



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.372 OF 2015**

**STANLEY KIPTANUI BII ..... CLAIMANT**

**VERSUS**

**CATHOLIC DIOCESE OF NAKURU ..... RESPONDENT**

**JUDGEMENT**

The claim herein is based on the facts that the claimant was first employed by the respondent at Baraka Agricultural College in November, 1986 as a lecturer. In the year 1998 he was promoted to the position of Deputy Principal and teacher at Baraka Agricultural College (Baraka). He worked for 15 years.

The claimant was transferred to Catholic Diocese of Nakuru Agricultural Programme (CDN Programme) vide letter dated 18<sup>th</sup> April, 2018 under a conditional service contract.

While the claimant was working at Baraka, his salary was paid every month at ksh.18, 165 and a house allowance of Ksh.2, 040. There was a running gratuity benefits to employee and payable at 25% of the employee's basic salary every year.

The service gratuity and annual leave between the years 1986 up to April, 2001 were paid. The respondent has however refused to pay under the agreement dated 25<sup>th</sup> March, 1998 on retirement benefits clause.

Upon the transfer of the claimant to the CDN programme there arose a disagreement between the donors and CDN programme management and which affected the employees especially the coordinator. The claimant and other employee affected were suspended from work for one month and the claimant resumed work on 11<sup>th</sup> July, 2002.

In the year 2002 the claimant was earning Ksh.19,981 and as at August, 2015 he was earning ksh.28,419.80 plus house allowance of ksh.4,341 all ksh.32,760.50.

The claimant worked until 26<sup>th</sup> October, 2015 when he left on alleged end of contract.

The claim is that the respondent retained the claimant on short term contracts under the provisions of section 10 for work which was continuous hence was in conflict with the provisions of section 37 of the Employment Act, 2007 (the Act). Such short term contracts would be signed days after the earlier contract had expired and where the claimant would be at work. The provision for short term contract became abused and resulted in unfair labour practice.

Upon the transfer of the claimant from Baraka to CDN programme the change of his employment terms and conditions to short term contracts was applied to edge him out of employment on 26<sup>th</sup> October, 2015. Such was done in bad faith.

The claim is that the services rendered to the respondent from 18<sup>th</sup> April, 2001 was not done in good faith as the respondent cheated the claimant to believe that he was going on normal transfer only to realise he was to be doing different work. The period between 18<sup>th</sup> April, 2001 to 26<sup>th</sup> October, 2015 should be counted to be a continuous employment relationship based on the letter of appointment dated 26<sup>th</sup> March, 1998 and that he worked continuously for the respondent for 30 uninterrupted years and terminal dues is paid in accordance with the letter of appointment.

The claims are for the payment of the following dues;

- a) September, 2015 salary at ksh.32,760.80;
- b) October, 2015 salary ksh.32,760.80;

- c) 4 months' pay per appointment letter dated 25<sup>th</sup> March, 1998 at ksh.131,043.20;;annual leave for 2014/2015 Ksh.56,838.00;
- d) Gratuity 23 days per year in accordance with letter of appointment dated 25<sup>th</sup> March, 1998 Ksh.754,170.00; and
- e) Compensation ksh.393,129.60;

The claimant testified in support of his claims.

He was employed at Baraka and issued with a letter of appointment to retire at age 55 with a benefit of 25% basic pay gratuity but before attaining such age he was transferred together with his benefits to the CDN programme and issued with short term contracts. That under his term contract with the respondent; at the end he would be paid a gratuity. The same would be paid by Britam. The retirement benefits should be paid from the March, 1986 to October, 2015 when his employment with the respondent ended.

The claimant also testified that he worked for the respondent continuously and without a break. He left employment aged 57 years and was supposed to have retired at age 50.

At the time of termination of employment he had not taken annual leave which he would normally take in November/December each year. His last leave was taken in the year 2013.

The claimant also testified that the short term contracts issued under CDN programme was premised on availability of funds. After contract end on 30<sup>th</sup> September, 2015 there was no contract issued. Upon the end of contract for the year 2014 he was paid gratuity at 25% by Britam. This was the same practice in every other end of contract.

In the year 2014 he only took 5 days of annual leave only and what is due is leave for 2014 and 2015.

He was housed by the respondent and paid rent. He was paid a house allowance.

At the end of the contract he has not vacated such housing.

At the end of the contract and programme all other employees were terminated in their employment with the respondent as of 28<sup>th</sup> September, 2015 and the claimant was left alone to hand over. Contract was meant to end 31<sup>st</sup> August, 2015.

Respondent paid to the NSSF and NHIF. There was also a pension scheme with Britam and for the duration of CDN employment he was under a term contract.

Defence

The defence I that the claimant was employed at Baraka upon appointment and upon transfer to CDN programmes as retained on short term contracts and paid from its terms thereof.

The claimant was transferred from Baraka before attaining age 55 and signed a new contract with CDN programme that had a different pension and retirement scheme with Britam.

The claimant was notified of the end of his contract hence not entitled to claims for salary for September, and October, 2015. The Certificate of Service is available for collection after end of employment contract in August, 2015.

The claimant did not attain age 55 at Baraka college to earn the retirement benefits under such contract. He was since placed under the Britam pension scheme.

The claims made should be dismissed with costs.

In evidence Jimnah Kimani Mwangi testified that he is the human resource manager at the respondent and the claimant worked at Baraka before his transfer to CDN programme under a new contract which had a different pension scheme with Britam. There arose a disagreement in the CDN program and the claimant was suspended and later recalled on 11<sup>th</sup> July, 2002 and he worked until he was notified of contract end in August, 2015 and hence not required to be at work from such date onwards and claims made in this regard should not arise. By letter dated 1<sup>st</sup> August, 2015 the claimant was required to hand over by 31<sup>st</sup> August, 2015.

Mr Mwangi also testified the contracts renewal solely depended on availability of funds under the programme.

The respondent is willing to issue the claimant with his certificate of serve upon clearance

The defence is that the claimant worked at Baraka for 15 years and upon transfer to CDN programme from April, 2001 to May, 2005 he signed the 1<sup>st</sup> short term contract.

At the close of the hearing both parties filed written submissions.

On the pleadings, the evidence and written submissions, the issues which emerge for determination are;

The nature of employment between the parties;

Whether the remedies sought are due.

Before assessing the remedies due, the claimant case is that upon employment by Baraka he was issued with a letter of appointment dated 1<sup>st</sup> December, 1986 and which employment had terms and conditions of service and allowed for a gratuity payment at age 55 at 25% basic pay for each year served. That these benefits should be factored in the payment of terminal dues owing to the claimant from the respondent.

What is apparent to the court is that by letter dated 25<sup>th</sup> March, 1998 the claimant was employed by Baraka but employment had commenced as of 1<sup>st</sup> December, 1986. The letter of appointment provided for various benefits and which included the payment of a retirement package upon attaining age 50 being payment of 23 days for each year worked.

The employment vide letter dated 25<sup>th</sup> March, 1998 did not take its full course as on 18<sup>th</sup> April, 2001 the respondent transferred the claimant from Baraka to CDN programme with effect from 1<sup>st</sup> May, 2001 on condition that;

*By copy of this letter, the principal of Baraka College is requested to calculate your benefits for the period you worked there and to transfer the same to the Diocese.*

Effectively the respondent is the principal employer. The claimant was thus transferred from one agency to another agency of the respondent.

The transfer of an employee from one location, different departments, places of work or as the case may require is the prerogative of the employer as held in **Anne Wairimu Kimani versus Kenya Agricultural Livestock Research Organisation (KALRO) [2017] eKLR;**

*Ordinarily, an employer is free to allocate or organise work as it deems prudent to achieve optimum results. A transfer of an employee from one station to the other should thus be seen from this perspective as the employer is at liberty to organise its business. This principle should be seen within the context of sections 10(2) (h), 17 and 18 of the Employment Act, 2007.*

*See Joseph Makau Munyao & 4 others v Kenya Ports Authority & another [2016] eKLR.*

Upon the transfer of the claimant to CDN programme his work benefits with Baraka were to be transferred to the respondent. The respondent being the principal employer and with the prerogative to transfer the employees thus held the benefits in trust.

By letter dated 11<sup>th</sup> June, 2002 the claimant was suspended from duty but employment was not terminated.

It has not been clarified as to the work status of the claimant from 1<sup>st</sup> May, 2001 until the term contract covering 1<sup>st</sup> January, 2005 to 31<sup>st</sup> December, 2005.

The respondent has not filed any work records in this regard the claimant has filed the first term contract covering the year 2005.

Without any work records giving contrary evidence, the court takes it that the terms applicable to the claimant vide letter dated 25<sup>th</sup> March, 1998 applied until his contract commencing 1<sup>st</sup> January, 2005. The terms upon transfer to CDN programme taken into account had not changed the core contents of the employment.

With regard to the fixed term contract 1<sup>st</sup> January to 31<sup>st</sup> December, 2005 the claimant signed on 18<sup>th</sup> May, 2005 and the same is witnessed.

Under the contract the claimant agreed to a 3 months' probation period, salary at ksh.21,980; 30 days leave, house allowance of ksh.3,194; gratuity at 25% of the basic salary and the end of the contract and which terms and conditions are fundamentally different and separate from the letter of appointment dated 25<sup>th</sup> March, 1998.

As correctly submitted by the claimant, section 10 of the Act allow an employer to issue the employee with a written contract of service. Upon the issuance of such contract, the parties to it are allowed to make changes thereof by mutual agreement pursuant to the provisions of section 13 of the Act.

In this regard therefore, where the claimant signed his term contract and was witnessed on 18<sup>th</sup> may, 2005 he became bound by the terms and conditions thereof.

However, where the term contract did not address any matter with regard to the previous employment relationship, its terms and conditions, the claimant as at 18<sup>th</sup> May, 2005 was under a duty to address his grievances in accordance with the applicable law, the Employment Act Cap 226, now repealed.

Upon the enactment of the Act thereof and repealing the Employment Act Cap 226 the claimant was bound by the provisions of section 90 to address his grievances, complaints, claims and dues within the time limitations set out. Such claims on the face of the changes in the employment terms and conditions vide contract commencing 1<sup>st</sup> January, 2005, the fundamental change from continuous employment

governed under the letter of appointment dated 25<sup>th</sup> March, 1998 the claimant cannot be found to rely on such employment terms to claim the benefits thereof vide the Memorandum of Claim filed on 20<sup>th</sup> November, 2015 a period of over 20 years since the cause of action arose.

The claimant cannot be covered under the provisions of section 37 of the Act as submitted on the grounds that he remained in the continuous employment of the respondent and by being issued with fixed and short term contracts there was bad faith and unfair labour practice. The issuance of term contract is lawful and legitimate mode of employment. The employment governed under section 37 of the Act only relates to verbal and causal terms of employment. Once an employment relationship is addressed under section 10 of the Act, such is protected and secured in law under such terms as agreed between the parties.

The only challenge that any party to it may claim is where there is fraud, misrepresentation of a forgery and evidence in this regard must be called.

In **National Water Conservation & Pipeline Corporation versus Jayne Kanini Mwanza, Civil Appeal No. 178 of 2014 (UR)**, the Court stated as follows:

*The general principle, as we understand it, is that a fixed term contract will terminate on the sun set date unless it is extended in terms stated in the contract. A court cannot rewrite the terms of a contract freely entered into between the parties. Once there is a written contract, the court will seek to give meaning to such contract giving ordinary meaning to its terms in determining any issue that may arise.*

This position was reiterated by the same court in the case of **Amatsi Water Services Company Limited versus Francis Shire Chachi [2018] eKLR** that;

*Further to being fixed, the contract between the parties in this matter contained a termination clause. In part, the contract would terminate "...in the event of any of the following:- expiry of the contract without renewal, retirement, summary dismissal, protracted illness, permanent disability or death". It could also be terminated by either*

*party giving to the other two months' notice or paying two months' salary in lieu.*

...

*A general principle that a fixed term contract will continue if not terminated would be a contradiction to the very definition of a fixed term. There is a definite start date and an end date. The contract would logically end automatically without more otherwise it would no longer be a fixed term contract. See the case of SA Rugby (Pty) Ltd vs CCMA & Others (2006) 27 ILJ 1041 (LC) at 1044 par 6.*

Therefore, the claimant bound by his fixed term contract and having given his consent thereof became bound. He cannot claim there was continuous employment under the terms under letter of 25<sup>th</sup> March, 1998. Such employment changed upon the issuance of the term contract as at 1<sup>st</sup> January, 2005.

The next contract as filed is one dated 4<sup>th</sup> March, 2008 for the period January to December, 2010;

Contract for the period 1<sup>st</sup> January, 2011 to 31<sup>st</sup> December, 2013 a period of 3 years;

Contract for the period 1<sup>st</sup> January to 30<sup>th</sup> September, 2014 to which the respondent issued note dated 1<sup>st</sup> April, 2014 on its end as of 30<sup>th</sup> April, 2014 despite the terms of the said contract having been agreed to end on 30<sup>th</sup> September, 2014.

There is no contract for the period of October, 2014 to October, 2015 or as per the defence the 31<sup>st</sup> August, 2015.

The claim is that there was termination of employment on 26<sup>th</sup> October, 2015. The defence is that employment terminated on 31<sup>st</sup> August, 2015 and the claimant was issued with notice in this regard. There is no notice filed by the respondent in this regard. The claimant filed his handing over notes to the respondent and signed 26<sup>th</sup> October, 2015.

Effectively, without any written contract filed by the respondent under section 10(7) of the Act to cover the period after rate expiry of contract ending 30<sup>th</sup> September, 2014 the claims made in this regard are without a challenge. The claimant worked for the respondent up and until the 26<sup>th</sup> October, 2015 and the claims made for the salary due for September, 2015 are due.

The claimant was earning ksh.32, 760.80 by 31<sup>st</sup> August, 2015 and thus entitled to ksh.65,520.

the claimant testified that he has since remained in the residence of the respondent and has not handed over the lap top and property of the respondent. the paid wage as at August, 2015 was all inclusive. This therefore included a house allowance. For the duration of the claimant's continued occupation of the respondent's premises upon the end of his employment and up to the date of his hearing, 23<sup>rd</sup> October, 2019 all 48 months and the last contract providing a house allowance of ksh.4,341 he has had a benefit of ksh.208,368 which should be deducted from the total dues owing from the respondent.

on the claim made for 4 months pay under the contract dated 25<sup>th</sup> March, 1998 the same analysed above are time barred.

On the claim for annual leave due for the period of 2014/2015 without any work record for any written contract covering this period the claimant having taken the last annual leave in November/December, 2013 this claim is justified save this is based on the basic pay of Ksh.28,419 for 30 days under the contract ending 30<sup>th</sup> September, 2014 and 21 days under for employment ending 26<sup>th</sup> October, 2015 under the provisions of section 28 of the Act. all due is 51 days all at 48,312.

On the claim for gratuity pay under the contract of 25<sup>th</sup> March, 1998 such claims are time barred.

On the claims for compensation, the evidence in this regard was that the claimant was unfairly treated by the issuance of short term contract and that the respondent acted in bad faith in changing his employment terms upon transfer from Baraka to CDN programme. On the analysis above, the court finds the respondent acted within the law and the claimant gave his consent to the new term contract. There is no matter for unfair labour practice or the respondent acting in bad faith. No compensation is due.

The issuance of a certificate of service is admitted as due.

The claimant shall ensure clearance with the respondent for the property still in his possession.

**Accordingly, judgement is herein entered for the claimant against the respondent in the following terms;**

- (a) Salary due for September and October, 2015 all at ksh.65,520.00;**
- (b) Payment in lieu of taking leave Ksh.48,312.00;**
- (c) Payments (a) and (b) above shall be paid less ksh.208,365.00 owing to the respondent for failure to vacate the allocated residence and in accordance with section 19 of the Employment Act, 2007;**
- (d) The claimant shall clear with the respondent and hand over all the property held and in his possession belonging to the respondent;**
- (e) A certificate of service shall issue in accordance with section 51 of the Employment Act, 2007.**
- (f) Each party shall bear own costs.**

**Delivered at Nakuru this 23<sup>rd</sup> day of January, 2020.**

**M. MBARU**

**JUDGE**

In the presence of: .....