



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 759 OF 2017

FRANCIS VALASA NGALA.....CLAIMANT

VS

MACKENZIE MARITIME (EA) LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Francis Valasa Ngala against his former employer, Mackenzie Maritime E.A Limited. The claim is documented by a Memorandum of Claim dated and filed in court on 21st September 2017.
2. The Respondent filed a Response on 3rd November 2017 to which the Claimant responded on 21st November 2017.
3. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its former Human Resource Manager, Lily Phidiliah Wanjughu Mwashu.

The Claimant’s Case

4. The Claimant states that he was employed by the Respondent as a Turn Boy from 8th March 2014 until 3rd February 2016. He earned a monthly salary of Kshs. 18,000.
5. The Claimant claims that on 3rd February 2016, he reported to work as usual but his employment was terminated verbally, without any justifiable cause and in violation of due procedure.

6. The Claimant therefore claims the following:

- a. 1 month’s salary in lieu of notice.....Kshs. 18,000
- b. Leave pay for 1 year.....14,532
- c. Service pay.....10,380
- d. 12 months’ salary in compensation.....216,000
- e. Overtime for 1 year & 7 months.....196,080
- f. Public holidays for 1 year & 7 months.....10,559
- g. Certificate of service
- h. Costs plus interest

The Respondent’s Case

7. In its Response dated and filed in court on 3rd November 2017, the Respondent admits having employed the Claimant as a Turn Boy from 1st June 2014 until 31st January 2015. The Claimant was offered further contracts of service from 1st February 2015.

8. The Claimant earned an initial monthly salary of Kshs. 12,500. On 9th November 2015, he was promoted to the position of Assistant Driver, earning a monthly salary of Kshs. 18,000.

9. The Respondent states that upon the lapse of the Claimant's last contract on 30th January 2016, the Claimant was, by letter dated 3rd February 2016, informed of the Respondent's decision not to renew his contract of service.

10. The Respondent avers that it performed its obligations under the contract of employment, including the prompt payment of the Claimant's agreed salary and remittance of all statutory dues. Further, the Claimant was issued with the relevant certificates of service whenever the contract period lapsed.

11. The Respondent adds that after the lapse of the last contract period on 30th January 2015, the Claimant's final dues were tabulated and the Claimant duly signed a letter of discharge on 17th May 2016.

12. The Respondent denies that the Claimant was continuously employed from 8th March 2014 until 3rd February 2016. The Respondent also denies that the Claimant's employment was unlawfully and/or unfairly terminated.

Findings and Determination

13. There are two (2) issues for determination in this case:

- a. Whether the Claimant has established a case of unlawful termination of employment;
- b. Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

14. The Respondent's case is that the Claimant's employment was not terminated; rather, his contract came to an end by effluxion of time.

15. In support of its case, the Respondent produced a letter dated 3rd February 2016, addressed to the Claimant as follows:

“Dear Francis,

RE: NON RENEWAL OF CONTRACT

Subject herein refers.

With reference to your contract with Mackenzie Maritime (E.A) Ltd as a turnboy in the Transport Operations department that ended on 31st January 2016, we regret to inform you that we do not intend to renew the same.

This decision was reached after careful consideration of various operational factors affecting the Transport Operations Department.

Kindly arrange to clear with the company as soon as possible and in case you have questions regarding the same please direct them to the HR office for clarification.

We take this opportunity to wish you well in your future endeavors.

Yours sincerely,

For: Mackenzie Maritime (E.A) Ltd.

(signed for)

SOLOMON ONDEGO

B.D DIRECTOR”

16. From the evidence on record, it emerges that the Claimant served on the basis of successive fixed term contracts. In its written submissions, the Respondent referred to case law on the self-executing nature of fixed term contracts.

17. In **Chacha Mwita v Kenya Medical Research Institute & others (Cause No 1910 of 2013)** it was held that where employment comes to an end at the expiry of a fixed term contract, a claim for unlawful termination does not lie.

18. Similarly, in **Margaret A. Ochieng v National Water Conservation & Pipeline Corporation (Cause No. 23 of 2012)** it was held that a fixed term contract does not carry with it an expectation of automatic renewal.

19. In the case now before me, the Claimant's last contract expired on 31st January 2016. The Claimant however continued working for the Respondent for three (3) days after the expiry date of his contract, with his last day at work being 3rd February 2016.

20. The Claimant maintains that because he was retained in employment after expiry of his contract, he had a legitimate expectation that his contract would be renewed

21. In **United Nations, Appeals Tribunal (Tribunal D' Appel des Nations Limes) Case No. 2010 125- Between Frenchon v The Secretary General of the United Nations** legitimate expectation by an employee, which is based on the employer's conduct, was affirmed as one of the grounds on which the employer's decision not to renew a fixed term contract may be challenged.

22. The question then is whether the Claimant in this case had a legitimate expectation that his outgoing contract would be renewed. I think so, not just because the Claimant worked for a few days after the expiry date of his contract but because from the evidence on record, it was not unusual for the Claimant to continue working after expiry of his running contract. For example, the Claimant's contract for period running from 1st February 2015 to 31st July 2015 was issued on 4th February 2015.

23. I therefore find that by its own conduct, the Respondent created a legitimate expectation that if the Claimant was allowed to continue working after expiry of the outgoing contract, a backdated renewal would be issued. In this regard, the Court was not convinced that the late communication of non-renewal of the last contract was an isolated case of managerial lapse.

24. In the result, I am persuaded that the Claimant has made out a case of unlawful termination of employment and he is entitled to compensation.

Remedies

25. Pursuant to the foregoing findings, I award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's cumulative service period as well as the Respondent's failure to observe the law in bringing the employment to an end.

26. I also award the Claimant one (1) month's salary in lieu of notice.

27. From the evidence on record, the Claimant was paid in lieu of pending leave days. The claim thereon is therefore without basis.

28. Having been a contributing member of the National Social Security Fund (NSSF) the Claimant is not entitled to service pay.

29. The claims for overtime and public holidays were not proved and are disallowed.

30. Finally, I enter judgment in favour of the Claimant as follows:

a. 6 months' salary in compensation.....Kshs. 108,000

b. 1 month's salary in lieu of notice.....18,000

Total.....126,000

31. This amount will attract interest at court rates from the date of judgment until payment in full.

32. The Claimant is also entitled to a certificate of service plus costs of the case.

33. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF JULY 2020

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Miss Oguna h/b for Mr. Ngonze for the Claimant

Mr. Ajigo for the Respondent