



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 763 OF 2017

SADIK RAMA MCHECHEMO.....CLAIMANT

VERSUS

MACKENZIE MARITIME (E.A) LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. In this claim, Mackenzie Maritime (E.A) Ltd has been sued by its former employee, Sadik Rama Mchechemo. 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. At the trial, 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 27th December 2011 until 3rd February 2016. He earned a monthly salary of Kshs. 18,000.
5. The Claimant claims that his employment was terminated verbally on 3rd February 2016, without justifiable cause and in violation of due procedure.
6. The Claimant's claim against the Respondent is as follows:

- a) One month's salary in lieu of notice.....Kshs. 18,000
- b) Leave pay for 4 years.....52,248
- c) Service pay @ 15 days' per completed year.....41,520
- d) 12 months' salary in compensation.....216,000
- e) Overtime worked for 4 years & 5 months.....691,440
- f) Public holidays for 4 years & 5 months.....27,950
- 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 engaged the Claimant as Turn Boy on

contractual basis from the 29th December 2011 to 28th December 2012, at an initial monthly salary of Kshs. 8,600.

8. The Respondent states that upon the lapse of the contract stated above, the Claimant was re-engaged in the same position from 1st January 2013 until 31st December 2013, at an enhanced monthly salary of Kshs. 10,000.

9. The Claimant was offered a further contract from 1st January 2014 to 31st December 2014 by which he paid a monthly salary of Kshs. 12,500 which contract was renewed to run from 1st January 2015 until 31st December 2015.

10. By letter dated 9th November 2015, the Claimant was promoted to the position of Assistant Driver, at a monthly salary of Kshs. 18,000 effective 1st November 2015.

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

12. The Respondent further states that during the subsistence of the Claimant's employment, the Respondent duly performed its obligations under the contract, including the prompt payment of the Claimant's agreed salary, the remittance of all statutory dues (where applicable) and the Claimant was issued with the relevant certificates of service whenever the contract period lapsed.

13. The Respondent adds that after the lapse of the last contract on 30th January 2016, the Claimant's final dues were tabulated and the Claimant duly signed a letter of discharge on 31st May 2016.

14. The Respondent denies that the Claimant was continuously employed from 27th December 2011 up to 3rd February 2016. The Respondent further denies that the Claimant's employment was unlawfully terminated.

15. The Respondent submits that it was expressly provided in the Claimant's contracts of service that the contracts, unless renewed at least 2 weeks prior to the termination date, would lapse by effluxion of time, with no requirement for notice.

16. Regarding the claim for accrued leave pay, the Respondent pleads that the Claimant duly discharged the Respondent upon termination and tabulation of his dues, which included leave days owed, if any.

Findings and Determination

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

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

Unlawful Termination?

18. On 3rd February 2016, the Respondent wrote to the Claimant as follows:

"Dear Sadiki,

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)

19. The Claimant worked for the Respondent on the basis of several fixed term contracts beginning 29th December 2011. His last contract dated 14th January 2015 was to run from 1st January 2015 until 31st December 2015. This contract was not renewed but the Claimant continued working until 3rd February 2016, when he was issued with a letter communicating non-renewal of contract.
20. The Respondent’s case is that the Claimant’s employment came to an end by effluxion of time and a claim for unlawful termination cannot therefore stand.
21. In its written submissions, the Respondent referred to case law on the self-executing nature of fixed term contracts.
22. There is firm jurisprudence to support the proposition that fixed term contracts are self-executing (see *Wanjohi Muriuki v Kirinyaga Water and Sanitation Company Limited & another [2012] eKLR*).
23. In the present case however, the Claimant worked for at least one month after the expiry date of his last contract being, 31st December 2015.
24. The Claimant told the Court that because he was retained in employment after expiry of his contract, he had a legitimate expectation that the contract would be renewed. The Claimant added that this was not the first time he had continued to work without a contract as renewals would be issued after commencement of the contract period. This is supported by the fact that the last contract was itself issued on 14th January 2015, well into the contract period, which was to run from 1st January 2015.
25. The question before the Court is whether by its conduct, the Respondent created a legitimate expectation in the mind of the Claimant that his contract would be renewed.
26. In *United Nations, Appeals Tribunal (Tribunal D’ Appeal 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.
27. The Respondent’s witness, Lily Phidiliah Wanjughu Mwasho told the Court that there was a lapse in communication of non-renewal of the contract for which the Respondent should take responsibility.
28. In the circumstances of this case, I find and hold that by its own conduct, the Respondent created a legitimate expectation in the mind of the Claimant that his contract would be renewed.
29. The corollary finding is that the Claimant has made out a case of unlawful termination of employment and he is entitled to compensation.

Remedies

30. I therefore award the Claimant six (6) months’ in compensation. In arriving at this award, I have taken into account the Claimant’s cumulative service period, diminished by his negative employment record as disclosed by documents filed by the Respondent, which the Claimant did not challenge. I have also considered the Respondent’s unlawful conduct in terminating the Claimant’s employment.
31. I further award the Claimant one (1) month’s salary in lieu of notice.
32. From the evidence on record, the Claimant was paid in lieu of pending leave days. The claim thereon is therefore without basis.
33. Having been a contributing member of the National Social Security Fund (NSSF) the Claimant is not entitled to service pay.
34. The claims for overtime and public holidays were not proved and are disallowed.
35. 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.....	<u>18,000</u>
Total.....	126,000

36. This amount will attract interest at court rates from the date of judgment until payment in full.
37. The Claimant is also entitled to a certificate of service plus costs of the case.

38. 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 judgment 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

LINNET NDOLO

JUDGE

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