



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 276 OF 2015

VINCENT ALUSI OPIYO.....CLAIMANT

- VERSUS -

KENYA POWER & LIGHTING COMPANY LIMITED.....RESPONDENT

-AND-

KENYA ELECTRICAL TRADES & ALLIED WORKERS' UNION (KEWAWU).....INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday 29th October, 2021)

JUDGMENT

The claimant filed the statement of claim on 29.04.2015 through Mulwa Nduya & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant was in a continuous employment with the defendant for a period exceeding six (6) months and was therefore on permanent employment with the respondent and that the termination of his employment was unlawful and wrongful.
- b) The claimant be paid his monthly salary at the rate of Kshs.29, 772.00(inclusive house allowance) from April 2014 till date.
- c) That this Honourable Court do issue an order that the respondent do immediately reinstate the claimant back to work with no further delay as it may deem fit to meet the ends of justice.
- d) That the Honourable Court be pleased to issue any further orders and directions as it may deem fit.

The respondent filed the response on 24.07.2016 through Hamilton Harrison & Mathews Advocates and Mr. Mugambi Advocate urged the case in that regard. The respondent prayed that the claimant's claim be dismissed with costs.

The interested party filed on 22.09.2015 the reply to respondent's response and through Rodgers M. Kweyu, the trade union's Coast Branch Secretary.

The claimant testified to support his case. The respondent's first witness (RW1) was a customer known as Taibu Ali Nassar and the second witness (RW2) was Ann Siyamo, the Senior Human Resource & Administration Officer at the material time. The interested party's witness (1PW) was Rodgers M. Kweyu, the Coast Branch Secretary.

By consent order at the hearing, the documents filed for parties were admitted in evidence. Final submissions were filed for the claimant and the respondent. The Court has considered all the pleadings, evidence and the final submissions.

It is not in dispute that the claimant worked for the respondent initially on casual basis from 2000 to 2009. Thereafter, the claimant was emplaced on renewable three months' contracts. The contracts have been exhibited.

The **1st issue** in dispute is whether after the contract of 01.04.2014 expiring by 01.07.2014, the respondent renewed the contract of service by a further 3 months. On the respondent's supplementary bundle of documents, the respondent has exhibited a temporary employment letter dated 01.07.2014 addressed to the claimant. The letter states that the claimant was being offered temporary employment as an Artisan Mate Assistant in O & M, Mbaraki from 01.07.2014 to 30.09.2014. The letter stated that the payment would be Kshs. 16, 871.68 plus Kshs. 3, 900.00 per month. The immediately lapsed contract of 01.04.2014 and exhibited for the claimant provided for a similar monthly pay.

The claimant pleaded and testified that he worked for the respondent on three months' renewable contracts. RW2 and IPW also testified that the claimant served upon the three months' renewable contracts including the one dated 01.07.2014. The court finds that the claimant is bound with his pleading at paragraph 3 of the statement of claim that he worked on three months' temporary contracts from 2010 to 2014 and his testimony in cross-examination thus, **"I was employed in 2000. There was no contract. I was a labourer. I was issued contract in 2010 for three months. It was in October. It was renewed at every end. I would sign contract. I refer to one dated 01.04.2014. It is for 3 months. I got another on 1st July 2014. I left in October 2014. The July contract indicates lapse on 30th September. I did not see this contract. My last contract ended in June 2014..."** The court finds that the claimant's evidence that he did not see the contract of 01.07.2014 is contradictory to his pleading that he served on three months' contract until 2014 and further contradicts his evidence that he got another contract on 01.07.2014. Parties are bound by their contractual intention and which was that the claimant was last working upon the contract dated 01.07.2014. In any event the claimant has not alleged and provided any other alternative arrangements under which he continued to work for the respondent after 01.07.2014. His evidence in cross-examination that he had been confirmed in permanent and pensionable service was vacuous as based on no pleading and no relevant confirmation letter was exhibited.

To answer the **2nd issue** for determination, the Court finds that the respondent terminated the claimant's employment by the letter dated 04.08.2014 titled, **"NON RENEWAL OF 3 MONTHS CONTRACT"**. The letter referred to the claimant's contract of employment and advised that it would not be renewed. Further per clause (d) of the contract, he would be paid one month's salary in lieu of notice and a cheque for Kshs. 16, 011.13 was attached being the payment in lieu of notice. The letter further stated that the claimant would be paid salary and any other dues up to and including 06.08.2014 upon surrendering all respondent's property and the supervisor confirming as such. The claimant was to arrange to clear and present the clearance certificate.

The **3rd issue** for determination is whether the termination was unfair. The claimant's case is that he received no letter to show-cause why his contract of service could not be renewed. Further the respondent and breached the CBA, section 41 of the Employment Act, 2007, the Anti-corruption and Crimes Act, 2004 and Recognition agreement between the respondent and the interested party. The claimant urged that the respondent had not shown the reasons for refusal to renew the contract as envisaged in sections 43 and 45 of the Act. The claimant prayed for reinstatement with full payback from April 2014 at Kshs. 20, 772.00 per month. The interested party supports the claimant's case in that regard.

The respondent has pleaded as follows:

- a) In November 2014 the claimant together with the respondent's employee one Francis Kenga and a subcontractor's employee one Abdallah Mohammed were arrested by the Ethics and Anti-Corruption Commission (EACC). After investigations the claimant was charged for alleged soliciting and receiving a benefit contrary to section 39(3) (a) as read with section 48 (1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. The claimant was released on a cash bail of Kshs. 100,000.00.
- b) Clause 29(a) of the CBA (which the Court finds was undisputedly binding upon the parties) entitled the respondent to suspend the claimant without pay after the claimant was charged in Court. However, the respondent maintained the claimant in its employment.
- c) The respondent invited the claimant to attend a disciplinary hearing on 24.12.2013. The claimant attended accompanied with IPW, the Branch Secretary. The interested party urged that the disciplinary hearing could not go on because of the pending criminal case. The respondent continued with its internal investigations and in July 2014 obtained the statement by the concerned customer, RW1. The claimant by internal memo dated 03.07.2014 invited the claimant to a disciplinary hearing on 10.07.2014 for alleged involvement in fraudulent activities. By letter dated 09.07.2014 the interested party conveyed to the respondent that the claimant would not attend the disciplinary hearing in view of clause 29(a) of the CBA – and the claimant did not attend the hearing. The respondent's case is that it was entitled to proceed with the disciplinary case despite the pending criminal case. Clause 29(a) of the CBA provides that an employee charged in a court of law with an offence involving company interest shall be suspended from duty without pay until the matter is heard and determined. Clause 29 (d) thereof states that the respondent shall not discipline any employee on any allegations made against him or her by any complainant from outside the respondent (KPLC) until the same is proved or determined in a court of law, unless it involves the respondent's interests.
- d) By the letter dated 04.08.2014 the respondent informed the claimant that the three months' contract would not be renewed. The claimant was paid Kshs. 16, 011.00 one month in lieu of termination notice and was to be paid other dues up to 06.08.2014 upon clearance by the respondent but he failed to clear.
- e) The respondent had no duty to renew the ending contract and section 35 of the Employment Act entitled the respondent to terminate by giving a one-month notice.

The Court has already found that the last term contract of 01.07.2014 applied. Clause 6 of the contract on termination stated thus, **"Unless otherwise advised, your last working day will be 30th September 2014. The employment however, may be terminated by either party giving the other one month's notice or pay in lieu of notice. This is without prejudice to the Company's right to terminate the employment summarily for lawful cause."** The Court returns that the respondent was entitled, under the clause, to terminate the contract in terms of the non-renewal letter of 04.08.2014. Even if the contract of 01.07.2014 had not been concluded, as urged for the claimant, under section 35 of the Employment Act, the Court considers that the respondent would be entitled to terminate the ensuing month to month contract by giving a month's pay in lieu of the termination notice. Further, in the Court's opinion, but for the respondent's magnanimity to retain the claimant in service by the contract of 01.07.2014 despite the pending criminal case and suspension due under clause 29(a) of the CBA, the claimant would otherwise have left employment effective 01.07.2014 the prevailing contract having lapsed the previous day and in circumstances that the claimant would be on suspension.

It was urged for the claimant and the interested party that the criminal proceedings did not relate to the respondent's interests and disciplinary proceedings could not go on. The Court finds that in any event the criminal proceedings related to the respondent's interests because per the exhibited charge, the counts in the criminal case were stated to attach by reason of the claimant being implicated in the course of his duties as a public officer in the respondent's employment. Further the Court finds that in any event, the dismissal was not flowing from the

disciplinary proceedings but flew from the contractual termination clause. The Court has already found that the contract having been for fixed 3 months' term lapsing while suspension would be subsisting, the claimant's position would not be any better because he would not claim a disciplinary process after the contract would have ended during the suspension period under clause 29(a) of the CBA.

In the circumstances, the Court returns that the termination was not unfair because it was consistent with the termination clause.

To answer the 4th issue for determination, the Court finds that the claimant is not entitled to the remedies as prayed for. As submitted for the respondent, in **Sotik Highlands Tea Estates Limited –Versus- Kenya Plantation and Agricultural Workers Union [2017]eKLR** the Court of Appeal (G.B.M Kariuki, Sichale & Kantai JJA) held thus, **“The ordinary meaning of the language of Section 12 of the Employment and Labour Relations Court Act is that the labour Court is empowered to order reinstatement of a dismissed employee within three years of dismissal. Parliament in its wisdom capped that period at three years and there is no provision or proviso qualifying that provision to say that time stops running or is interrupted by an action filed in court....”** The termination was effective 06.08.2014 and from then to the date of this judgment, the three years have since lapsed. The payback as claimed was based on the order for reinstatement but which the Court has found was barred by statute. The Court further finds that in view that the term contract would lapse during the contractual and statutory suspension, there is no established basis to impose a reinstatement from the date of termination whereas there was no contractual basis for the claimant to continue in the respondent's employment. The Court has already found that the claimant's alleged confirmation or appointment in permanent service was vacuous and not established at all. As submitted for the respondent, it would amount to unjust enrichment for the respondent to pay the claimant for the period not served at all. The parties agreed to unpaid suspension per clause 29(a) of the CBA and the claimant is bound accordingly, the circumstances of the suspension having accrued.

The Court has considered the claim for 21 leave days from 2001 till to date. The claimant pleaded and testified that from 2000 to 2009 he was a casual employee or daily labourer and the Court finds the claim inconsistent with the casual service. Even if the claimant may have worked from 2000 to termination date without a break, the claim is in the nature of special damages which were not computed and then specifically prayed for and, strictly proved as is trite law to do. The amount claimed remains at large. The claim will fail.

The Court has considered the dispute or grievance resolution procedure under clause 30 of the CBA. The parties appear to have failed to invoke the internal dispute resolution procedure culminating with referring the dispute to the Central Joint Council where the Union's General Secretary and the Managing Director are required to consult in an attempt to resolve the dispute. Clause 30 (i) states, **“Where no settlement is achieved, either side wishing to proceed with the matter in dispute will report the matter to the Minister of Labour who will invoke the formal Trade Disputes Settlement Machinery.”** The parties also appear to have had a dispute about the interpretation of clause 29(a) and (d) of the CBA in the circumstances of the dispute. Under clause 39 of the CBA, a dispute on interpretation or application of any provision of the CBA was to be settled per the negotiating procedure in the recognition agreement and the Labour Relations Act but which appears to have been disregarded by the parties. The material on record show that the parties failed to avert expenses incurred in the suit when they failed to respect their agreed dispute resolution procedure and instead prosecuted their respective cases before the Court. Taking that failure into account, each will bear own costs of the suit.

In conclusion the claimant's statement of claim is hereby dismissed with orders each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 29TH OCTOBER, 2021.

BYRAM ONGAYA

JUDGE