90 thereof.

Being retained in employment cumulatively for 21 years is not a basis to claim from each contract of employment at the end of employment/21 years. Such would be to negate the law as addressed above at section 10(3) and 18(5) of the Act. Each contract was meant to start and end as given and agreed upon by the parties. The renewal of each contract is not a continuing injury. Each had a set term. These facts are different from the referenced case of **Njai Mutitu v University of Nairobi [2020] eKLR** and upon which the claimant heavily relied upon.

In the Amended Memorandum of Claim at paragraph 14 the claim is that the claimant earned salary up to April, 2016.

At paragraph 13 the claim was that his employment terminated vide letter dated 9th October, 2015 without being allowed to serve under his term contract.

The claimant was therefore aware at all material times that he was engaged under fixed term contract. Upon termination/rescission of his one year term contract on 9th October, 2015 he continued to receive payment until April, 2016. There was notice terminating employment and a reason given pursuant to section 41, 43 and 45 of the Act. The court finds no material case for constitutional or statutory violations.

The claim herein was filed on 19th August, 2016.

Any claims arising out of the various contracts of employment can only go back to the period ending 18th August, 2013. This was the period after the claimant had attained the retirement age and was under post retirement contracts each running for a year each.

All claims going beyond the 18th August, 2013 are time barred pursuant to section 90 of the Act. Such cannot be urged before this court which is denied jurisdiction. These claims cannot be revived by any CBA terms.

The claimant is seeking payment for the following;

- Gratuity for 21 years;
- Leave travelling allowance;
- Men suits;
- Shirts;
- Gumboots;
- Shoes;
- Tie;
- Overall;
- Hardship allowance;
- Passage and baggage;
- Terminal benefits;
- 6 months term contract; and
- Certificate of service.

The claimant last served under a fixed term contract envisaged to run from 1st November, 2015 to 31st October, 2016. The basis of rescission was that the national government had issued circular stopping issuance of post retirement contracts. Notice terminating the contract was dated 8th October, 2015.

The claimant had notice and reasons leading to the contract being rescinded. He however received his wages until April, 2016. Such well compensated him for loss of employment under his fixed term contract since employment stopped way before the contract took effect or being perfumed. To claim more and outside the 6 months payment until April, 2016 would be unjust enrichment.

Gratuity pay and leave travelling allowance were covered under the CBA. Without placing the claimant at a disadvantage thereof, employment pay last being April, 2016 such gratuity pay only arise for the period ending 3 years. The last wage paid was ksh.25, 413 and 31% therefore total gratuity payable is ksh.23, 634.09.

Leave travelling allowance under clause 20 of the CBA provided for Ksh.4, 956 per year and for the last 3 years all due is ksh.14, 868.

Clothing and work tools in suits, shirts, gumboots, shoes, tie, overall were tools available within employment. Such ought to be issued and claimed for within employment. These cannot be quantified and claimed outside of employment.

The claim for hardship allowance is on the basis that the claimant was placed at Kibwezi under a project. However, the logs attached to the memorandum of claim and particularly the work sheets at pages 34 to 36 for the period of February to April, 2016 he was and his station was Kabete. The journey logs show various travels with start journey at Kabete and ending at the same station. To claim a hardship allowance on the face of time barred claims and on the evidence before court is without justification.

Passage and baggage allowance under clause 21 of the CBA was ksh.9, 680 payable at the end of employment. This claim is justified.

The claim for terminal benefits and prorata leave, the claimant served for 6 months under his term contract. Section 28 of the Act allows tabulation of leave days at 1.75 for each month based on the basic wage all at ksh.11, 859.

A certificate is due at the end of employment irrespective of the terms and pursuant to section 51 of the Act. Such should issue unconditionally.

Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;

- (a) Gratuity pay ksh.23,634.09;**
- (b) Leave travelling allowance ksh.14,868;**
- (c) Passage and baggage allowance ksh.9,680;**
- (d) Pro rata leave ksh.11,859;**
- (e) Certificate of service shall issue; and**
- (f) Each party to bear own costs.**

DELIVERED AT NAIROBI THIS 13TH APRIL, 2021.

M. MBAR?

JUDGE

In the presence of: