



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.324(B) OF 2015

SUSAN WAIRIMU KARAYACLAIMANT

VERSUS

EGERTON UNIVERSITY (LAIKIPIA UNIVERSITY)RESPONDENT

JUDGEMENT

The claimant is a female adult. The respondent is a registered public university under the Education Act.

On 9th December, 2009 the claimant was employed by the respondent as a typist as confirmed by the certificate of service issued by the respondent on 16th January, 2013. The claimant was also issued with a letter of appointment dated 26th June, 2012.

The claimant was earning Ksh.4,000 per month without other benefits.

The claim is that the claimant was not allowed annual leave in the year 2010/2011. On 26th June, 2012 the respondent wrote to the claimant converting her employment to short term fixed contracts of 3 months and her wage was Ksh.11,730 per month without any benefit apart from 2 ½ days of leave for every month worked.

By letter dated 27th September, 2012 the contract was renewed for one (1) year.

There was renewal of contract vide letter dated 3rd October, 2013 for two (2) month.

The claimant continued to attend work until 28th November, 2013 but the board failed to approve the renewal of her contract.

The claim is also that prior to the claimant being placed under fixed term contracts she had worked continuously for the respondent under the provisions of section 7 and 9 of the Employment Act. from December, 2009 to June, 2012 the claimant had no pay slips issued to her.

The claimant was only registered with the NSSF upon being employed on fixed term contracts.

The claimant was never paid a house allowance. The respondent had a CBA with KUDHEIHA which provided for a house allowance for the grade he claimant was employed under.

The claim is that the conversation of employment to short term fixed contract were in violation of the Employment Act; the claimant be paid annual leave not taken for 4 years; there be payment of a house allowance for 4 years; there be payment of allowances provided for under the CBA and compensation under the provisions of section 49 of the Employment Act. cumulatively the claimant worked for 4 years section 37 of the Employment Act and the CBA applied and her terminal dues should be paid in this regard.

The claim is for the following dues;

- a. 2 months' notice pay ksh.27, 546;
- b. Annual leave Ksh.55,092;
- c. Leave traveling allowance Ksh.5,600;

d. House allowance Ksh.452,928; and

c. Compensation.

The claimant testified that upon employment she was paid a wage of ksh.8,000 per month, initially paid in cash and later through her bank. Employment was on casual terms until June, 2012 when she was issued with a contract and the wage changed from Ksh.8,000 to ksh.11,730 per month.

The first contract was for 3 months which was renewed periodically until 28th November, 2013 when the respondent failed to approve the renewal of contract. Dr Pauline Ndolo called the claimant with information that her contract would not be renewed after 30th November, 2013.

The claimant also testified that she consulted with Joseph Kairu the Registrar for the reasons of nonrenewal of her contract as she was among the over 60 employees on contract and only 3 were affected including herself. The 2 others had disciplinary cases but the registrar only issued her with a certificate of service.

The claimant also testified that she was unionised under KUDHEIHA and paid her union dues noted in the pay slips. She however did not benefit from the terms of the CBA. No house allowance paid, medical or leave travelling allowance were ever paid. The notice pay due upon termination of employment is 2 months on payment in lieu thereof. There was discrimination against her by the respondent.

The defence is that the claimant served the respondent under fixed term contract and prior had been employed on casual terms without regular work and only on needs basis. The certificate of service issued covered the entire duration of service.

The claimant was appointed under contract on 26th June, 2012 as a copy typist.

The allegation that the claimant would be paid ksh.4,000 when a casual is not correct. The casuals' payment list confirms the contrary.

The defence is also that the respondent gave the claimant a chance to work under contract terms which is lawful under section 9 and 10 of the Employment Act. Under the fixed term contract the terms and conditions of employment/service were agreed upon.

Each category of employees had their terms and conditions without differentiation as alleged. The claimant had 2 ½ leave days each month as a benefit and fully complied with the provisions of section 10 and 41 of the Employment Act by issuing a written contract and terminating employment upon notice. The claimant was also aware of the end of each contract the last being 28th November, 2013 and was informed by the respondent management that there would be no renewal.

The respondent advertised for positions but the claimant failed to apply. Interviews were done on 13th August, 2013. She was not a candidate.

The respondent paid for NSSF and issued pay slips.

The alleged CBA applicable to the claim is not attached and there is no relation to the contract of service issued.

Annual leave was factored in each contract. The payable salary was consolidated for Laikipia. The alleged allowances claimed are not due and are unrelated to the claimant's contract of service. The claims made should be dismissed with costs.

Mugo Mureithi the Deputy Registrar Administration and human resource with the respondent testified that the claimant was initially employed as a casual employee until 1st July, 2012 when she was issued with fixed term contract. Her wages as a casual were varied and paid a month other casual employees. On the filed list the claimant was No.63 paid ksh.8,000 in July, 2010 for days worked.

The wage was staggered for the number of days worked.

The claimant was offered fixed term contracts and she accepted.

The respondent council decided in the transition from Egerton University to give contracts to its employees. Each contract issued was purely voluntary for the employee to accept. There was no complaint by the claimant that she was treated differently from other employees or the terms of the contract were unacceptable. She signed them in acceptance.

The claimant had a contract with a consolidated wage with the benefit of 2 ½ leave days. This was noting the respondent had various categories of employees;

Casual employees;

Fixed term contracts;

Permanent employees with gratuity;

Permanent and pensionable; and

Unionised employees.

The claimant was in the category of fixed term contract employees and the alleged CBA terms were not applicable to her. The respondent does not restrict unionisation but the claimant was not a member. There is no complaint by the union that there was discrimination against the claimant.

Mr Mugo also testified that the respondent advertised for secretarial jobs in August, 2013 and there were recruitments but the claimant did not apply. All positions have now been filled and it was not necessary to keep the claimant on contract and thus no renewal after the end of the last contract on 28th November, 2013.

The claimant took her annual leave 6th September, 2012 to 17th December, 2012.

31st December, 2012 to 21st January, 2013;

6th to 17th May, 2013;

8th July to 12th August, 2013;

26th to 29th November, 2013. The claimant enjoyed her leave days.

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

The court has analysed the pleadings, the evidence and written submissions.

It is common cause that the claimant was employed under casual terms from the year 2009 up and until 26th June, 2012 when she was issued with a letter of appointment as a copy typist with effect from 1st July, 2012.

The appointment was for a period of 3 months at a wage of ksh.11,730 per month and a benefit of 2 ½ leave days every month worked. *There are no other benefits attached to this appointment* the respondent offered. and on 3rd July, 2012 the claimant accepted the letter of offer and terms thereof.

By letter dated 27th September, 2012 the contract was renewed for one year with effect from 1st October, 2012 thus ending 30th September, 2013.

By letter dated 3rd October, 2013 the contract was renewed for two months with effect from 1st October, 2013. This became the last contract as there was no subsequent renewal.

On the claims made that there was unfair treatment of the claimant, there was abuse of the terms of the Employment Act, 2007 and that there was discriminatory treatment, however, section 10 of the Employment Act, 2007 read inherently with articles 41 and 27 of the Constitution, 2010 allow an employer to issue a written contract of service with a fixed term and such is therefore lawful and not an unfair labour practice or an act in discrimination against the claimant.

A fixed term contract end on its own terms as held in the case of **Bernard Makokha & others versus Centre Star Company Limited Cause No.2177 of 2016 (Nairobi)**.

Fixed term contract in employment and labour relations is recognised as a lawful and legitimate mode of employment and in accordance with section 10(3)(c) of the Employment Act, 2007 (the Act);

c. where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end;

Also a written contract of service defining terms and conditions of employment is regulated under the provisions of section 10 of the Act and an employer is required to issue such written contract to an employee. Where there is a dispute, the court is bound by the agreed terms and conditions unless there is evidence to the contrary in defining the set out terms and conditions. See **Fatuma Abdi versus Kenya School of Monetary Studies [2017] eKLR** and **Narry Philemons Onaya-Odeck versus Technical University of Kenya [Formerly, the Kenya Polytechnic University College] [2017] eKLR**.

Where the claimant enjoyed fixed term contracts from 1st July, 2012 to 30th November, 2013, this was lawful.

The assertion that the claimant is owed terminal dues running to the entire period of service from 9th December, 2009 to 13th January, 2013 [30th November, 2013] should be addressed in the context that the issued fixed term contracts were lawful and no injustice was visited upon the claimant.

The contracts ended on the time and terms agreed upon by the parties.

The claims made with regard to the payment of terminal dues shall be assessed on the merits.

The claimant is seeking for payment of notice pay at two months as under the CBA. Payment of annual leave for 4 years, leave travelling allowances for 4 years, house allowance for 4 years.

The claimant asserted that she was unionised under KUDHEIHA which had a running CBA with the respondent and provided for terms and conditions of employment. The claimant had filed 3 payment statements for November, 2012, January, 2013 and December, 2012.

On the pay slip for December, 2012 there is no union dues deduction.

On the pay slip for November, 2012 there is no union dues deduction.

On the pay slip for January, 2013 there is a union deduction of ksh.150.

The respondent filed several payment statements with regard to the claimant. These relates to August, 2013, September, October, November, 2013 and none included a deduction of trade union dues. the last payment statement for November, 2013 only comprise statutory deductions to NSSF, KRA and NHIF.

The employer is the lawful custodian of work records. The record of the claimant well taken into account must be addressed visa-a-vies what the respondent has filed.

The respondent's witness Mr Mugo testified that the claimant was not unionised, she was contracted in the category of employees different and separate from unionised employees. This evidence was not challenged in any material way. and on this basis, the claimant not unionised under KUDHEIHA the payment statements filed by the respondent are taken as the correct account of employment, there was no union dues deduction(s) and the alleged CBA applicable to the claimant does not apply.

Even where there were unionised employees, the claimant was not subject of such CBA. No agency fee was deducted for her to enjoy the terms thereof and in any event the claimant was protected in her employment vide the fixed term contracts..

As noted above, the claims made shall be addressed on the merits.

The claimant filed her Memorandum of claim on 9th number, 2015. By application of section 90 of the Employment Act, 2007 the claims due only relate to the period of 3 years accruing and not beyond 10th November, 2012. Effectively, the only claims that remain valid relates to the period the claimant was under the contract subsisting as of 1st July, 2012.

On the claim for annual leave for 4 years, as set out above, the applicable claim under the contract commencing 1st July, 2012 is addressed where the claimant was allowed 2 ½ days of leave for every month worked. This allocated for 2 ½ days is generous looked against the provisions of section 28 of the Employment Act, 2007. The respondent has also filed work records to demonstrate the claimant taking all her annual leave days and assessed with regard to what was taken and what was due, the claimant enjoyed more annual leave days.

In the contract for 3 months starting 1st July, 2012 the claimant had in total 7 ½ days of annual leave. The claimant took 7 days in September, 2012. A balance of ½ day.

Under the contract running 1st October, 2012 to 30th September, 2013 the claimant had a total of 30 leave days. She took 15 days leave in January, 2013; 10 days in May, 2013; 25 days in July/August, 2013 all being 40 days for leave a period of 10 days over and above what was due. and under the last contract the claimant was entitled to 3 days of annual leave and enjoyed such leave days from 26th to 29th November, 2013.

Cumulatively, the claimant enjoyed 9 ½ leave days beyond what was due.

On the claim for house allowances, the paid monthly wage was stated to be *consolidated*. Under the applicable wage orders as of 1st July, 2012 a copy typist working in Laikipia was entitled to a basic wage of ksh.8,834.20.

Where the claimant was paid a house allowances under the wage orders such would have amounted to ksh.1,325.10 per month. The payment of a consolidated wage at ksh.11,730 was thus over and above the minimum wage and generous for the position held. To pay a house allowances beyond the consolidated wage and in tandem with section 10 of the Employment Act, 2007 which allow the employer to issue a written contract of service with the terms applicable thereof.

The respondent having paid the claimant within the minimum wage requirements is compliant.

Leave travelling allowances is not a legal requirement and can only be addressed in the employment contract or private treaty as a work benefit.

On the claims made, the court finds no merit and hereby dismissed in the entirety. The claimant shall meet 50% costs due to the

respondent.

Delivered at Nakuru this 6th day of February, 2020.

M. MBARU

JUDGE

In the presence of: