



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 716 OF 2012

EMILY MIGWACLAIMANT

VERSUS

SEVENTH DAY ADVENTIST CHURCH

CENTRAL KENYA CONFERENCE (CKC)1ST RESPONDENT

SEVENTH DAY ADVENTIST CHURCH

EAST KENYA UNION CONFERENCE.....2ND RESPONDENT

JUDGMENT

1. The Claimant's suit is contained in the Amended Statement of Claim filed on 14.10.2019 in which she avers that she was employed by the Respondent on or about 10th November 2008 as an Accountant based at the Central Kenya Conference office until 3rd February 2012 when her services were terminated without any notice, valid reason and without following the due process provided under the Employment Act. She contended that she was earning Kshs. 25,000/= per month at the time her services were terminated which was an underpayment, in addition to being denied all the allowances which were provided for in the respondents' ECD Working Policy including transport allowance, medical allowance, education allowance and rent/ house allowance. She also contended that she never went for annual leave during the 3 years worked and she was not compensated for the same. Therefore, she prays for judgment against the Respondents for:

a) Compensation for loss of earnings as an accountant amounting to Kshs. 2,955,220.

b) Costs of the suit.

c) The payment of 12 months' salary as compensation for loss of earnings during the period she was kept out of employment which within Section 15 (c) of Labour Institution Act of 2007.

d) Compensation for unpaid medical expenses incurred by the claim any in the cause of her employment amounting to Kshs. 1,495,000.

e) Any other relief that this Honourable Court may deem fit and just to grant.

2. The 1st Respondent filed defence on 10th October 2012 stating that the claimant joined her on 10.11.2008 on 3 months' attachment as part of her training, after which she was employed on a one-year contract in February 2009 which expired in January 2010. It is further defence case that she advertised the position of Accountant and the Claimant applied and was shortlisted for interviews that were conducted on 23/09/2011 but she failed. She further averred that the claimant continued with a fixed term contract until it expired in January 2012 and she was paid all her terminal dues and outstanding benefits through M-PESA transaction number "CA26IP535". It is therefore the respondent's case that the Claimant is not entitled to the dues enumerated in her claim and prayed for the suit to be dismissed with costs.

3. After many years of delay, the suit was heard in February 2020 when both parties tendered evidence and thereafter filed written submissions.

Claimant's case

4. The Claimant testified as CW1 and adopted her witness statement as her evidence in chief stated that when she joined the Respondent, she had a degree in B.Com Finance option, a diploma in banking and CPA 2; that she worked for the Respondent for 3 years but was not issued with any written confirmation after finishing her internship but she was being paid Kshs 19,561 until 2011 when the salary was

increased to kshs 23,100 per month; that the Treasurer kept on promising her that she will be employed as one of the accounts because there was a vacancy; that in June 2011, the respondent advertised the position of Accountant and she applied but after the interviews, the process was nullified because a Kisii was not needed because the position was in Central Kenya region; that in July 2011, the post was re-advertised and interviews were done and man from Meru and a Kikuyu lady were picked; that in January 2012 an unqualified accountant was recruited in her place and she was dismissed; and finally, she contended that even before the termination, she was given a letter of recommendation.

5. She further testified that her employment was governed by the respondents' ECD Working Policy under which she was entitled to allowances including rent, medical, travel, education and utility in addition to basic salary. However, she contended that she was the lowest paid employee in the organization earning kshs. 23,100 without allowances, while other accountants were earning over kshs. 40,000 plus the said allowances. According to her she was subjected to discrimination contrary to law by being paid differently from the other accountants in the respondents' service yet she was more qualified. She also felt discriminated on account of ethnicity during the recruitments. She was at a loss as to why secretaries, receptionists and drivers were being paid more than herself.

6. In conclusion she contended that her employment was terminated unfairly, wrongfully and illegally, and prayed for the reliefs set out in the amended Claim including the arrears of her benefits under the ECD Working Policy.

7. On cross-examination, she stated that she became a permanent employee after completing her internship because she was not given any fixed term contract in writing. She further contended that despite lack of a written confirmation of appointment she continued working and being paid salary, though, lower than the other accountants by half.

8. In re-examination, she stated that the employer has the obligation to prepare a written contract of employment. She contended that she was earning half of what the 4 other accounts were earning yet all they were doing the same job.

Respondent's case

9. Mr. Stephen Kioko, the respondent's Treasurer testified as Rw1 and basically adopted his written statement as his evidence in chief. He stated that the Claimant was not a permanent employee but a seasonal contract employee engaged twice to relieve accountants who went on maternity leave. He contended that after completing her internship, the claimant was appointed for one year from February 2009 to January 2010; that from February to March 2010, she was out of employment, but from April to November she was given 8 months contract; that from December 2010 she was out of employment but in 2011 she was given another contract of one year up to January 2012, after an accountant was transferred to another organization.

10. He further testified that in June 2011, the position of accountant was advertised and the claimant applied and was interviewed among other candidates but she emerged number 6; that due to some technicalities, the recruitment was nullified and the position was re-advertised; that the claimant applied and was interviewed again but she scored 41% and therefore she failed the interview and someone else was appointed; that since the appointee was engaged elsewhere till mid-January 2012, the claimant continued with her contract until it expired on 31.1.2012 when she was released and paid gratuity for the period she served.

11. He contended that the allowances being sought by the claimant are only payable to employees on regular and permanent employment and not those on fixed term contracts like the claimant. He further contended that even if the claimant was to be paid any house allowance, the same should not exceed kshs. 15000 per month while travelling allowance would not exceed kshs. 5500 per month. He stated that education allowance was in respect of children education and as such the claimant who did not have any child, did not qualify for the same. As regards leave, he contended that leave could not be paid for except on mutual separation, in which case only a maximum of 4 weeks could be paid for. He, therefore prayed for the suit to be dismissed.

12. On cross-examination, he maintained that the Claimant worked for three years with breaks but he admitted that he did not have any contract of service signed by her or any letter concerning her terms of service. He confirmed that the Claimant was never issued with any warning letter and maintained that she was never dismissed. He maintained that only regular and permanent employees were given fringe benefits. He admitted that he was not able to confirm whether claimant's statutory deductions were remitted to the relevant agencies.

13. He contended that the accountant who was recruited during the said interviews was a university graduate and a CPA. He reiterated that the claimant never worked continuously for 3 years and contended that there were breaks in between the fixed term contracts he was engaged in. Finally, he contended that the claimant notified that she had not succeeded in her interview but she was not told the reason for her failure.

Claimant's Submissions

14. The Claimant submitted that the termination of her employment was not in accordance with justice and equity as provided for under **Section 45 of the Employment Act**. For emphasis she relied on **Walter Anuro vs Teachers Service Commission [2013] eKLR** where the court observed that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness in relation to the validity of the reason for the termination and the procedure followed before the termination. She also relies on the case of **Evans Kamadi Misango vs. Barclays Bank of Kenya Limited [2015] eKLR** where the Court held that under **Section 43 of the Employment Act**, the employer must demonstrate a valid reason for terminating employment.

15. She further submitted that the Respondent did not to produce any written contract to prove that she was engaged on fixed term contract basis, and as such she maintained that, since she worked for the Respondent for a cumulative period of over 4 years, she was entitled to all the benefits of an employee as stipulated under the Employment Act. For emphasis, she relied on the case of **Paul Ochieng' Agola v Gateway Marine Services Limited [2018] eKLR** where the court held that the claimant's prolonged casual employment had converted to term contract of service under section 37 of the Employment Act.

16. Further, the claimant submitted that since the Respondent in the instant case never tendered any evidence to prove the reason for terminating her contract of service, the termination was unjustified. She contended that the letter of dismissal simply stated that they were terminating her contract because the existing vacant position of accountant had been filled. In addition, the claimant stated that she was not accorded any hearing before the termination as required by section 41 of the Act. She also submitted that she was never given a certificate of service after the separation to help her get another employment. Consequently, she contended that the termination was unfair and unlawful.

17. As regards the reliefs sought, she submitted that she is entitled to the maximum 12 months' salary at as compensation for the unfair termination and relied on ***Patrick Asuma v Arm Cement Limited [2019] eKLR***.

18. She argued that since she has established that she was an employee, and NSSF contributions were remitted to the agency in her favour, she is entitled to service pay. She submitted further that she entitled to unpaid housing allowance; unpaid education allowance; unpaid medical expenses incurred and medical allowance; and to generally every other benefit that the rest of the employees were entitled to.

19. She also submitted that she is entitled to general damages because the Respondent discriminated against her contrary to **section 5(3) of the Employment Act** which prohibits discrimination with respect to recruitment, training, promotion terms and conditions of employment or other matters arising out of the employment. Further, **section 5(4) of the Act** requires an employer to pay his employees equal remuneration for work of equal value. She also relied on **Article 1 of Convention No. III - Convention Concerning Discrimination in Respect of Employment and Occupation, 1958** which defines discrimination thus;

“For the purpose of this Convention the term discrimination includes; a. Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”

20. For emphasis she relied on the case of ***VMK v CUEA [2013] eKLR*** whereat the court awarded damages in the sum of Kshs. 5 Million.

Respondent's Submissions

21. The Respondent relies on the case of ***Emmanuel Musembi Nthambi v Tamar Wire Products Ltd [2017] eKLR*** where the learned Judge opined that: -

“...It is my considered view that when parties to a contract agrees to vary the terms of the contract in writing, none of the parties can succeed in any lawsuit based on the allegation that the variation of the said terms of contract was done unfairly unless he can prove that the variation of the contract was founded on any, or all known vitiating factors. Consequently, the answer to the first question herein is in the negative.”

22. The respondents submitted that the claimant was never a regular and permanent employee but a seasonal employee engaged as a reliever under fixed term contracts which lapsed by effluxion of time. They argued that after the lapse of the last contract on 31.1.2012, she was released because the vacancy she was acting was filled by permanent employee. They contended that after the lapse of claimant's contract, she was paid her terminal dues totalling to kshs. 52,560 and as such she was not entitled to any other relief. They maintained that the claimant's contract was not terminated unfairly and that being not a regular employee, she was not entitled to allowances sought in the amended claim. Therefore, she urged the court to dismiss the suit with costs.

Issues for determination and analysis

23. After careful consideration of the pleadings, evidence and submissions presented to the court by both sides, it is clear that the claimant was employed by the respondents as a trainee Accountant and later as an Accountant between November 2008 and January 2012. The issues for determination are: -

- (a) Whether the Claimant was engaged by the Respondent on permanent or fixed term contract basis.
- (b) Whether the Claimant's employment contract was unfairly and wrongfully terminated by the Respondents.
- (c) Whether the Claimant is entitled to the remedies sought.

Was the claimant permanent or fixed term contract employee?

24. Section 2 of the Employment Act, defines a contract of service as: -

“an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies.”

25. The Act does not specifically talk about permanent contract of service but it talks of contract of service for indefinite period and a fixed term contract of service. The two types of contracts have also not been defined under section 2 of the Act. However, section 10(3) (c) of the Act gives us a hint by referring to the fixed term contract of service as one where the employment is not intended to continue for an indefinite period and whose last date must be indicated. It follows therefore, that a contract of service to serve for an indefinite term is what in common parlance known as permanent contract of employment because its end date is unknown or unascertainable.

26. Under section 9(2) of the Employment Act, the employer has the responsibility of causing the contract of employment to be drawn up stating the particulars of the employment. On the other hand, section 10(7) of the Act provides that: -

“if in any legal proceedings an employer fails to produce a written contract or written particulars prescribed in subsection(1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”

27. In this case the claimant alleges that she was employed on as a permanent employee continuously from 10.11.2008 to 3.2.2012 when she was served with a termination letter by the respondent. However, the respondents admitted that the claimant worked for them during the said period but denied that it was a continuous service. Rw1 averred that the claimant’s service was on fixed term contracts basis to relieve officers who went on leave. However he did not produce any written contract of service and as such the burden of disproving the alleged permanent employment and proving that the claimant was engaged under fixed term contracts rests with the employer. On the other hand, the claimant has the burden of proving by evidence, that she indeed worked continuously without any break as she alleges.

28. In his attempt to discharge the employer’s burden of proof, Rw1 reiterated that the claimant never worked continuously after completing her internship in January 2009 but under fixed terms contract as a reliever from 1.2.2009 to 31.1.2010, from 1.4.2010 to 30.11.2010 and then from 1.2.2011 to 31.1.2012. He maintained that the claimant’s contracts were never renewed but they were punctuated by breaks in between. He further testified that the position of accountant was advertised twice and the claimant applied but she did not emerge top in interviews. However, he did not produce the employment records for claimant nor did he produce any attendance registers to prove that indeed, the claimant only attended work during the said contract terms.

29. On the other hand, the claimant did not produce any documentary evidence to prove that she worked continuously without any break, and that she was paid salary all through until 31.1.2012. For example, she did not produce bank statements for her Salary Account to prove that salary was paid to her by the respondents throughout the entire period of 3 years or any other documentary evidence like correspondences. She also did not call any witness to support her allegation of continuous service.

30. Having carefully considered the evidence and submissions by both sides, I find that despite the failure by the employer to produce employment records for the claimant, Rw1 has managed to prove on a balance of probability that the claimant was a seasonal employee hired on contract basis and not a permanent employee. The evidence by Rw1 was corroborated by the claimant when she stated that on several occasions including during a training in February 2011, the Treasurer had told her that she will be employed as one of the respondent’s accountants. She further corroborated the said evidence by admitting that she indeed applied for the job when it was advertised twice and participated in the interview.

31. In my view, the foregoing conduct of the parties manifest an implied agreement between the parties to enter into a contract of service but not for an indefinite period since the claimant hoped to be employed by the respondents at a future date. If that was not the case, the claimant would not have pestered the treasurer about employment. Further, she would not have applied for the same job from the same employer if at all she was already employed on permanent basis.

32. As indicated above, a contract of service need not be written but it can be verbal or even implied from the conduct of the parties. Applying the said meaning of a contract of service and fixed term contract to the facts of this case, it is clear that the claimant was not employed on permanent terms but under fixed term contracts. The claimant was working as a reliever under fixed term contracts and remained optimistic that she would one day secure a permanent appointment with the respondent as an accountant but she failed in the two interviews she participated in. Although she alleged that she was denied the appointment because of her ethnicity, she did not substantiate that allegation by evidence. The said oral allegation could not rebut the documentary evidence of the results of the interview produced by Rw1, which showed that the claimant performed dismally in the interviews.

Was the claimant’s contract unfairly and unlawfully terminated.

33. Having found that the claimant was employed under fixed term contract, the next question to consider is whether the contract was unlawfully terminated or lapsed automatically by an effluxion of time. Rw1 contended that the last contract for the claimant was for one year ending on 31.1.2012. He further contended that despite the said interviews yielding a substantive accountant, the claimant continued till her contract term expired on 31.1.2012. He also contended that the claimant was duly notified that her services would end on 31.1.2012 and she confirmed the same by her email to Pastor Jeanpierre on 1.2.2012 in which she stated that the Treasurer had been telling her to stop attending work, the last communication on the same being made on 31.1.2012.

34. After careful consideration of the rival contentions by the two sides, I find that the respondent has proved on a balance of probability that the claimant’s one-year contract commenced on 1.2.2011 and lapsed automatically on 31.1.2012. On the other hand, I find that the claimant has failed to prove on a balance of probability that her contract was terminated by the respondent prematurely. It is a fact that the claimant knew all along that she was a temporary employee serving the respondent until a substantive accountant was appointed. She competed for the job but failed to secure the appointment. Although she alleged that the person who was appointed was unqualified, she did not rebut the evidence by Rw1 that the appointee had a degree of Bachelor of Commerce and CPA.

35. In view of the foregoing, I must find and hold that the claimant’s contract of employment was not terminated by the respondents but it lapsed automatically on 31.1.2012 by effluxion of time. All what the respondent did was to notify the claimant that she would not continue serving after the expiry of the contract term on 31.1.2012. Consequently, the issue of unfair and unlawful termination of the claimant’s contract under section 45 of the Employment Act does not arise in the circumstances of this case.

36. I gather support from section 47(5) of the Act, which provides that the burden of proving unfair termination of a contract of service rests with the employee, while the employer bears the burden of justifying the reason for the said termination. It is obvious therefore that the said burden of prove does not shift until the employee proves that the termination of the contract was done by the employer, without a valid reason and/or without following a fair procedure.

Is the claimant entitled to the reliefs sought?

37. In view of the finding that the claimant's contract lapsed automatically and therefore not terminated by the respondent unfairly, the claim for salary in lieu of notice and compensation for unfair termination fails.

38. As regards the claim for unpaid allowances, Rw1 contended that the claimant was not entitled because she was not a regular and permanent employee. The claimant denied allegation by the Rw1 and maintained that she was entitled to all the allowances sought under the respondent's ECD Working Policy and the Employment Act. I have carefully considered the foregoing contentions, the said Policy and the Act and find no merit in the respondents' argument. Chapter Y of the said Policy which provides for the Remuneration and Assistance to employees, does not provide for superior remuneration and allowances for permanent employees than their counterparts who are engaged under fixed term contracts. The same position obtains in the Employment Act which provides for the irreducible minimum terms and conditions of service for the employee in Kenya save those expressly excluded by the Act.

39. In view of the foregoing, I dismiss the allegation that only permanent employees were entitled to the allowance set out in the ECD Policy and hold that all the employees of the respondent's including the claimant were entitled to the said allowances subject to meeting the conditions set out in the Policy. In this case the claimant sought kshs 552000 as her unpaid education allowance but she did not plead the particulars of the claim nor did she adduce any evidence to prove that she incurred any expenses towards her children's education or towards improving her vocation by purchase of books and equipment which are the only items identified for assistance under Clause Y 20 05 , Y20 10 and Y25 35 of the ECD Policy. She also did not rebut the evidence by Rw1 that she did not have any children. Consequently, that claim fails.

40. Likewise, the claim for salary for February 2012 is dismissed because the claimant's contract had already lapsed and she acknowledged by her emailed dated 1.2.2012 that for two weeks and in particular on 31.1.2012, the respondents' Treasurer had told her not to report to work again.

41. The claim for service pay is fairly straight forward because the claimant was not a member of any pension or gratuity scheme nor was she in the NSSF. However, I find that the amount paid to her after the separation as gratuity sufficient and decline to make any further award for service pay.

42. The claim for leave is also fairly simple because section 28 of the Employment Act entitles every employee to at least 21 leave days per year. In this case there is no dispute that the claimant served for at least 35 months and therefore she was entitled to 62 leave days which is hereby awarded.

43. The claim for unpaid house allowance is also a right to every employee who is not housed by the employer by dint of section 31 of the Act. The claimant prayed for kshs. 30,000 per month but Rw1 contended that it should not exceed kshs. 15,000 per month. I award the amount suggested by the employer because the claimant has not shown the basis for the higher pay. The award excludes the 3 months she was on attachment from November 2008 to January 2009.

44. Transport allowance is provided under Clause Y25 20 of the ECD Policy and in particular paragraph 2. The claimant did not provide particulars of the of kshs 195,000 but Rw1 contended that the allowance should not exceed kshs. 5,500 per month. Thereafter , I award to the claimant Kshs. 5,500 per month excluding the 3 months she was on attachment.

45. The claimant further prayed for reimbursement of expenses she incurred for medication during her employment totalling to kshs. 1,495,000. She produced, as exhibits without any objection from the respondents, a bundle of receipts for expenses incurred towards medicines, laboratory and consultation plus prescription notes. The respondent also did not make any effort to deny that the said expenses were indeed incurred. All what Rw1 did was to say that the claimant was not entitled to the allowance because she was not a regular and permanent employee. Clause Y 15 20 1 of the ECD Policy provides for medical assistance to all employees at 75% of the Medical drug expense, laboratory and physician's fees. I therefore award the claimant 75% of the said expenses pleaded by the claimant.

Conclusion and disposition

46. I have found that the claimant was not a permanent employee but a fixed term employee. I have further found that her contract was not terminated by the respondents unfairly but it lapsed automatically by an effluxion of time. Finally, I have found that the claimant was entitled to the allowances set out under the respondent's ECD Working policy and the Employment Act like all the other employees of the Respondents. I therefore enter judgment for her in the following terms:

- | | |
|--|------------------------|
| (a) Leave kshs 23,100 x 62/30 | kshs. 47,740 |
| (b) House allowance kshs. 15,000 x 32 | kshs. 480,000 |
| (c) Travelling allowance kshs. 5,500 x 32 | kshs. 176,000 |
| (d) Medical allowance kshs 1,495,220 x 75% | <u>kshs. 1,121,415</u> |

Total **kshs. 1,825,155**

The above award is subject to statutory deduction but the Claimant will also have costs and interest at court rates from the date of filing the suit.

Dated and delivered at Nairobi this 15th day of October, 2020.

ONESMUS N MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE