



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 229 OF 2015

WILLY CHANGWONY.....CLAIMANT

VERSUS

LAIKIPIA UNIVERSISTY.....RESPONDENT

JUDGMENT

1. The Claimant herein filed a Memorandum of Claim dated 4th August, 2015 on the 10th August, 2015 through the firm of Ndeda and associates Advocates alleging unfair termination and bad Labour practices by the respondent against him. He therefore sought for the following reliefs;

i. Reinstatement back to work without any conditions at all.

ii. That the claimant be reinstated back to work as a cook grade (1) and not ungraded cook after working for 9 years and 3 months given the minimum education he has.

iii. That the claimant on reinstatement be paid all the money withheld or paid to him due to discrimination he had undergone since his employment i.e.

a) Underpayment on basic salaries

b) Housing allowance arrears

c) Annual leave for 9 years, 3months

d) Commuter allowance, medical benefits and hardship allowances for the 9 years and 3 months.

e) The period between September, 2012 up to the time the claimant is reinstated be treated as unpaid leave but the payments which goes with the years of service be put into consideration.

IN THE ALTERNATIVE THE CLAIMANT BE PAID THE FOLLOWING;

i. 3 months' salary in lieu of Notice based on the provisions of CBA sections 5 (c)

ii. Service gratuity as provided for by clause 27 of the CBA, clause 27 (a) a sum equivalent to 3 weeks pay at the current CBA for every year worked.

iii. Annual leave for 9 years 3 months

iv. Underpayment on basic salary for 9 years 3 months

v. Commuter allowance, hardship allowance and medical benefits for 9 years 3 months.

vi. Compensation based on section 49 sub section 1 (c) of the employment Act

vii. Appropriate certificate of service as given under section 51 of the employment Act

viii. Exemplary damages based on the provisions of section 49 subsection 4 (a)(c) and (j)

ix. The respondent to pay cost of suit.

2. The Claimant avers that he was employed by the respondent as a cook following his application by his letter dated 2nd January, 2003 and accepted by the respondent by the letter of 17th January, 2003 for a basic salary of Kshs. 3,000/-. That the said employment was for a period of 3 months which was later extended indefinitely.
3. The claimant avers that the respondent granted him 2 days unpaid leave per month and was never allowed to take out annual leave.
4. It was stated that, the claimant worked diligently for the respondent till 26th June, 2012 when the respondent unilaterally by a letter of even date changed the terms of engagement and purported to convert the employment contract to that of fixed short term contract of 3 months under a salary of Kshs11,730/- per month, which contract was to expire in October, 2012. The claimant was informed by a letter dated 28th September, 2012 that his contract will not be renewed upon expiry of the said contract and indeed on expiry of the said contract the same was not renewed.
5. The claimant avers that the respondent begun deducting NSSF due after converting his contract to a fix short term contract and had never paid his NSSF during the 9 years worked at the respondent employment.
6. The claimant avers that his services were illegally and unfairly terminated pursuant to conversion of his terms of engagement without his consultation.
7. The respondent on the other had entered appearance on 11th September, 2015 though the firm of Mwangi Mukira and company Advocates and filed a response to the memorandum of claim on 3rd November, 2015.
8. The respondent conceded that the claimant was employed in 2003 but stated that the terms of engagement was on casual basis which depended on availability of work therefore denies that the claimant was engaged as an employee continuously for the 9 years as alleged. Further that since the claimant was engaged on casual basis the prayer for leave pay and gratuity ought to be disregarded.
9. The respondent contends that the claimant did not at any point raise concerns with regard to the salary he received and only raised it at the end of his contact as such the claim of underpayment is an afterthought. It was stated that in any event the claimant was paid over and above what the regulation of wages for cook/ waiter are paid under the law.
10. The respondent further stated that the claimant had requested for employment at the catering department which the respondent agreed and offered him a short term contract for 3 months which contract was willingly accepted by the claimant and legally expired after the three months and renewal of the same was subject to availability of work. Accordingly, the respondent avers that the notice pay is not merited as the contract expired.
11. The respondent avers that the claimant went into slumber land only to wake up after 3 years and file this suit, therefore contends that the suit herein is statute barred under section 90 of the Employment Act.
12. The respondent avers that it has not breached any labour laws in the terminating of the claimant services but that the claimant services terminated on expiry of the contract between them.
13. On the issue raised on career progression, the respondent avers that that is a reserved of employees employed on a permanent basis.
14. The claimant challenged the respondent's reply and filed a reply to the memorandum of response on 20th November, 2015 and in essence reiterated the averments in his memorandum of claim.

Hearing

15. This cause proceeded for hearing on 16th March, 2021, with the claimant, Willy Changwony, **CW-1** adopting his witness statement and document filed herein on 10th August, 2015.
16. On cross examination he testified that he was employed on 17th January, 2003 as a casual employee and later promoted by signing a new contract. That he signed the 3 months contract on 26th June, 2012 which was to expire in October 2012 and that he was notified of the expiry of the said contract.
17. The respondent called one witness, **Mugo Mureithi, RW-1**, the acting Deputy Registrar Administration for the respondent who testified that she was employed by the respondent on 18th April, 2011.
18. She adopted her witness statement dated 6th November, 2015 and filed in court on 19th November 2015 together with document filed on even date. She testified that the claimant was employed in 2003 as a casual employee and paid on a daily basis. That the employment was dependent on availability of work. She averred that the claimant was a good employee who had no disciplinary issues.

Claimant's Submissions

19. The claimant herein filed his submissions on 29th March, 2021 and submitted from the onset that, the claimant herein was employed on 17th January, 2003 on casual basis for three months on a monthly salary of Kshs. 3000/- which was extended by conduct of the parties and the claimant continued with employment as seen in the payment vouchers produced by the parties herein as such the employment engagement converted from casual to a regular employee contemplated under Section 37(1)(b) of the Employment Act, therefore section 35(1)(c) ought to apply to the claimant contract.

20. Counsel argues that for all purposes and intent the claimant was not a casual employee as the claimant was paid on monthly basis as evidenced in the payment vouchers produced and the letter of appointment which indicated the claimant salary to be Kshs. 3,000/- per month not per day as testified by RW-1.

21. Counsel maintained that the fixed term contract which was signed by the claimant indicated that **‘the appointment was with no other benefits attached’** which clause was contrary to the express provision of part III Clause 7 of the Employment Act since it sought to take away the benefits such as house allowance, overtime, sick offs, notice pay, right to be heard among others making the said contract illegal. Further that the claimant signed the said fixed term in the belief that the same was a permanent employment.

22. In conclusion counsel, argued that the respondent illegally changed the terms of employment of the claimant contrary to section 13, Part III of the Employment Act therefore leading to his termination. he thus prayed that the Claim herein be granted as prayed.

Respondent’s submissions

23. The respondent filed submissions on 19th April, 2021 and submitted that the claimant herein was engaged on casual basis which was dependent on availability of work at the respondent. He argued that the last engagement with the claimant was a fixed term contract of 3 months which was signed by the claimant willingly. Further that before expiry of the said contract the respondent took the initiative by the letter of 28th September, 2012 to inform the claimant that his contract would not be renewed as such there was no need to inform him further of the said termination by a notice of termination as alluded by the claimant and cited the cases of **Fatuma Abdi –v- Kenya School of Monetary Studies Nairobi ELRC No. 1261 of 2015(Ur)** where the court held that a fixed term contract is a lawful mode of employment with a start and an end as per section 10(3)(c) of the Employment Act.

24. Counsel argued that the claimant herein has argued that he ought to be awarded notice pay in accordance with CBA annexed in his pleadings but failed to produce evidence on whether he was a member of the said union. He buttressed his argument by citing the case of **Susan Wairimu Karaya –v- Egerton University (Laikipia University in Nakuru ELRC Cause no. 324(B) of 2015(Ur)** where the court held that;

“even where there was unionized employees, the claimant was not subject of such a CBA. No agency fees were deducted for her to enjoy the terms thereof and in any event, the claimant was protected in her employment vide the fixed term contract.”

25. On the alleged unlawful termination, Counsel submitted that the claimant had signed a new fixed terms contract which came to an end and the casual employment subsisting before the fixed term contract ended with the issuance of the fixed term contract thereafter, therefore the claimant’s service was never terminated as alleged. He cited the cases of **David Kinuthia –versus- Laikipia University in Nakuru ELRC Cause No. 496 of 2014(UR)**. Further that the failure to renew a fixed term contract does not amount to unfair termination as was held in the case of **Kenya Union of domestic Hotel Educational Institutions Hospitals and Allied workers in Nakuru ELRC Cause No. 208 of 2013(UR)**

26. On the issue of underpayment, counsel submitted that the suit herein was filed pursuant to the alleged termination of the services of the claimant on expiry of the fixed term contract therefore, the regulation that guide the payment of the claimant who was a cook/ waiter is regulations of wages issued under legal Notice of 1st May, 2012 which gives the basis pay as Kshs. 5,288.60 plus 15% house allowance adding up to Kshs. 6,081.90/- therefore he argued that according to the pay slips produced by the claimant herein it is indicative that the respondent paid the claimant Kshs. 11,730/ which pay was over and above what is provided by the law therefore the underpayment prayer ought to fail.

27. On the prayer for leave days earned and not utilized, the respondent’s Advocate submitted that since the claimant initially was engaged in casual basis he was given his 2 days leave as admitted in his pleading. Further that under the fixed term contract the claimant was granted 21/2 days leave as such the prayer for leave is not merited. Further the prayer for leave travelling allowance is not warranted as the claimant contract did not provide for such allowance and the law does not make it mandatory for such leave to be paid.

28. Counsel therefore urged this Court to dismiss the claimant case with costs to the respondent.

29. I have examined the evidence and submissions of the parties herein. From the claimant’s evidence he avers that he worked for the respondent for over 9 years with effect from 2/1/2003, on a 3 month contract which was reviewed over time until it was extended indefinitely. The claimant exhibited his initial appointment letter dated 17/1/2003.

30. He also exhibited evidence that as at November 2009 he was still on the list of casual employees (App WCV & App WCV(a) showing he was on the casual list as at 6th January 2012 and WCV(b) for month of February 2012, WCV(c) (June 2012).

31. On 26/6/2012 he was placed on a 3 month fixed contract (WC VI) which he accepted. This contract was not renewed.

32. From the evidence above, it is apparent that the claimant was a casual worker on and off from 2003 to 2012 June when he was placed on a fixed 3 month contract but which was never renewed.

33. The respondents deny that the claimant worked for them for 9 years but aver that he was a casual who was hired occasionally whenever there was a job.

34. They only accept that he was given a 3 month fixed contract in 2012 which was never renewed. The respondent also submitted that this claim is time barred.

35. From the pleadings again, the claimants fixed term contract ended in September 2012 and this claim was filed on 10th August 2015 which was within the 3 year limitation period. The contention that the claim is time barred is therefore not true.

36. As per the evidence of the claimant, there is no evidence that he worked for the respondent for 9 years. There is only evidence submitted that he served as a casual sometimes in 2003, 2009 and 2012 when he was given the fixed term contract of 3 months.

37. The assertion that he worked for 9 years is not supported by any evidence.

38. However from the evidence submitted by the respondent the claimant never worked for over 3 months continuously except during the fixed contract period of July to September 2012.

39. The claim by the claimant that he was unfairly terminated is therefore not true as he was on a fixed term contract which ended by effluxion of time.

40. Having found as above the only remedy the claimant is entitled is issuance of a certificate of service which he seems to have already been supplied with as per his Appendix WCVIII.

41. The rest of the claim is not tenable and is dismissed accordingly.

42. There will be no order of costs.

DATED AND DELIVERED IN OPEN COURT THIS 10TH DAY OF JUNE, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mr. Awuor for Claimant – present

Ndichu for Respondent – present

Court Assistant – Fred and Wanyoike