



**REPUBLIC OF KENYA**

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

**CAUSE NO.753 OF 2014**

**TIMOTHY IKAALE KOTOL.....1<sup>ST</sup> CLAIMANT**

**EDDAH CHEPKOSGEI TANUI.....2<sup>ND</sup> CLAIMANT**

**NELLY JEPKEMEI KIPKAZI.....3<sup>RD</sup> CLAIMANT**

**VERSUS**

**MOGOTIO CONSTITUENCY**

**DEVELOPMENT FUND COMMITTEE.....1<sup>ST</sup> RESPONDENT**

**CONSTITUENCY DEVELOPMENT**

**FUND SECRETARIAT.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

By consent dated 31<sup>st</sup> October, 2018 and filed on 2<sup>nd</sup> November, 2018 the claim by the 2<sup>nd</sup> claimant, Eddah Chepkosgei Tanui was withdrawn.

By consent of the parties in court on 1<sup>st</sup> November, 2018, the suit against the 2<sup>nd</sup> respondent, Constituency Development Fund Secretariat was marked withdrawn.

**Claim**

The claim is that the claimants were employed by the respondent, an institution established under the provisions of the Constituency Development Act, 20033.

The 1<sup>st</sup> claimant was employed on 2<sup>nd</sup> June, 2008 on a 3 years contract as an office clerk at a monthly wage of Ksh.5, 000.

The 3<sup>rd</sup> claimant was employed on 1<sup>st</sup> March, 2011 as an office clerk on a 2 years contract at a wage of Ksh.14, 000 per month.

The claimants served the full term contracts. These were not renewed but they continued in the service of the respondent in a similar capacity until 29<sup>th</sup> May, 2014 when they were called by the chairman, manager and the Member of Parliament, Mogotio Constituency who directed them to report to work the next day for a meeting with the full committee.

On 30<sup>th</sup> May, 2014 the claimants attended the meeting as required and were verbally informed that their employment had been terminated and should hand over their duties to the manager. There was no prior notice or reasons given contrary to the law and this resulted in unfair termination of employment over vindictive reasons.

The claim is also that the respondent issued the claimants with cheques but their service gratuity was to be paid later. Despite repeated demands such gratuity has not been paid.

The claimants are seeking the payments of the following dues;

- a) One months' notice pay;
- b) Gratuity at 31% of annual basic pay for each year worked;
- c) Compensation under section 49(c ) of the Employment Act;
- d) Certificate of service;
- e) Costs and any other dues the court may deem fit to grant.

The claimants for each claimant are that;

The 1<sup>st</sup> claimant;

- a) Notice pay Ksh.12,000;
- b) Gratuity for 6 years at ksh.44,640;
- c) Compensation Ksh.144, 000.

The 3<sup>rd</sup> claimant;

- a) Notice pay ksh.18,000;
- b) Gratuity for 3 years 2 months ksh.212,040;
- c) Compensation Ksh.216, 000.

Both the 1<sup>st</sup> and 3<sup>rd</sup> claimants testified in support of the claims.

Nelly Jepkemei Kipkazi the 3<sup>rd</sup> claimant testified that she was employed as the office secretary by the respondent where she worked from 1<sup>st</sup> March, 2011 to 30<sup>th</sup> May, 2014. She was on a 2 years contract and when it lapsed, she continued in the service of the respondent. When the contract ended in the year 2013 the respondent failed to renew it but work continued.

Ms Kipkosgei also testified that on 29<sup>th</sup> May, 2014 the area Member of Parliament Hon. Sambili (MP) came to the office and called for a meeting where she thanked the employees for their good work. The next day there was a full board meeting and they were required to attend when they were directed to hand over their duties to the manager and she was issued with a cheque of ksh.54, 000 without any explanation. The respondent said it was severance payment. There was no other payment. The due gratuity was not paid. There was no written letter on termination of employment or any notice.

The claimant also testified that she started at a wage of ksh.14, 000 which was increased to Ksh.16, 000 and the last pay was ksh.18, 000 per month. Her wage was paid through the Sacco account called Skyline Sacco. She was not made aware that on 10<sup>th</sup> October, 2014 a deposit of Ksh.206, 820 was made by the respondent and the claims made should be confirmed.

The 1<sup>st</sup> claimant, Timothy Ikaale Kotoi testified that on 2<sup>nd</sup> June, 2008 he was employed by the respondent on a 3 years contract at a wage of ksh.5, 000 per month. The contract ended in the year 2011 but he continued in the service of the respondent.

On 29<sup>th</sup> May, 2014 the MP came and thanked the employees at the office for their good work and left. The next day, 30<sup>th</sup> May, 2014 the chairman called the claimant with information that he would be paid his terminal dues and employment had terminated. The claimant handed over his duties to the manager. There was no prior notice, reasons or hearing and was only paid Ksh.60, 000 by cheque but the due gratuity was not paid.

The claimant also testified that at the time his was ksh.12, 000 per month. He was never paid he due gratuity.

In response the respondent avers that there was payment of Ksh.206, 820 to Skyline Sacco but he never got such payment.

#### Defence

The defence is that the claimants were employed by the 1<sup>st</sup> respondent's predecessor CDF Committee whose term expired immediately prior to the March, 2013 general elections. Each claimant had a specific term contract, the 1<sup>st</sup> claimant contract from 2<sup>nd</sup> June, 2008 for 3 years ending 2<sup>nd</sup> June, 2011. The 3<sup>rd</sup> claimant contract on 1<sup>st</sup> march, 2011 to 1<sup>st</sup> March, 2013.

The fixed term contracts lapsed and were not renewed. The claimants were paid in full for the period at work and including January, 2014. The claim that there was unfair termination of employment does not arise as the claimants were on fixed term contract which lapsed on their term.

On 30<sup>th</sup> May, 2014 the claimants wrote letter to the respondent requesting payment of gratuity as their contracts had lapsed. There was a meeting held and a resolution passed to pay gratuity which was paid as follows;

1<sup>st</sup> claimant vide cheque No.1627 dated 30<sup>th</sup> May, 2014 Ksh.60, 000; and

3<sup>rd</sup> claimant vides cheque No.1624 dated 30<sup>th</sup> May, 2014 for ksh.54, 000.

These payments went through vide bank statement from Co-operative Bank of Kenya.

Further gratuity payments dues were paid in lump sum to the claimant at ksh.206,820 vide cheque No.395 dated 7<sup>th</sup> October, 2014 through skyline Sacco to the claimants accounts and a bank statement from Equity Bank confirm such payment.

The claimants are dishonest to the extent that they have been paid the claimed dues. The claimants were aware that their contracts with the respondent had expired and were not renewed. The claims made are without merit and should be dismissed with costs.

Michael Lagat testified that between the years 2014 to 2017 he was the chair of the respondent and previously in the year 2008 to 2013 he was a member and secretary and he knew the claimants.

The claimants had a contract. 1<sup>st</sup> claimant's contract ended in the year 2011 after 3 years and 3<sup>rd</sup> claimant was employed in the year 2011 on 2 years contract. These contracts ended and were not renewed. At the end of the contract each claimant was paid the agreed gratuity.

On 30<sup>th</sup> May, 2014 the claimant applied for the payment of gratuity. The request was approved and paid by cheque. The 1<sup>st</sup> claimant was paid in two instalments of Ksh.60, 000 and Ksh.54, 840. The 3<sup>rd</sup> claimant was paid Ksh.54, 000 and ksh.47, 680.

Gratuity was paid based on the number of years worked at 31% of the annual basic pay.

The claim that there was unlawful termination of employment in the year 2014 is without merit as the claimants had no valid contract of service with the respondent. The claimants had re-applied for employment on 21<sup>st</sup> July, 2014 with the knowledge that their employment with the respondent had since terminated at the end of their fixed term contracts.

The witness also testified that the claimants were paid their dues through Skyline Sacco. There were other 4 employees being paid through the same Sacco and a single cheque of ksh.260, 840 was deposited with a list and details of each employee.

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

On the pleadings, the evidence of the parties and whiten submissions these put into account, the issues which emerge for determination can be summarised as follows;

Whether there is unfair termination of employment;

Whether there is non-payment of gratuity; and

Whether the remedies sought should issue.

It is common cause that the 1<sup>st</sup> claimant was employed by the respondent vide letter dated 2<sup>nd</sup> June, 2008 on a 3 years contract. The 3<sup>rd</sup> claimant was employed vide letter dated 1<sup>st</sup> March, 2011 on a 2 years contract.

Effectively the term contract lapsed on 1<sup>st</sup> June, 2011 and 28<sup>th</sup> February, 2013 for the 1<sup>st</sup> and 3<sup>rd</sup> claimants respectively. The contracts of service were not renewed, save the claimants remained in the service of the respondent as confirmed by Michael Lagat, witness for the respondent.

By its meeting and resolutions on 30<sup>th</sup> May, 2014 the respondent resolved that;

*... there was need to address the Mogotio CDF staffing needs given that the employment contract for the existing staff expired recently. It was explained that this being a period of transition after the appointment of a new CDF committee, the predecessor committee had agreed verbally with the then existing staff to serve pending competitive recruitment of CDF staff. ...*

The meeting further resolved following a request by the employees to be paid their gratuity as their contracts had expired, the respondent resolved with regard to the claimants that;

*Timothy Ikaale Kotal ... total payment ksh.112, 840*

*Nelly Jepkemei Kipkazi ... totals 101,680.*

On the fixed term contracts, at the end, the respondent by a resolution agreed to pay a gratuity of 31%.

Indeed section 10 (3) (c) of the Employment Act, 2007 (the Act) allow parties to an employment contract to be bound by a fixed term contract;

*(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;*

Employment on a fixed term contract hence starts and ends on its terms. Such is lawful and valid.

In this case, at the end of the 1<sup>st</sup> and 3<sup>rd</sup> claimant's fixed term contracts on 1<sup>st</sup> June, 2011 and 28<sup>th</sup> February, 2013 there was no stoppage of employment. They continued in the service of the respondent as confirmed by Mr Lagat for the respondent. This is also supported by the full committee meeting held on 30<sup>th</sup> May, 2014 that to allow for transition and to have time to recruit new employees, the employees serving then were verbally asked to continue in the service of the respondent.

Section 8 of the Act allow parties in an employment relationship to be bound by a verbal contract subject to the provisions of section 10 of the Act which requires that such verbal contract should be reduced in writing within two months of service. Where such written contract of service is not issued and the employee continues in the service of the employer over work which cannot reasonably be completed and continues for over 28 days, such an employee is protected under the provisions of section 37 of the Act. See **Rashid Mazuri Ramadhani & 10 others versus Doshi & Company (Hardware) Limited & another [2018] eKLR** where the Court of Appeal held that;

*Section 37 is the one which empowers the Employment and Labour Relations Court (ELRC) to convert a contract of service of an employee engaged on a casual basis, to one where such an employee is deemed to have been engaged under a contract of service and thereby entitling him/her to monthly wages and other benefits such as leave and certificate of service.*

The Court further held that;

*Our reading of Section 37 of the Employment Act reveals that before the court can convert a contract of service thereunder, the claimant ought to establish first, that he/she has been engaged by the employer in question on a casual basis and second, he/she has worked for the said employer for a period aggregating to more than one month. See this Court's decision in **Krystalline Salt Limited vs. Kwekwe Mwakele & 67 others [2017] eKLR**.*

In this regard, upon the lapse of the fixed term contract issued to the 1<sup>st</sup> and 3<sup>rd</sup> claimants, to retain them on causal terms and verbal contract without any defined terms and conditions of service, these claimants being in the service of the respondents became protected under the provisions of section 37 of the Act. They enjoyed the rights and benefits due to an employee covered under the Act.

Rights and benefits due to an employee protected under the Act requires that before termination of employment, the employer should issue notice pursuant to section 35 of the Act or make a payment of one month in lieu of notice thereof.

Section 43 requires that termination of employment should be with a valid reason and upon due process pursuant to section 41 of the Act where there is alleged misconduct.

There are therefore statutory requirements placed upon the employer before termination of employment with regard to a protected employee under the provisions of section 37 of the Act. The employer must prove the reasons for termination or dismissal; prove the given reasons are valid and fair; prove that the grounds relied upon to terminate employment are justified amongst other provisions of the Act under section 43, 44, 45, 47 and 41. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination of employment. See **Kenya Revenue Authority versus Reuvel Waithaka Gitahi & 2 others [2019] eKLR**

In this case, despite the claimants serving the respondent for a period over and above the term contracts, and for a from 2<sup>nd</sup> June, 2011 to 30<sup>th</sup> May, 2014 and 1<sup>st</sup> March, 2013 to 30<sup>th</sup> May, 2014 respectively, employment was terminated without due process, without being given any reasons and or payment of terminal dues. Such resulted in unfair termination of employment and contrary to the mandatory provisions of section 41, 43 and 45 of the Act.

The claimants are entitled to notice pay under the provisions of section 35 of the Act at one month's pay. The 1<sup>st</sup> claimant was last earning Ksh.12, 000 and the 3<sup>rd</sup> claimant Ksh.18, 000. This is due.

For the unfair termination of employment, section 49 of the Act allow for compensation. The 1<sup>st</sup> claimant worked for a period of 3 years under the provisions of section 37 of the Act. A compensation of 6 months gross wage is hereby found appropriate all at ksh.72, 000.

The 3<sup>rd</sup> claimant worked for a period of one (1) years under the provisions of section 37 of the Act. Compensation for two months gross wage is hereby found appropriate all at ksh.36, 000.

Under the provisions of section 51 of the Act, an employee should be issued with a certificate of Service for the total period of service with a given employer. The claimant served the respondent continuously and without stoppage and the Certificate of service should be issued in this regard as required under the law.

On whether gratuity should be paid, as set out above, the respondent by a resolution at its meeting held on 30<sup>th</sup> May, 2014 resolved to pay the

claimants gratuity. This is also pursuant to the contract of service between the parties.

The claimants confirmed to having been paid ksh.60, 000 and Kshs. 54,000 each on 30<sup>th</sup> May, 2014. The balances due are said to have been paid through Skyline Sacco in a common cheque of ksh.206, 820 dated 7<sup>th</sup> October, 2014.

The claimants contested that they never received this payments but they had accounts with Skyline Sacco. The 3<sup>rd</sup> claimant testified that since leaving the employment of the respondent she has never checked her Skyline account again.

On the evidence that the respondent, by cheque No.395 dated 7<sup>th</sup> October, 2014 and cashed on 10<sup>th</sup> October, 2014 at Equity bank paid the 1<sup>st</sup> claimant Ksh.52, 840 and the 3<sup>rd</sup> claimant ksh.47, 680 through their accounts with Skyline Sacco, each claimant shall confirm with the Skyline Sacco on the deposits and statement of payments in this regard. This shall be reported to the court within 14 days.

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

**(1) There was unfair termination of employment and the claimants are awarded as follows;**

**(a) 1<sup>st</sup> claimant Timothy Ikaale Kotal;**

**i. Notice pay Ksh.12,000;**

**ii. Compensation Ksh.72,000;**

**(b) 3<sup>rd</sup> claimant Nelly Jepkemei Kipkazi;**

**i. Notice pay ksh.18,000;**

**ii. Compensation Ksh.36,000;**

**(2) The claimants shall be issued with a Certificate of Service pursuant to section 51 of the Act;**

**(3) The claimants shall report on their Skyline Sacco statement for the year 2014 within 14 days;**

**(4) The claimants are awarded costs of the suit.**

**Delivered virtually and dated this 28<sup>th</sup> July, 2020 at 0900hours.**

**M. MBARU**

**JUDGE**