



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION 84 OF 2017

IN THE MATTER OF: ARTICLES 10, 20, 22, 23, 27, 41, 47, 162(2)(a) and 236 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE EMPLOYMENT ACT

IN THE MATTER OF: THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTIONS ACT

IN THE MATTER OF: CONTRAVENTION OF ARTICLES 27, 28, 41 AND 47 OF THE CONSTITUTION

BETWEEN

SAMUEL OWITI OBAGE.....PETITIONER

-VERSUS-

KENYA REVENUE AUTHORITY.....RESPONDENT

JUDGMENT

1. The Petitioner was employed by the Respondent in 1996 on permanent and pensionable terms but in 2013 his terms of employment, together with other senior managers, were converted to renewable fixed term contracts of 3 years. The first contract took effect from 1st January, 2014 and was renewable for a further 3 year term subject to attainment of the retirement age of 60 years.

2. On 27th October, 2016 the petitioner received a letter from the Chief Manager, Human Resources informing him that his contract would expire on 31st January 2017 and that the authority expected him to express his desire regarding the renewal of his contract for a further term upto his retirement age. On 30th October, 2016, he expressed his desire for the contract of service to be renewed for another term subject to the retirement age of 60 years. Thereafter his supervisor and the Head of Department (Commissioner of Domestic Taxes) recommended renewal of his contract for similar reasons and he worked for the respondent up to 30th September, 2017 when he retired after at 60 years.

3. On 4.10.2017, the petitioner brought this suit contending that the conversion of his terms of employment from permanent and pensionable to 3 years' renewable fixed term contract was not voluntary and that he signed the same because he had no option. He further averred that, the Respondent had withheld his salary from February 2017 till the date of his retirement without any lawful basis, yet his colleagues continued to receive their salaries. He contends that the Respondent violated his rights under Articles 27,28,41 and 47 of the Constitution. He therefore prays for the following reliefs: -

a. A declaration be issued that the Respondent's action of withholding the Petitioner's salary and emoluments amount to breach of the Petitioner's constitutional right under Article 27,28,41 and 47 of the Constitution.

b. An award for compensation of withheld salaries be issued directing the Respondent to pay the Petitioner 8 months' salary compensation of Kshs. 4,560,000.

c. An award for interest on the withheld salary at 14% = Kshs. 196,609 (which interest continues to accrue)

d. An award for payment of gratuity at 25% of salary=Kshs. 1,140,000

e. An award for bonus for the Year 2016/2017= Kshs. 570,000

- f. Leave allowance for 2017= Kshs. 50,000
- g. Transport allowance = Kshs. 120,000
- h. Damages for unlawfully withholding his salary for 12 months = Kshs. 6,840,000.
- i. Exemplary and punitive damages for withholding the Petitioner's salaries.
- j. Pension dues payable to the Petitioner.
- k. Award for penalty interest that accrued from HFCK loan.
- l. Award for sums recovered from loan deposits at Hazina Sacco Limited of Kshs. 577,739.75.
- m. Damages for breach of the Constitution in Articles 27,28,41 and 47.
- n. Interest at court rates from date of filing this suit up to full payment.
- o. The costs of this Petition be borne by the Respondent.

4. The Respondent filed her Statement of Response on 7th June, 2018. She averred that the conversion of the Petitioner's terms of employment was effected after communication between the parties vide the letters dated 27th November, 2013 and 19th December, 2013 leading to the voluntary execution of the contract of service executed on 18th December, 2013.

5. She denied that the letter dated 27th October, 2016 was sent to all managers whose contracts were expiring.

6. She further averred that if the Petitioner continued to render his services as he alleges, those services were being rendered voluntarily without a subsisting contract of employment since no renewal of contract had been done pursuant to Clause 17 of the Terms of Service of contract. She contended that since there was no subsisting contract of employment from February 2017, then there was no lawful basis of paying a salary to the Petitioner.

7. The foregoing notwithstanding, the respondent averred that she has since paid the Petitioner salaries up to 30th September, 2017, his allowances up to 30th September, 2017, transport allowance of Kshs. 20,700 on his retirement, gratuity for the period between 1st February 2017 to 30th September, 2017 and 40 days leave.

8. However, she denied that she violated her constitutional and statutory obligations towards the Petitioner and reiterated that it had no contract of employment with the Petitioner, at the material time, so as to occasion the alleged violations.

9. During the hearing, Ms. Kashindi Counsel for the Petitioner informed Court that the Respondent had since settled some of the claims being prayers b,d,e,f and j in the Petition. Both parties tendered evidence during the hearing of the suit and thereafter filed written submissions.

Petitioner's case

10. The Petitioner testified that vide a letter dated 19th December, 2013 his terms of service were converted from permanent and pensionable to fixed term contract. He contended that he had no option but to sign the contract converting his employment terms or else he would have lost his job. He further contended that the conversion of the terms of service prejudiced him as the renewal of the fixed term contract was not automatic and was subject to the Commissioner General's discretion. He testified that after conversion of his terms to fixed term contract, his pension contribution ceased.

11. He testified that when the Human Resource (HR) informed him that his contract would expire on 31st January, 2017 and would be renewed, he accepted to the renewal of his contract. He further testified that by the letter dated 30th October, 2016 the HR informed him of the procedure for renewal of the contract and required him to respond to the letter by 7th November, 2016. He never responded by the expected date because he was hospitalised for a brain surgery but he responded on 21st December, 2016.

12. He testified that the HR issued him with contract renewal form thereafter and he filled and signed and it was also signed by the department's Deputy Commissioner who held the position of Department Commissioner in an acting capacity. He contended that in March 2017 and on 5th June, 2017 he wrote to the substantive Commissioner in the Department following up on the renewal of his contract but he did not receive a response to the letters. He however stated that only the Commissioner General responded to his email informing him that he would be notified of the renewal of his contract. He further contended that he continued to work for 8 months without receiving any pay. That as a result of this he was not able to meet his financial obligation.

13. He further testified that on 27th September, 2017, just 3 days to his retirement, the substantive Department Commissioner signed the renewal form and the Commissioner General approved by signing the form. He contended that a letter dated 13th March, 2017 from the Commissioner General renewed his contract for 7 months until his retirement age. However, the petitioner stated that he received the letter on 17th October, 2017 after filling this suit.

14. In cross-examination, he admitted that he never approached the Court to challenge the conversion of his terms of service. He further admitted that, as a permanent employee he earned Kshs. 380,000 but when the terms were converted to fixed term contract he earned Kshs. 550,000 plus a gratuity of 25% of his annual basic salary.

15. He further testified that after his surgery he was on sick off and no one informed him of the letter dated 27th October, 2016. He contended that, he only learned of the letter when the HR called him to inform him that he had not seen his contract renewal letter. He admitted that the renewal of the contract of service was at the discretion of the Commissioner General but averred that the discretion could not be exercised unfairly. Finally, he admitted that he was paid his emoluments for the 7 months of the renewed contract except for transport allowance.

16. Hilda Aboke, Pw2, testified that she is the Petitioner's daughter. She adopted her witness statement dated 8th March, 2019 and filed on 25th March 2019 as her evidence-in-chief. In brief, she stated that the Petitioner had taken out several loans prior to February 2017 and they had to look for options to offset his accruing liabilities; that she was compelled to take a loan from NIC Bank of Kshs. 1,200,000 to assist her father in the debts including a Mortgage; and, that the borrowings would never have happened had the Respondent paid the Petitioner his salary and allowances in due time.

17. Pauline Atieno Owiti Abogo, the Petitioner's wife testified as Pw3. She adopted her witness statement dated 8th March, 2019 and filed on 25th March 2019 as her evidence in chief. In brief, she stated that she had to seek financial assistance from Pw2 as well as borrow friendly loans which she paid with interest in order to pay loans advanced to the Petitioner by several lenders including Hazina Sacco.

18. In cross-examination, she admitted that she is a housewife living with Pw2. She further admitted that she had no receipts to prove that she did the house shopping. She also confirmed that the Respondent paid the Petitioner's hospital bills in 2017.

Defence case

19. Grace Wambui, a HR professional in charge of discipline matters at the Respondents' testified as Rw1. She stated that in 2013 the Respondent decided that terms of service for certain cadre of staff, that is, Chief Manager or Deputy Commissioner Grade KRA 7 and 8, be converted from permanent and pensionable to contract terms. As a result, about 70 staff members including the petitioner executed the contracts for a 3 year renewable term. She explained that, prior to expiry of the contract the employer was required to issue notice expressing intent to renew the contract.

20. She further testified that the Petitioner was issued with a notice dated 27th October, 2016 which provided for a deadline of the close of business the same day. She testified that the Petitioner replied vide a letter dated 31st October, 2016 which was 3 days after the expiry of the notice. She confirmed that the petitioner's letter was nevertheless accepted and he was given another letter dated 31st October, 2016 spelling out the procedure for renewing the contract and enclosing a contract renewal form to fill and forward to the Head of HR by 7th November, 2016. However, according to her the Petitioner never complied with the deadline which meant that the contract was not renewed.

21. She further testified that before the approval of the renewal/extension of the contract, the Petitioner was not entitled to any salary because there was no contract of service between him and the respondent. She confirmed that the contract renewal form was eventually signed and approved by the concerned officers on 27th September, 2017, only 3 days to the petitioner's retirement date. She contended that the delay in approving the contract was because the renewal was at the discretion of the Commissioner General.

22. She confirmed that the payment to the petitioner was effected after he had exited. She contended that the Petitioner was paid his transport allowance after retirement at the rate of Kshs. 50 per kilometre to the Petitioner's home. This payment was made through the bank on 20th May, 2019.

23. In cross-examination, she admitted that besides the contract there is no other document that signifies that the Claimant voluntarily accepted the conversions of his terms of employment from permanent and pensionable to contractual. She further admitted that the retirement notice dated 7th March, 2016 indicated that the Petitioner would be paid his salary up to 30th September, 2017.

24. She blamed the Petitioner for the delay in the renewal of his contract as he returned the contract renewal form on 21st February, 2016. She further contended that the Petitioner ought to have pursued the matter with his Head of Department (HoD) who was to sign the renewal form and then submit it to the HR. She contended that the original form was not signed by the HoD and that it was endorsed on 23rd December, 2016 by the acting HoD at the wrong place. According to her the correct endorsement by the HoD was on 27th September, 2017.

25. She testified that the contract renewal process was not set out in the contract of service but was provided for in the HR manual. She further testified that the letter dated 30th October, 2016 explained the procedure for renewal of the contract. She admitted that it took about 9 months before the contract was renewed and before payment of the Petitioner's dues. She maintained that the Petitioner continued to work without a salary because there was no contract of service in place. However, she admitted that the Petitioner was ill for a while therefore he delayed in responding to contract expiry notice.

26. She denied that the Petitioner was denied his salary and maintained that it was him who failed to comply with the procedure for renewal of his contract. She further testified that the letter dated 13th March, 2017 was not issued to the Petitioner because he had not complied with the procedure for renewal of his contract. Finally, she testified that the email dated 13th July, 2017 indicated that the Petitioner's pending leave days were 29 days.

Petitioner's submission

27. The Petitioner submitted that Article 41 of the Constitution provides for the right to fair labour practices. He submitted that in **Joseph Maina Theuri v Gitonga Kabugi & 3 Others [2017] eKLR** and **Kenya County Government Workers' Union v County Government of Nyeri & another [2015] eKLR** the Court held that Article 41 is in respect of the basic fair treatment of employees and that what is fair goes beyond what is lawful and legal.

28. The Petitioner submitted that he confirmed that the variation of the terms of his contract was not with his consent and that he had to sign the fixed term contract to keep his job. It was his submission that the conversion of this employment terms was unilateral and that it grossly violated the provisions of section 10 (5) of the Employment Act.

29. He relied on the case of **James Ang'awa Atanda & 10 others v Judicial Service Commission [2017] eKLR** where the Court held that the unilateral variation of employment contract is unlawful and amounts to repudiation or breach of contract. He further relied on the case of **Maxwell Miyawa & 7 others v Judicial Service Commission [2017] Eklr**

30. He submitted that the unilateral conversion of his contract violated not only his right to fair labour practices under Article 41 of the Constitution but also his right to fair administrative action under Article 47 of the Constitution.

31. He further submitted that the Respondent's explanation for the unjustified withholding of salary for reason that there existed no employment relationship between the Respondent and the Petitioner is unsupported by facts and the law. He maintained that he was an employee of the Respondent up to the time of his retirement in October 2017 but the Respondent unlawfully and without any justification chose to withhold the renewal of his contract.

32. He also submitted that an employee's salary or wages are protected under Part 4 of the Employment Act and that the Respondent failed to discharge a key responsibility of an employer by withholding his remuneration for more than 9 months without any valid reason. In addition, he contended that his right to equality and freedom from discrimination was violated when his benefits, salaries and allowances were withheld while other staff members of equal rank were being paid. He relied on **Janine Buss v Gems Cambridge International School Limited [2016] eKLR** where the court held that under section 5 (6) of the Employment Act the burden of disproving an allegation of discrimination lies with the employer.

33. He submitted that his right under Articles 27, 28, 41 and 47 were grossly violated.

34. He contended that his claim for an award of 14% interest on the withheld salaries is uncontroverted and is just and fair to be granted in the circumstances. He further contended that his transport allowance in the sum of Kshs. 20,700 was not paid to him after the retirement. He also prayed for Kshs. 6,840,000 as damages for unlawful withholding of salaries arguing that the same put him back to the position he would have been if his emoluments were not withheld. He relied on the case of **Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR**.

35. He further submitted that he is entitled to an award of exemplary and punitive damages for unlawful withholding of his salaries to discourage the unconscionable practice that violate the right to fair labour practice by employers. He also submitted that he is entitled to an award equal to the penalty interest that accrued from his HFCK Loan and the sums recovered from his deposits at Hazina Sacco Limited.

36. Finally, he submitted that damages in the sum of Kshs. 10,000,000 would be sufficient compensation for the breach of his constitutional rights under Articles 27,28, 41 and 47 of the Constitution. He therefore urged the court to grant the reliefs sought in the Petition plus costs and interest.

Respondent's submissions

37. The Respondent submitted that for the Petition to succeed it ought to meet the competency threshold for petitions set in the case of **Anarita Karimi Njeru v Republic [1979] eKLR**.

38. She further submitted that vide the letter dated 27th November, 2013 the Petitioner was invited to exercise the option of changing the terms of his employment contract and he raised no objection. She submitted that there was no unilateral conversion of the contract in violation of Article 41 of the Constitution as nothing stopped the Petitioner from invoking his right under section 10 (5) of the Employment Act.

39. She submitted that having signed the contract and there being no other evidence of his account of coercion, the contract is deemed to have been duly signed within the provisions of section 9 (3) of the Employment Act. Accordingly, he contended that the Petitioner is estopped from claiming that the conversion was unconstitutional, unfair and or unlawful under Articles 41 and 47 of the Constitution. She relied on **Fedelix Mwendwa Muli v Bamburi Cement Limited [2018] eKLR** where the Court held that the consent of the employee his signified under section 9 (3) by the employee signing is names therefor or imprinting an impression of his thumb in the presence of a person other than his employer.

40. She distinguished **James Angawa Atanda case** and **Maxwell Miyawa case** from the present case on the ground that in the said cases there was no demonstration of the intent to invoke consultations and the employer unilaterally sought to vary the employment contracts with only two options being to either accept the varied contract or treat the contract as terminated.

41. On the other hand, the respondent submitted that the communication of the renewal of the contract to the petitioner was dependent upon compliance with the renewal process as evidenced in the documents. She further argued that there was no time frame within which the Respondent was required to respond to the request for renewal of the contract but it all depended on the Commissioner General's discretion to renew the contract under Clause 17 of the terms of service. She further submitted that the expectation held by the Petitioner that the contracts would be renewed has no basis as there was no express, clear and unambiguous promise given by the Respondent. Accordingly, she

contended that she cannot be faulted for delay in communicating the decision to renew the contract. She relied on **Margaret A Ochieng v National Water Conservation & Pipeline Corporation [2014] eKLR** .

42. As regards the withholding of salary, the respondent submitted that there was no subsisting contract of employment to warrant payment of salaries as the contract had expired on 31st January 2017. She further submitted that the purported violation under Article 27 of the Constitution has not been proved and it does not meet the threshold in the **Anarita Karimi Njeru** case.

43. She also submitted that there was no way she would have breached the Petitioner's right to dignity under Article 28 of the Constitution as the contract of service terminated at the end of January 2017. She averred that the Petitioner did not have a contract of service to create an obligation on the part of the Respondent, the breach of which would amount to a violation of the Petitioner's right under the Constitution.

44. As regards the reliefs sought, the respondent maintained that no salaries were due to the Petitioner until the Commissioner exercised his discretion to renew the contract and as such the claim for interest on withheld salaries is untenable. She further contended that the petitioner has since been paid his salaries plus the transport allowance Kshs. 20700 as per the pay advice produced as exhibit. She contended that the claims for damages for unlawful withholding of salaries, exemplary and punitive damages are untenable since no salaries were withheld from the Petitioner.

45. In addition, she submitted that the claim for interest on the accrued HFCK loan is misdirected against the Respondent as it is so remote to the contract of employment since it was availed pursuant to a contract between the Petitioner and HFCK. Likewise, she further submitted that the Petitioner has not exhibited the nexus between the loan taken from Hazina Sacco and the obligation by the Respondent in repayment by way of a contract.

46. Finally, she submitted that the Petitioner has not been able to prove breach of constitutional rights thus no damages can obtain. She relied on the case of **Jasbir Singh Rai & Others v Tarlochan Rai & Others** and submitted that the primary consideration in constitutional litigation must be the way in which costs order would hinder advancement of constitutional justice. She submitted that this being a private law claim which is frivolous she ought to be granted costs for defending the Petition.

Petitioner's rejoinder

47. In his brief rejoinder the petitioner submitted that there is a clear violation of section 10 (5) of the Employment Act which requires in mandatory terms that consultation be done with employees before changes are made and an employee is notified. In support of this position he relied on the case of **Elizabeth Kwamboka Khaemba v BOG Cardinal Otunga High School Mosochi & 2 others [2014]eKLR**. He further submitted that the Respondent's assertions that the Petitioner did not request for consultation is baseless as section 10 (5) of the Employment Act directs the employer to consult with his employee prior to effecting changes to the terms of contract.

Issues for determination

48. Upon consideration of the pleadings and the evidence herein, there is no dispute that the petitioner was initially employed by the respondent on permanent and pensionable basis until 2013 when the terms of the contract of service was converted to a renewable 3 years' fixed term contract subject to attainment of the retirement age of 60 years. There is also no dispute that the petitioner served through the first contract and the employer made an offer to him to renew the contract. There is further no dispute that the petitioner accepted the offer but the employer failed to communicate whether or not the contract was renewed. Finally, it is common knowledge that the petitioner continued working until he retired in 30th September 2017 but the respondent did not pay him.

49. The main issues for consideration are:

- a. Whether the Petitioner's terms of service were irregularly converted.
- b. Whether the Petitioner's rights were violated as a result of the withholding of his salary
- c. Whether the Petitioner is entitled to the reliefs sought

Analysis and determination

(a) Whether the Petitioner's terms of service were irregularly converted.

50. The Petitioner avers that his terms of service were irregularly converted from permanent and pensionable to contract of service. He testified that he had no option but to sign the contract or else he would have lost his job. It was his submission that the conversion of his terms of service was neither consensual nor voluntary. He submitted that the conversion violated the provisions of section 10 (5) of the Employment Act.

51. The Rw1 testified that the Petitioner voluntarily executed the contract on the change of terms as other managers did. The Respondent submitted that the letter dated 27th November 2013 specifically indicated that the Petitioner was to express his support for the change of terms.

52. Section 10 (5) of the Employment Act provides:

“Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the

contract to reflect the change and notify the employee of the change in writing.”

53. The Petitioner executed the contract of service dated 18th December, 2013 to which Paragraph 1 of Schedule to the Agreement provided that he would be engaged for a period of 3 years. The Respondent in her letter dated 27th November, 2013 stated:

follow the procedure for the renewal. It is common sense that until the acceptance of request for the renewal of the contract was communicated by the Commissioner General to the petitioner, no valid agreement to renew the contract could be implied.

61. In addition to foregoing, it also obvious that without a confirmation of the renewal of the contract by the Commissioner to the concerned department, the petitioner could not be reinstated into the respondent's payroll and no salary could be paid from the public coffers to the petitioner after his initial contract had lapsed. I must agree with the respondent that without a contract of employment in place between the parties herein, there was no obligation on the part of the respondent to pay any salary to the petitioner. In my view the respondent was right in withholding any salary for the services rendered by the petitioner until the renewal of his contract was regularized. Consequently, I return that the said withholding of salary by the respondent did not violate the petitioner's rights under Article 27,28,41 and 47 of the Constitution as alleged.

(c)Whether the Petitioner is entitled to the reliefs sought

62. Having found that the Petitioner's rights were not infringed upon the prayer for a declaration that the Respondent's action of withholding his salary and emoluments breached his constitutional rights fails.

Withheld salary, gratuity, bonus, leave and pension

63. The parties herein admitted that prayers b, d, e, f and j in the Petition namely, withheld salary, gratuity, bonus, leave and pension were settled during the pendency of the trial.

Interest on the withheld salary

64. The claim for interest for the withheld salary must fail because I have already held that the respondent was not bound to pay any salary to the petitioner until the renewal of the contract had been regularised. There is, therefore, no basis for the award of interest on withheld salary.

Transport allowance

65. The Petitioner avers that he is yet to receive his transport allowance. Rw1 testified that the amount was paid to the Petitioner and produced email and a document indicating that the Petitioner was paid his transport allowance on 20th May 2019. Consequently, this claim fails.

General, Exemplary and punitive damages

66. The claims for damages under the various heads must fail because the Petitioner's rights were not violated.

67. In conclusion the suit is dismissed save for the claim for withheld salary, gratuity, bonus, leave and pension which were settled before the trial of the suit. However, the Petitioner is awarded costs of the suit because the respondent failed to settle his claims until he filed the suit.

Dated and delivered at Nairobi this 24th day of January 2020

ONESMUS N. MAKAU

JUDGE

In the presence of:

Mr. Kashindi for the petitioner

Mr. Chabala for the respondent

ONESMUS N. MAKAU

JUDGE