



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC CAUSE NO. 357 OF 2015

ANDREW MWANGI WACHIRA.....CLAIMANT

VERSUS

EGERTON UNIVERSITY, CURRENTLY LAIKIPIA UNIVERSITY....RESPONDENT

JUDGMENT

1. The Claimant sued the respondent for alleged unfair termination and unfair contractual services.
2. The claimant stated that he was employed by the Respondent sometimes in September, 2007 as a cook earning a daily wage of Kshs. 160 translating to Kshs 3,630. 00 per month which was indeed paid on a monthly basis.
3. He averred that he worked for the respondent for 5 years till September, 2012 when his services were terminated. That throughout his employ with the Respondent he never went for leave neither was he compensated for leave not taken.
4. Prior to the termination, the claimant stated that on 26<sup>th</sup> June, 2012 the respondent unilaterally changed the terms of engagement and converted his employment to a short term contract of 3 months earning a monthly salary of Kshs 10, 178, removing all benefits initially given such as annual leave, travelling allowance, medical allowance, house allowance among others. In the alternatives to leave the Respondent included 2 ½ days leave each month.
5. He also stated that the other colleagues under his job group were paid gross pay of Kshs 29,971/- while he remained at Kshs 10,178 an act which the claimant contended that was discriminatory against him.
6. The claimant also alleged that the Respondent denied him a right to join a trade Union of his choice.
7. The 3-months contract expired on 28<sup>th</sup> November, 2012 and the Respondent did not renew the said contract therefore the claimant's employment came to an end.
8. The Claimant was aggrieved by the termination of his employment and prayed for judgment against the Respondent for;
  - a. That the Court finds the action taken by the respondents on account of redundancy was done in bad faith and it does not merit.
  - b. That the claimant be reinstated back to work without any loss of benefits as regards to the period of his work with the respondent,
  - c. That the claimant be absorbed in the respondent's employment conditions as a regular and permanent employee in job group II or III catering department
  - d. That if reinstated to work the claimant be paid as follows:
    - i. That the claimant be paid underpayments of wages between the regular and permanent employees in arrears for 5 years as hereunder.
    - ii. That could it be that the claimant was a permanent employee he could have been earning Kshs. 13,696.00 as basic

pay, Kshs. 10,325.00 as housing allowance, Kshs. 1,200.00 being hardship allowance, Kshs.750 being medical allowance, Kshs. 4,000.00 being commuters allowance totaling to gross pay of Kshs. 29,971.00 per month. Kshs. 29,971.00- Kshs, 10,178.00= Kshs. 19,613 underpayments per month x 12 months' x yearsKshs. 1,176,780.00.

iii. Annual leave for 5 years.

iv. Leave travelling allowance = Kshs. 1,400 x 5 years = Kshs. 7,000.00. Total annual leave and travelling leave allowance = Kshs. 75,475.00 Total claim when the claimant is reinstated back to work = Kshs. 1,252,255.00

e. If not reinstate to work the claimant should be paid: -

i. Two months' salary in lieu of notice = Kshs. 13,695 x 2 months = Kshs. 27,390.00

ii. Salary underpayment in arrears = Kshs.1,176,780.00

iii. Annual leave and leave allowance = Kshs.75,475.00

iv. Gratuity for 5 years of Kshs 55,303.50.

9. The Respondent entered appearance on the 18<sup>th</sup> January, 2016 and filed a response on the same day. The Respondent denied all the contents of the memorandum of claim and in particular that the claimant was employed in the year 2007. The Respondent stated that the claimant was engaged as a casual employee in September, 2011 on availability of work basis and was once retained for a 3 month fixed term commencing on 26<sup>th</sup> June, 2012 and expired in September, 2012.

10. It was stated that the claimant was given the fixed term contract, which he read before binding himself to the said contract by appending his signature in acceptance of the same. Therefore, he was not fired but the contract came to an end.

11. Regarding the pay disparity, the respondent stated they have hired various employees from casual, contract employee and permanent ones whose terms of engagement vary depending on job groups therefore the pay was not uniform in all job groups.

12. The Respondent therefore contends that the claimant was hired as a casual in September, 2011 and worked depending on availability of work which never at any point run for the entire month. Also that upon his employment on the fixed term, the terms were clear that the contract was fixed with its end clearly determinable.

13. Accompanying the Memorandum of response is a Notice of Preliminary Objection which was raised on the basis that the suit herein is statute barred having been filed on 9<sup>th</sup> November, 2015 when the cause of action, being expiry of contract, arose on 28<sup>th</sup> September, 2012. The Respondent therefore contends that the claim herein offends the provision of section 90 of the Employment Act and should be struck out.

14. The claimant in response to the Preliminary Objection stated that as much as the contract came to an end on 28<sup>th</sup> September, 2012, he was officially informed of the expiry of the said contract on 5<sup>th</sup> October, 2012 but continued working till 28<sup>th</sup> November, 2012 when he exited the Respondent's employ.

### **Hearing**

15. The Claimant, **Andrew Mwangi Wachira**, sought to adopt his witness statement dated 2.6.2017 together with list of document and maintained that he was employed by the Respondent in the year 2007 and fired in 2012.

16. On cross examination, he testified that he does not have any documentation to affirm that indeed he was employed by the Respondent in the year 2007. He stated that he was paid Kshs 3,640 while others received Kshs 14,000. He also told the court that disparity in his pay was because he at times applied for salary advance. He stated that he was paid according to the number of days worked. On asked about the contract, he stated that he was issued with a fixed term contract which he signed and came to an end in November, 2012. On the payslips used in comparison to his, he stated that the name of the employee is not indicated in the pay slip as he was bringing it for comparison purposes only to show that others were paid more than him.

17. The Respondent called one witness, **Mungwa Mureithi, RW-1**, the Deputy Registrar Administration and Human Resource Capital, who adopted is witness statement and documents filed therein.

18. On cross examination, he stated that the claimant was employed by the Respondent in September 2011 as a casual employee depending on availability of work and later in July 2012 was taken up for a 3 months fixed contract.

19. He told the Court that the disparity of pay in the sheet produced was depended on the number of days worked by each employee.

20. On further cross examination, he testified that the claimant signed the contract of employment for the fixed period willingly and without any duress.

### **Submissions**

21. The claimant submitted that he was employed by the Respondent in the year 2007 though no documentation was given. He submitted that it is not in dispute that both parties agreed that the claimant worked continuously from September, 2010 till end of June, 2012 when the Respondent introduced the fixed term contract.

22. According to the claimant during the period between September, 2011 and June, 2012, he worked in the catering department as a waiter/cook earning a salary of Kshs. 5,000 as indicated in the documents produced in court and affirmed by the Respondent which money was below what is payable to a waiter/cook under the Government general wage Order. The wage payable to a waiter is Kshs 5,459.30 plus 15% house allowance of Kshs 818.85 adding up to Kshs 6,278.15 therefore the claimant was underpaid in the circumstances.

23. On the change of terms of engagement to the fixed term contract, the claimant submitted that the change of terms of engagement went against the express provisions of section 10 (5) of the Employment Act. It was argued that the claimant was never consulted on the changes and was merely forced to sign the contract, having been misled that the same was to secure his employment on permanent basis.

24. The claimant thus submitted that the fixed term contract that led to the termination of his service to the Respondent is null and void and the Court should hold as such and allow the claim as prayed.

25. The Respondent on the other had submitted that they first engaged the claimant in September, 2011 and not 2007 as alleged and the allegation that the claimant worked for the respondent for 5 years is without any basis.

26. With regard to underpayment pleaded, the respondent submitted that the claimant was paid in accordance with the legal order in place 2012, in the column labeled other areas since the respondent was not in a municipality or a city. It was also argued that the claimant being a casual employee between September, 2011 to June, 2012 was paid depending on days worked and not at the end of each month.

27. On payment of service gratuity, the Respondent submitted that the claimant did not work regularly for a full month and also that the claimant cannot enjoy the privileges of the CBA signed between it and KUDHEIHA for year 2010 -2012 since the claimant was not a member of the Union and no dues were authorized to be deducted to the union for him to enjoy the Union privileged. In this it cited the case of **Susan Wairimu Karaya V Laikipia University, Nakuru ELRC Cause Number 324(B) of 2015(UR)**.

28. On the leave pay, the Respondent submitted that the claimant worked for it continuously only on the fixed term contract which leave was factored in at the rate of 2 ½ days per month.

29. On whether the claimant was unfairly terminated, the respondent submitted that the claimant signed a fixed term contract which came to an end by effluxion of time therefore the claim for unfair termination, notice pay and compensation is without and basis. In this they cited the case of **Fatuma Abdi v Kenya School of Monetary Studies [2007] eKLR**, where court recognized a fixed term contract of employment as legal mode of employment.

30. The Respondent then concluded that the claim herein is statute barred having been filed outside the 3 years period contrary to section 90 of the Employment Act. It submitted further that the cause of action arose in 30<sup>th</sup> September, 2012 when his 3 months' contract came to an end. The claimant then filed this suit on 9<sup>th</sup> November, 2015 which was outside the 3 years required of filing an employment claim in this Court. The respondent therefore urged this Court to struck out this suit on that basis.

31. I have examined the evidence and submissions of the parties. I will first consider the preliminary objection raised by the respondent herein that this claim is time barred by virtue of Section 90 of the Employment Act.

32. From the memorandum of claim, the claimant averred at paragraph 4 that the contract expired on 28<sup>th</sup> November, 2012. The claim was filed on 9<sup>th</sup> November, 2015 which this court finds was within the 3 years period contemplated under Section 90 of the Employment Act 2007 other than this claim being rightfully before court for determination the claimant has validly indicated that he was placed on a three year contract on 26<sup>th</sup> June 2012.

33. He signed and accepted this contract and upon its expiry, the same was not renewed. It is indeed true that this contract was terminated by effluxion of time and the claimant cannot claim termination or redundancy as has claimed.

34. The claimant also claimed for underpayments on his wages for period before 2012 which claim I find is time barred this claim having been filed in 2015 November.

35. I will therefore not delve into the merit of the said prayers.

36. The upshot is that the claim is not merited and the prayers sought are not tenable. I dismiss this claim accordingly with no order as to costs.

**DATED AND DELIVERED VIRTUALLY THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2021**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Ndichu for respondent – present

Owuor for claimant – present

Court Assistant - Fred