



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2126 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

DAN CAXTON CHOGO UNDUSU.....CLAIMANT

VERSUS

THE JUBILEE INSURANCE COMPANY OF KENYA LIMITED....RESPONDENT

JUDGMENT

Vide a Memorandum of Claim filed on 14th October 2015, the Claimant alleges that the termination of his employment was unlawful as he expected the Respondent to extend his contract. He further avers that he did not receive a notice to terminate his contract after several contract extensions. He further avers that the Respondent did not pay him his terminal dues.

The Claimant seeks the following reliefs:

- a. The Respondent pays gratuity pay from July 2011 to July 2015 at a rate of 25% of the total earnings amounting to Kshs.400,000/-.
- b. Unpaid leave allowance for 9 days amounting to Kshs.36,200/-.
- c. Damages for wrongful, unfair and unlawful termination of employment.
- d. Any other award or benefit which this Honourable Court may deem fit and just to grant.

The Respondent filed a Memorandum of Defence on 8th February 2017. It avers that it was not obligated to issue a notice of termination or provide reasons for termination as the contract expired through effluxion on 28th August 2015. It further avers that through a discharge voucher dated 7th September 2015, it remitted to the Claimant all his terminal dues and benefits.

The Claimant filed a response to the Memorandum of Reply in which he joins issues with the Respondent and reiterated the averments in his claim.

Claimant's Case

The Claimant testified as CW1 and he relied on his Witness Statement dated 8th September 2016 as his evidence-in-chief. He testified that he was not given one month's notice and that having worked for 4 years and 8 months, he was entitled to gratuity. He further testified that he had 9 accrued leave days.

In cross examination, he admitted that he executed a fixed contract dated 17th January 2011 for a period of one year. He testified that the contract was extended from time to time and the terms were adopted in the subsequent contracts save for the commencement and expiry dates. He testified that on 25th February 2013 his contract was extended for one year, to 25th January 2014.

He further testified that at all times he was aware of the date his contract was to end. He testified that the last contract was to end on 28th August 2016 but he served the Respondent until 31st August 2015. He confirmed that the voucher dated 2nd September 2015 states all the salary due to him. He admitted that he received payment of 40.25 leave days.

He testified that for the period he worked, the Respondent deducted his NSSF contribution. With respect to gratuity, he testified that he had

sought the same in his claim but his contracts did not provide for such payment.

Upon re-examination, he testified that he worked until 31st August 2015 because the project manager asked him to. He testified that the Staff Clearance Certificate stated that he had outstanding leave days and that he was paid for 40.5 days but was not paid for 9 days.

He testified that though gratuity was not provided for in his contract, there is a legal notice which states that if one works for many years, one is entitled to gratuity.

Respondent's Case

BEATRICE NJOROGE the Respondents Human Resource Business Partner testified as RW1. She testified that the Claimant was employed as a Clerk of Works on a fixed term contract.

She testified that according to the discharge voucher, the Claimant was paid all his dues being his salary for August 2015 at Kshs.125,000, an allowance of Kshs.1,500 phone allowance, salary arrears at Kshs.98,838 and leave of 40.5 days at Kshs.238,922. She confirmed that throughout the Claimant's employment NSSF deductions were remitted.

In cross-examination, she testified that, from the records, the Claimant's first contract was in 2011 and in 2012 he was issued with another contract. She confirmed that his contract was extended from time to time. She testified that the contract provided for termination by either party before the end date upon issuing one month's notice. She testified that the claimant was not issued with one month's notice as his contract was not terminated during the period of his service.

She confirmed that the Claimant's last day of work was 31st August 2015. She testified that though she did not produce any records the Claimant's record indicates that he had 40.25 days. She testified these were leave days for the period he had worked and that some days were carried forward from 2013 – 2014.

Claimant's Submissions

The Claimant submitted that he is entitled to the claim for gratuity as per his first contract and that it should be granted since there was no wrongdoing on the part of the Claimant that would not entitle him to gratuity.

He relied on the case of **Bamburi Cement Limited v William Kilonzi [2016] eKLR** where the Court held that gratuity is a gratuitous payment of services rendered and that a contract may provide there is no payment of gratuity where termination of employment is by dismissal.

He argued that he is entitled to gratuity pay from January 2011 to August 2015 at the rate of 25% of his total earnings.

He submitted that Section 74(1)(f) as read with Section 10(3)(a)(i) of the Employment Act requires an employer to keep records of an employees' leave entitlement setting out days taken and days due as this would ensure that the particulars given are sufficient to enable the determination of the employee's entitlement. He submitted that the Respondent failed to tender any evidence rebutting the claim for 9 days leave.

He submitted that the termination of his employment was unlawful as the contract of employment provided that a party would terminate the contract by written notice to the other party. He submitted that Courts do not rewrite contracts and relied on the case of **James Heather Hayes v African Medical and Research Foundation (AMREF) [2014] eKLR**.

He submitted that the Court should find that he is entitled to a written notice of termination of his contract and that the conduct of the respondent to continue assigning him work implied they intended to extend his contract as was the practice.

He relied on Section 36 of the Employment Act as the basis of his claim for notice pay. He argued that he has proved his case on a balance of probabilities thus he is entitled to compensation as prayed in the claim.

Respondent's Submissions

The Respondent submitted that the letter dated 25th February 2015 set out the terms of the contract of employment which were similar to the appointment letter but revised the claimant's consolidated salary to Kshs.121,000 per month. It maintained that the Claimant's contract of employment was for a fixed term with an option for renewal on mutually agreeable terms.

It averred that as at 28th August 2015, no mutual agreements were entered into or signed by the Claimant after the lapse of his contract term. It submitted that the Claimant has not presented evidence of any promise by the Respondent that there would be an extension of the contract. He relied on the case of **Chacha Mwita v KEMRI & Others [2014] eKLR** where the Court held that a fixed term contract naturally terminated on the expiry date and does not constitute a dismissal.

The Respondent submitted that it was the parties' intention to have the contract for a fixed term and upon expiry it was to be renewed in writing. It was submitted that the court in **Cleopatra Kama Mugenyi v Aidspace [2019] eKLR** upheld the principle that fixed term contracts carry no expectation of renewal.

It relied on Section 35(6) of the Employment Act in arguing that gratuity is not payable to employees who are members of NSSF. It submitted that the Claimant in his testimony admitted that he was a member of NSSF and remittances were made in respect thereof. It submitted that the Claimant was paid all amounts due to him including the sum of Kshs.223,922 being for 40.25 leave days.

It urged the Court to find that the Claimant was not unfairly terminated. That should the Court be inclined to find that he was, it should be guided by the well established principle that where a contract of employment provides for termination upon notice and a party seeks reliefs for damages under section 49 of the Employment Act, then the Court will only award salary in lieu of notice. For emphasis, it relied on the case of **CMC Aviation Limited v Mohammed Noor Civil Appeal No. 199 of 2013**.

In conclusion, it urged the Court to dismiss the suit with costs.

Determination

The issues for determination are:

- a. Whether the Claimant was unfairly terminated.
- b. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant was unfairly terminated

The parties herein are in agreement that the Claimant was employed by the Respondent as a Clerk of Works vide the contract dated 17th January 2011 for a fixed term of one year. Further, that there were several extensions to his contract with the last contract extension expiring on 28th August 2015.

It is the Claimant's case that he expected that his contract would be extended as he had not received any notice to terminate the same. On its part, the Respondent avers that the contract was a fixed term contract thus the Claimant could not possibly have any expectation that the contract would be extended.

The Respondent's letter dated 27th July 2015 stated:

"... Mr. Dan Undusu,

Clerk of Works

Nairobi

Re: Extension of contract

Further to our letter dated 27th April 2015, I am pleased to inform you that your contract has been extended further by one (1) month from 24th July, 2015 to 28th August, 2015.

All other terms and conditions remain the same. If you are in agreement, kindly sign a copy of this letter and return it to the undersigned.

..."

Additionally, the contract dated 25th February 2013 provided that it was for a limited period of one year and would be renewed upon terms mutually agreed by the parties.

Fixed terms contracts have a definite commencement and termination date. Thus should it not be terminated prior to expiry date thereof, it lapses by effluxion of time. In the instant case no notice was required to terminate the contract as the contract end date had reached and there was no agreement on its renewal.

In the case **Margaret A Ochieng v National Water Conservation & Pipeline Corporation [2014] eKLR** the court held that: -

"The Court is persuaded the Claim has no merit. The fixed-term contract had its own in-built termination notice, in that the date of termination was advised to the Claimant on execution of the three year contract in December 2008. She knew termination would be upon the lapse of the three years in 2011. The Respondent has no obligation to pay her notice pay as there was no premature termination of the fixed-term contract."

Further in the case of **Francis Odero Okello v Kenya Power and Lighting Company [2019] eKLR** the court held that –

"With regard to the claim for one month salary in lieu of notice, the fixed term contract dated 29th February 2012 had under

paragraph (d) indicated that the last working day for the claimant was 30th April 2012. There was no need to further give any more notice to the claimant or pay in lieu of notice.”

The Claimant could not also have expected that the contract would be renewed as there was no such a mutual agreement by the parties. I agree with the Respondent’s argument that in the absence of a promise that the contract would be extended, the claimant cannot claim that he expected to continue working. This is irrespective of the fact that his last working date was 31st August 2015 which was some 3 days after the lapse of his contract. In the case of **Rajab Barasa & 4 Others v Kenya Meat Commission 2016] eKLR**, it was held that:

“A fixed term contract will not be renewed automatically even when there exists a clause allowing for such renewal.”

In the instant case, the claimant was aware of the impending termination of his employment as he wrote a letter to the Respondent dated 31st March 2015 and an email dated 25th June 2015 in which he acknowledged that his contract was coming to an end. In both letters he sought payment of his final dues. In the letter dated 31st March 2015 he sought the following –

- a) Pay for the period up to 25th April 2015.
- b) Gratuity at the rate of 25% of the total earnings for the period of service between January 2011 to 25th April 2015.
- c) Severance pay at the rate of 15 days per every year of service or part thereof.
- d) Cash pay in lieu of pending leave days now at 35 days up to and including 31st December 2014 plus the days up to and including 25th April 2015.
- e) Leave allowance for the period 2011, 2012, 2013 and 2014.
- f) Honoraria Bonus as declared by the chairman for the period 2012, 2013 and 2014.

In the email dated 25th June 2015 he stated as follows –

From: Dan Undusu
Sent: Thursday, June 25, 2015 8:40 AM
To: Emily Kamunde
Cc: Patrick Tumbo; Amin Poonja; jabbalcqs@gmail.com
Subject: RE: END OF CONTRACT FOR DAN CAXTON CHOGO UNDUSU – CLERK OF WORKS

Dear Madam,

This to kindly remind you that my contract which was first drawn on 18th January 2011 and kindly extended by three months on 27th April 2015 ends on 24th July 2015. I wish to extend my gratitude to you and the entire management of Jubilee Kenya for this kind decision.

As we draw closer to this end, I kindly request to know if you would consider to pay my outstanding leave days accrued due to my nature of work, leave allowance for the period I have been around and any other ex-gratia payment that you may deem necessary in appreciation for the period I have been at Jubilee.

I wish to express my sincere thanks to the Jubilee management for allowing me to serve the company in the capacity of Clerk of Works for the last 55 months. I admit that I gained vast experiences both on the work and general areas of day to day life.

In conclusion I wish to add that I have enjoyed working at and for Jubilee for the entire period mentioned above and will avail myself in case my services will be required in any capacity beyond the 24th July 2015. May God bless Jubilee.

Yours faithfully,

Dan Undusu”

From the above, it is my finding that the Claimant was not unfairly terminated as provided under the Employment Act and that his contract came to an end by effluxion of time.

Whether the Claimant is entitled to the reliefs sought

The claimant avers that he is entitled to gratuity at the rate of 25% of his total earning. It was his testimony that having worked for 4 years and 8 months, he was entitled to gratuity. The Claimant admitted that his contract did not provide for payment of gratuity and that he was a member of NSSF. Neither of the 2 contracts dated 17th January 2011 and 25th January 2013 provided that the Claimant was entitled to gratuity at the rate of 25%. Consequently, this claim fails.

With respect to the 9 leave days, RW1 testified that the 40.25 leave days' pay of Kshs.223,992 was for the entire period of service which included days carried forward in 2013/2014. I find that the claim for 9 days' leave has not been proved by the claimant.

The claim for damages for wrongful termination fails as the Claimant was not unfairly terminated.

In the end the entire claim fails and is dismissed with no orders for costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF OCTOBER 2020

MAUREEN ONYANGO

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 March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE