



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 248 OF 2018

(Formerly Nairobi ELRC 1250 of 2018)

ANTHONY MWANGI WARUL.....CLAIMANT

VERSUS

NG – CDF MWEA CONSTITUENCY.....1ST RESPONDENT

ISAAC K. WAMUGUNDA.....2ND RESPONDENT

NICHOLAS K. KIRIKO.....3RD RESPONDENT

HON. J. KIBINGA WACHIRA.....4TH RESPONDENT

JUDGMENT

1. The Claimant sued the Respondents asserting that he was employed on a 3 year contract on 1st January 2017 as a filing clerk. He sued the 1st Respondent who is a creature established under the National Government Constituency Fund Act No. 30 of 2015 with capacity to sue and be sued, the 2nd Respondent who is the Fund Account Manager of the 1st Respondent, the 3rd Respondent who is the Chairman of the 1st Respondent and the 4th Respondent who is a member of Parliament and the patron of the 1st Respondent. The Claimant averred that the 3 year contract was renewal and he was entitled to earn gratuity at the end of each contract. He averred that he worked faithfully and diligently for the 1st Respondent without any warning or disciplinary case. The Claimant averred that on 1st July 2018 the 2nd Respondent and the 3rd Respondent issued the Claimant with a compulsory terminal leave letter without any reason terminating his contract of service prematurely. The Claimant averred that he was to hand over by the 31st July 2018 and that the termination of his contract before the period of 3 years was illegal and contravenes labour practice. He averred that when he entered into the contract for service he had legitimate expectation that he would work for 3 years and had taken a loan with Equity Bank. The Claimant averred that the Respondents had demonstrated bias, violated his rights and he therefore sought a declaration that the compulsory terminal leave letter dated 1st July 2018 is illegal, unjust, irregular null and void and unconstitutional; a permanent injunction restraining the Respondents jointly and severally from terminating his contract until the completion on 31st December 2019; the Claimant to resume work immediately without loss of benefits, victimization and/or interference of his employment by the Respondents without due process of law being followed; and any other relief that this honourable court may deem fit to grant in the interest of justice.

2. The 4th Respondent filed a defence on 15th November 2018 and in it averred that he was not privy to the contract between the 1st Respondent and the Claimant. He averred that the Claimant had failed to plead a cause of action against him. He averred that the Claimant was duly issued with a notice of termination as per the contract of employment and the termination thus followed due process. The 4th Respondent averred that in light of the foregoing the allegations of unlawful termination have no merit and should be dismissed. The 4th Respondent averred that no demand and/or notice of intention to sue preceded the institution of the suit consequently the Claimant is not entitled to costs in any event. The 4th Respondent thus sought the dismissal of the Claimant's claim with costs.

3. The 1st, 2nd and 3rd Respondents filed defence on 2nd July 2019 and in the defence averred that the termination was lawful as per the contract of employment. The 1st, 2nd and 3rd Respondents denied that the Claimant worked faithfully and diligently or that the 1st Respondent through its Fund Account Manager and Chairman issued the Claimant a compulsory terminal leave letter without any reasons for terminating the Claimant's contract of service. The 1st, 2nd and 3rd Respondents denied that the Claimant had legitimate expectation he would serve the full 3 years of the contract or that the actions complained of were illegal and unlawful or unconstitutional, or in gross violation of the Claimant's rights or in contravention of the contract of service; or that the 1st, 2nd and 3rd Respondents demonstrate bias or violated the Claimant's rights under Articles 41, 47 and 50 of the Constitution, the Fair Administration of Actions Act 2015 and the

Employment Act 2007. The 1st, 2nd and 3rd Respondents urged the dismissal of the Claimant's claim with costs.

4. The Claimant withdrew the claim as against the 4th Respondent just prior to the hearing. He testified that he was employed on 1st January 2017 and earned Kshs. 16,000/- at the time plus a house allowance of Kshs. 4,000/- and commuter allowance of Kshs. 4,000/-. He stated that he was appraised for job group H to job group J from 1st July 2017. He stated he received an upgrade and his terms changed to Kshs. 40,000/- all inclusive. He testified that the house allowance was Kshs. 5,000/- plus commuter allowance of Kshs. 4,000/-. He stated that he worked as required and on 1st July 2018 he was called and told that his contract had ended. He said this was after he had worked for 1½ years of the 3 year contract. He testified that they served him with a compulsory terminal leave letter and did not state why they were terminating the contract. He said there was no warning letter and he did not have a hearing. He sought reinstatement and in the alternative compensation of 12 months salary together with costs of the suit. He was cross-examined and he testified that he was employed on 1st January 2017 and was earning Kshs. 16,690/- at the time. He said he was called only once for a meeting. He stated that the meeting was not discussing his employment but was for dismissing his employment. He testified that he handed over and was paid his terminal dues. He stated that he had good performance and he made the office presentable and his salary raised to Kshs. 40,000/-. He said he had not produced the evidence of the Kshs. 40,000/- earning. He admitted that he could be terminated per the contract and that he was paid his dues. In re-exam he stated that he was paid his dues for only one month and that his gratuity was not paid. He said it was not tabulated or paid. He testified that he was entitled to 31% of annual gratuity for the 3 years worked and he never received it. He said that is what he wanted if he was not reinstated. The Respondents sought an adjournment and the application for adjournment was found unmerited and parties were to file submissions.

5. The Claimant submitted that the contract was for 3 years and was renewable and upon expiry he was entitled to gratuity. He submitted that he performed his duties diligently and he was issued a notice of compulsory terminal leave requiring that he vacate office and hand over the office properties by 31st July 2018 upon which the Respondents terminated his contract of employment prematurely. The Claimant submitted that upon termination he was only paid his July salary but no gratuity was paid to him. He submitted that from evidence tendered in court he earned Kshs. 22,992/- made up of Kshs. 16,992/- as basic salary, house allowance of Kshs. 4,000/- and commuter allowance of Kshs. 4,000/- a month. He submitted that his basic salary was raised to Kshs. 32,920/- and his house allowance at Kshs. 5,000/- with commuter allowance of Kshs. 4,000/-. He submitted that the letter of 1st July 2018 did not make any allegations to the effect that the Claimant was guilty of any misconduct in the manner he carried out his duties for the Respondent. The Claimant submitted that he never breached any of the terms of his contract of employment or any provisions of the Employment Act 2007 which could lead to his dismissal from employment. He thus submitted he was entitled to full benefits plus gratuity. The Claimant submitted that since he was terminated unfairly he was entitled to gratuity and his leave allowance for the period of 2 years. He submitted that he was also entitled to leave dues for the leave not taken plus payment of one month salary in lieu of notice. He sought Kshs. 1,030,080/- being the sum for the term of 2 years (24 months) the Claimant never served for full compensation of his term of contract at the rate of Kshs. 42,920/- a month, Kshs. 39,915.60 being his service gratuity at the rate of 31% of annual basic salary for the term of 3 years per clause 8 of his contract. He also prayed for costs of the suit to be assessed by the court.

6. The 1st, 2nd and 3rd Respondents (hereinafter 'Respondents') submitted that the critical issues for determination were whether the Claimant's termination was unlawful and whether the Claimant was entitled to any of the reliefs he sought in his claim. The Respondents submitted that under clause 12 of the contract the contract could be terminated by either party giving one month's notice or on payment of an equivalent of one month's earnings in lieu of such notice. The Respondents cited the case of **Joseph Muthama Ndambuki & 4 Others v Delmonte (K) Limited [2012] eKLR** where it was held that termination at the will of an employer was permitted. The Respondents submitted that the parties were under contractual obligation and the Respondents did not breach the terms of the contract when they terminated the same by giving notice to the Claimant. They submitted that the prayers sought by the Claimant were akin to asking the court to rewrite the terms of the contract which the court has no jurisdiction to do. The Respondents relied on the cases of **Walter Musi Anyango v Hilton International Kenya Limited & Another [2008] eKLR** and **Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR** where the courts upheld the termination meted out in terms of the contract. The Respondents submitted that the Claimant was heard prior to dismissal in the meeting of 29th June 2018 and that he was informed of the decision to send him on terminal leave. The Respondent submitted that in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so the termination shall be deemed to have been unfair. The Respondents submitted that the Claimant was given reasons why his services were no longer needed and on the strength of clause 12 of the contract the Claimant was accorded a chance to a fair hearing. The Respondents submitted that the Claimant cannot be entitled to Kshs. 1,030,080/- as he had submitted since the termination of the contract was lawful and the Claimant given an explanation why his services were to be terminated. The Respondents submitted that the sum claimed on gratuity was not supported by any evidence and the Respondents sought the dismissal of the claim with costs.

7. The Claimant's contract was entered into in January 2017. It was for a 3 year period and provided as follows under clause 12 thereof.

This contract may be terminated by either party giving one (1) month's prior notice, or on payment of an equivalent of one(1) month's earnings in lieu of such notice as provided for in Employment Act 2007.

The dismissal was per the letter of 1st July 2017. The letter referred to a meeting on 29th June 2018 whereat the Claimant was required to proceed on compulsory terminal leave effective 1st July 2018. He was notified that on 26th July 2018 he was to attend another meeting to handover any office material, equipment or information under his custody. He was notified that he was entitled to his service gratuity at 31% of his annual salary for the period served. He also was entitled to the salary for July 2018. He was notified that at the meeting on 26th July 2018 he was encouraged to ask questions and he was free to contact the 2nd and 3rd Respondents to ask any questions prior to the meeting. The Claimant filed this suit on 25th July 2018 before the meeting of 26th July 2018. He obtained interim relief per the decision of Wasilwa J. rendered on 26th July 2018 when the interlocutory motion was argued *ex parte*. The Claimant never attended the meeting of 26th July 2018 or any other subsequent meeting as can be surmised from his testimony and pleadings. He therefore sought relief against the employer for giving effect to the terms of the contract as clause 12 permitted the termination as was carried out by the Respondents. The Claimant cannot turn around and assert he was not heard when he himself declined the invitation to be heard. The dismissal was regular and in line with the law and the contract of service. The suit is therefore only fit for dismissal. The Claimant was entitled to gratuity which ought to be paid per the terminal leave letter. The suit is therefore dismissed with no order as to costs but gratuity due to be paid within 30 days.

8. This decision was rendered online in keeping with the express consent by parties to the waiver of Order 21 Rule 1 and 3 of the Civil Procedure Rules and in line with the Chief Justice's Practice Directions to Mitigate COVID-19 dated 16th March 2020 and the Kenya Gazette Notice 2357 of 20th March 2020 issued in Vol. CXXII No. 50. In line with the Practice Directions of the Chief Justice and the statement he made in the NCAJ address to the Nation of Kenya when the Judiciary and the other stakeholders in the administration of justice agreed to scale down operations to mitigate the effects of COVID-19, execution of the judgment is automatically stayed for 14 days.

It is so ordered.

Dated and delivered at Nyeri this 24th day of April 2020

Nzioki wa Makau

JUDGE