



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1110 OF 2017

(Before Hon. Justice Ocharo Kebira)

JOSEPHINE MWENDE.....CLAIMANT

VERSUS

UNIVERSITY OF NAIROBI.....RESPONDENT

JUDGMENT

Introduction.

1. Through a statement of claim dated **7th June 2017**, the Claimant contending that her employment with the Respondent was pre-maturely terminated sued the latter seeking the following reliefs;

- a. A declaration that the Claimant is entitled to payment of the remaining part of the contract.
- b. Certificate of service.
- c. Gratuity for the years worked.
- d. Cost of the suit.
- e. Interest on (a), (c) and (d) above at the present court rate.

2. The Respondent filed a memorandum of response dated **31st October, 2017**, denying the Claimant's case and her entitlement to the reliefs she has sought.

3. When this matter came up for hearing on the **27th October, 2021**, the parties herein by consent moved court to admit their respective witness statements and documents as their evidence and then render itself on the matter upon premise of the same.

The Claimant's case

4. The Claimant states that on **14th January 2008** she was employed by the Respondent on a renewable contract as a cleaner with a salary of Kshs. 6,450, House Allowance Kshs. 5,380 and commuter allowance of Kshs 1500. The contract was renewed on a number of occasions, the last such renewal being in September 2015. The renewal was for one year and therefore the expiry date was **30th September 2016**.

5. She contended that under this contract she was earning a salary of KShs 11,005, House Allowance KShs 6,956 and transport allowance of Kshs 13,000.

6. The claimant stated that the Respondent pre-maturely terminated the contract on **4th March 2016** which termination has prejudiced her.

7. She filed a list of documents, purporting to have the following documents filed thereunder, her pay slip, contract letter, and letter of termination of contract. The documents were not.

Respondents case

8. The Respondent in its pleadings stated that the claim herein is scandalous, frivolous, vexatious and does not disclose any reasonable cause of action and prays that the same be struck out with costs.

9. It denied the contents of paragraph 4 of the Claimant's statement of claim, therefore that the Claimant's contract of employment was last renewed in the month of September 2015 for one year with a lapse date set for 30th September 2016.

10. In its pleadings too, the Respondent denied that the Claimant was in any contract of employment with it as alleged in paragraph three of her statement of claim.

11. The Respondent stated that the Claimant was an employee on a period contract that was subject to termination anytime and she was fully paid.

12. Prof. Horace Ochanda, the Respondent's witness presented himself as the Deputy Principal, Kenya Science Campus of the Respondent. Through his witness statement dated 7th November, 2017, he stated that the claimant was offered a terminal renewed contract as a cleaner/sweeper for a period of 1 year with effect from 1st November, 2014 up to and including 31st October 2015.

13. He asserted that later the contract was amended, the contract period was provided to ran from October 1st ,2014 to and including September 30, 2015.

14. The witness stated that on or about July 24, 2015 the Claimant requested for a further extension of her contract, which resulted to the Respondent offering her a terminal renewed contract for same position at Kenya Science Campus for one year, with effect October 1st October ,2015 to September 30th 2016.

15. The witness stated that through a letter dated 4th March 2016, the Claimant was informed that her contract had been terminated on the basis of circular OP/CAB.2/7A, on retention in service of officers beyond mandatory retirement age. He asserted that the Claimant was paid all her dues.

Claimant's Submissions

16. Counsel for the Claimant submitted that the Claimant managed to prove that her contract was terminated prematurely. That the Respondent admitted this fact. He further submitted that though the Respondent contended that the termination was as a result of a government circular, the circular was not placed before the Court.

17. Counsel further submitted that the Respondent failed to prove that they followed the required procedure in terminating the services of the Claimant. The termination was premature and it subjected the Claimant to prejudice. The termination was unfair.

18. The Claimant's Counsel submitted that consequently the Claimant is entitled to be compensated for the remainder of her contract period.

Respondent's Submissions

19. The Respondent submitted that the Claimant's contract was renewed for a period of 1 year from 1st October 2015 to 30th September 2016 but the Respondent was constrained to terminate the contract on the 4th March 2016 following a government directive that was contained in circular reference OP/CAB/2/7 directing termination of post retirement contracts.

20. The Respondent submitted further that it is in obligation to the circular that it terminated the Claimant's contract of employment, which was a post retirement contract. The Claimant was subsequently paid her dues and this is evidenced by vouchers and letters in the bundle of documents that the Respondent placed before the Court.

21. The Respondent states that it has demonstrated that the termination was on a valid reason and fair hence it's in compliance with the provisions of Section 43 of the Employment Act and to buttress this relies on the holding in **Kenya Power & Lighting Company Limited versus Aggrey Lukorito Wasike [2017] eKLR** where the Court stated;

“Under Section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he “genuinely believed to exist,” causing him to terminate the employee's services.”

22. The Respondent states that failure to terminate the said contract would have meant that the claimant would operate on an irregular and/or illegal contract for the remaining part of the contract which is not enforceable. To grant the claim herein would be enforcing the irregular/or illegal part of the contract. In this proposition, Counsel for the Respondent relies on a statement from the **Halsbury's Laws of England [4th edition], Volume 16[1A] page 29 the Formation of Contracts of Employment paragraph 18;**

“ A finding of illegality means, however, not only that no common law claim may be maintained on the contract, but also that the employee subject to the contract, loses any statutory employment rights which rely on his having been an employee under a contract of employment, in particular the right to claim unfair dismissal..... If the illegality affects the contract only for a certain period during its currency, the contract may be unenforceable for that period.”

23. The Respondent states that the claimant is not entitled to payment of the remainder of her contract as the same was not unfairly terminated.

24. The Respondent also submits that the Claimant's claim herein is monetary in nature. It is trite law that such claims must be specifically pleaded and proved. The Claimant has not particularised the claim or made a tabulation on the sums sought. He has not proved sums claimed. The Black's Law Dictionary: Damages that are alleged to have been sustained in the circumstances of a particular wrong. To be awardable, special damages must be specifically claimed and proved.

25. Reliance was further placed on the holding in **John Richard Okuku Oloo v South Nyanza Sugar Co Ltd [2013] eKLR**, thus:

“We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.”

26. The Respondent states that the Certificate of service has been at all material times ready, the Claimant should collect it.

27. The Respondent states that the Claimants contract does not provide for gratuity and further states that gratuity is only payable where it has been contractually provided for as held by the Court of Appeal in **H. Young & Company EA Limited vs. Javan Were Mbango [2016] eKLR** thus:

“This Court in *Central Bank of Kenya vs. Davies Kivieko Muteti [2009] eKLR* emphasized that there is a difference between severance pay and gratuity. Gratuity as correctly enunciated by this Court in *Bamburi Cement Ltd vs Farid About Mohammed [2016] eKLR* denotes a gratis payment by an employer in appreciation of service. There is no express provision for gratuity in the Employment Act. It is usually payable under terms set out in a contract of service or collective bargaining agreement.”

28. The Respondent urges the court to dismiss the claim as the reason for termination of the Claimants contract was valid and fair.

Analysis and determination

29. The following issues emerge as issues for determination in this matter;

[a]. **Whether the Claimant's contract of employment was irregular and or illegal during its currency or at any time thereof.**

[b]. **Whether the contract of employment was prematurely terminated.**

[c]. **What reliefs can be availed, if any, to the Claimant?**

[d]. **Who should bear the costs of this suit?**

30. The Respondent's counsel submitted that the Claimant's contract of employment was or became irregular and or illegal following the government directive that was contained in a circular under reference number/CAB. /2/7 of 12.02. 2016. Therefore, she cannot enforce the remainder of her contract. Before I delve further into this issue, it is imperative to state from the onset that the issue of the government circular and the contract of employment being or becoming irregular and illegal as a consequence of the directive therein, was a matter that was not pleaded by Respondent. It is here that I must comment on the importance of pleadings and the implication of a party venturing out of what he or she has not pleaded.

31. No doubt, numerous judicial attentions have been given on the importance of pleadings and the implication on a party's dwelling on matters not pleaded or that cannot be ascertained from its pleadings. In **Adetoun Oladeji [NIG] Ltd vs Nigeria Breweries PLC S.C 91/2002**, Judge Pius Aderemi J.S.C expressed himself;

“.....It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded,”

32. Sir Jack Jacob in his Article entitled **“The Present Importance of pleadings”** cited with approval by the learned Judges of the Malawi Supreme Court in **Malawi Railways Ltd v- Nyasulu [1998] MWSC**, aptly captures it thus;

“As the parties are adversaries, it is left to each one of them to formulate his own case, subject to the basic rules of pleadings.....for the sake of certainty and finality, each party is bound by its own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as bound by pleadings of the parties as they are themselves. It is no part on the duty of the Court to enter upon inquiry into the case before it, other than to adjudicate upon specific matters in dispute which the parties themselves have raised by way of pleadings. To do so would be to enter upon the realm of speculation. Moreover, such event the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or a defence not made or raised by or against a party is equivalent not to hearing him at all and thus be a denial of justice.....In an adversarial system of litigation therefore, it is the parties themselves who set the agenda for trial by their pleadings and neither party can complain if the agenda is not strictly adhered to. In such an agenda there is no room

for an item called “any other business” in the sense that points other than those raised may not be raised without notice.”

33. The Respondent having not pleaded irregularity and or illegality of the contract of employment, cannot be allowed to rely on it to defeat the Claimant’s case.

34. Assuming that the Respondent had a right to raise the issue and rely on it, right which I have concluded it didn’t have under the circumstances, section 109 of the Evidence Act placed a burden of proof on it to prove the fact. It never discharged this burden. The Respondent asserted that the Claimant’s contract was terminated before its full period on strength of a government circular, the circular was not placed before this court for consideration. Is it possible that the circular had a retrospective effect? is a question the Respondent needed to answer but didn’t.

35. I am not prepared to agree with the Respondent therefore that the contract was irregular and or illegal at any time of its life.

Was the contract terminated prematurely?

36. It is not in contest that through its letter of renewal of contract dated **15th September 2015**, the Respondent offered the Claimant a terminal renewal of contract as a cleaner. According to the letter, the Respondent’s Exhibit 3, the renewed contract was to run from 1st October, 2015 upto and including 30th September, 2016. The Claimant accepted the offer and got into the employment under the contract. The contract was terminated on 4th of March 2016, six months before its appointed lapse date. From the pleadings by the Respondent one cannot see any reason or justifiable reason advanced for the termination. It will be noted that substantially the memorandum of response made general denials on the averments in the statement of claim save for paragraph 9 where it stated that the Claimant was on a period contract that was subject to termination anytime and was terminated and the Claimant fully paid.

37. That the contract would be terminated at any time is a position this court does not agree with. The contract had a lifespan, it would only be terminated in accordance with the terms of the contract or the relevant provisions of the law. Besides this bare assertion by the Respondent, it didn’t lead evidence to establish that this happened.

38. The foregoing premise, coupled with the fact that this Court has hereinabove rejected the Respondent’s unpleaded assertion that the contract was irregular and or illegal, leads this court to a conclusion that the Claimant’s case that the contract was prematurely terminated, without justification, and unlawfully, was not controverted, it stood on firm ground

Of the reliefs

40. The Claimant sought for a declaration that she is entitled to the payment for the remaining part of the contract. Having found as I have hereinabove that the Respondent didn’t manage to demonstrate that the contract was terminated in accordance with terms of the contract of employment between it and the Claimant, or the law, the court agrees with the Claimant that this is a relief she is entitled to.

41. The Claimant pleaded that at the time of termination she was earning a salary of Kshs. 11,005, House allowance of Kshs. 6956 and transport allowance of Kshs. 13,000. Therefore, a gross salary of Kshs. 30,961. The Respondent did not challenge this or place any evidence before the court to displace it. The Court holds that this is the gross salary she was earning under the renewed contract. Consequently, this Court awards the Claimant gross salary for the remainder of the contract period, namely Kshs. 185,766.

42. From the documents presented by the Respondent there is no reflection of what the Claimant was paid as her terminal dues that the Respondent alleged it paid her.

43. The Claimant further claimed gratuity. The Claimant didn’t place evidence before Court to establish that it was a term of the employment contract that she would be entitled to gratuity. In **H. Young & Company EA Limited vs Javan Were Mbangi** [2016] eKLR, the Court of Appeal, held;

“This Court in *Central Bank of Kenya vs Davies Kivieko Muteti* [2009] eKLR emphasized that there is a difference between severance pay and gratuity. Gratuity as correctly enunciated by this Court in *Bamburi Cement Ltd vs Farid Aboud Mohammed* [2016] eKLR denotes a gratis payment by an employer in appreciation of service. There is no express provision for gratuity in the Employment Act. It is usually payable under terms set out in a contract of service or collective bargaining agreement.”

44. This Court agrees with this view, and is bound by it. Consequently, the prayer for gratuity is denied.

45. Under Section 51 of the Employment Act, issuance of a certificate of service to an employee whose contract of employment has been terminated, is an entitlement to such an employee. The Claimant is entitled to the certificate by dint of the provision.

46. Costs follow the event, the event here being a successful litigation by the Claimant against the Respondent, she is therefore awarded costs of this suit.

47. In the upshot, judgement is hereby entered in favour of the Claimant in the following terms;

1. That the Claimant is entitled to payment of her gross salary for the remainder of the contract period, Kshs. 185, 766.
2. Costs of this Suit.

3. Interest at Court rates with effect 4th March 2016, till full payment.

4. The Respondent shall issue the Claimant with a Certificate of service within 21 days from the date hereof.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF DECEMBER, 2021

OCHARO KEBIRA

JUDGE

In Presence of

Mr. Oduor - Claimant

No appearance for the Respondent