



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.482 OF 2016

BENSON MAIYO CLAIMANT

VERSUS

AGRICULTURAL FINANCE CO-OPERATION RESPONDENT

JUDGEMENT

Issues in dispute;

- (a) Wrongful, unlawful and unfair termination of employment
- (b) Notice pay;
- (c) Leave pay;
- (d) Underpayments;
- (e) Damages for termination of employment;
- (f) Transport and house allowances;
- (g) NSSF and NHIF dues;
- (h) Payment for work done.

The claimant filed his Memorandum of Claim on 5th December, 2016 on the claims that sometime in the year 2006 he was employed by the respondent as a Watchman. He as later allocated duties of a Gardener/Messenger.

As a watchman, the claimant was paid a wage of between Ksh.3, 000.00 to 5,000.00 depending on the day and work allocated and the respondent would issue him with a temporary contract after every 3 months.

The claimant was then paid between Ksh.4, 000.00 or 4,500.00 when he was appointed Gardener/Messenger and depending on the work allocation and following issuance of temporary contracts.

In the year 2011 the respondent stopped issuing the letters of contract but the claimant remained in employment.

On 31st May, 2016 the claimant was summoned by the respondent and informed that his work had been terminated with immediate effect. The claimant pleaded his case without success. He then reported the matter to the labour office. The respondent attended and offered to pay the claimant Ksh.140,605.80 as terminal dues but the claimant declined as there was no outline as to what such payment constituted and in any event it was an underpayment.

The claimant is seeking for a declaration that termination of employment was unfair, that he is entitled to his wages as a permanent employee from July, 2007 to May, 2016 and the payment of;

- a) Salary due in underpayments for 10 years Ksh.1,407,000.00;
- b) Gratuity Ksh.84,250.00;

- c) House allowance Ksh.615,000.00;
- d) Transport allowances Ksh.324,000.00;
- e) Leave allowance Ksh.54,000.00;
- f) NSSF Ksh.21,000.00;
- g) NHIF Ksh.54,000.00;
- h) 3 months' notice Ksh.63,000.00.

The claimant testified that he was employed by the respondent at the Eldama Ravine Branch as a Watchman from March, 2006 and where he worked continuously until May, 2016. He was issued with letters of temporary employment but his position changed to a Gardener/Messenger. He would work over public holidays and in June, 2007 the manager outsourced the security work whereupon the claimant was retained as messenger/gardener. He was paid Ksh.300.00 per day. There were temporary letters issued after every 3 months until the year 2011.

On 31st May, 2016 the manager called the claimant and issued him with a letter terminating employment without giving any reasons and on the grounds that it had come from the head office.

The claimant also testified that the various contracts issued with him on temporary basis were not lawful and he ought to have been a permanent employee. Being retained as a casual gardener for work which was continuous was not lawful and based on the nature of duties assigned where he would report early and open the offices make tea and attend to banking for the respondent. The claimant would also be required to go to the lands office and make photocopies and such duties were done for and on behalf of the respondent as the office messenger.

The claimant also testified that his wages were paid through vouchers for 3 days per week whereas he would be at work for a full week. Such was wrong as he would report to work daily and attend to allocated duties as a gardener and messenger.

When the claimant reported the matter to the labour officer, the respondent attended and noting the underpayment and wrongful termination of employment, offered to pay Ksh.140, 605.00 which was too low and such was an admission that various dues owed.

Defence

In response the respondent admit the claimant was issued with various letters of temporary employment as a casual and the terms spelt out. The claimant was required to work on weekends and public holidays only and was paid a daily wage of Ksh.250.00. Employment eventually terminated at the end of each contract term.

By contract letter dated 31st March, 2008 the claimant was appointed gardener to work for 3 days a weeks on a wage of V320.00 per day. Each term contract ended and renewed at the option of either party. On 31st May, 2016 the respondent opted not to renew employment.

The defence is also that the respondent attended before the labour officer when summoned and following a report by the claimant. Upon advice and to settle the matter, the respondent offered to pay Ksh.140, 605.80 which the claimant declined to accept.

The respondent paid to the claimant all the due wages as agreed and there is nothing outstanding unpaid. The claims made have no basis and should be dismissed.

Paul Ngulat, Branch Manager at Eldama Ravine and Charles Muli Kimeu the Senior Human Resource and testified that the claimant was employed on casual terms and issued with written contracts spelling out his duties to work as a reliever over weekends and public holidays. He was later appointed gardener to work for 3 days a weeks and was paid for work during such days until his last contract ending in May, 2016.

Mr Ngulat also testified that the respondent is engaged in offering financial facilities to farmers and when each applicant is issued with a loan, they must register a security with the respondent which is processed at the lands officer and to avoid further costs, the requirement is to have individual applicant process the documents and return to the respondent. In this regard the claimant who would be found within the premises of the respondent would go out and help such farmers and applicants which was an arrangement outside his duties as allocated by the respondent. The respondent has its own messenger to send to the bank and tea-lady would make tea for all staff and such duties would not be part of what the claimant was required to attend to under his contract. Each employee of the respondent has a key to open the office and such was not a duty lawfully allocated to the claimant who remained a casual employee. Where the claimant went out of his way to do electrical work, plumbing or messenger work, these were not duties required of him under his contract.

The claimant was never employed on permanent basis and the attendance register only required those in fulltime employment to register their work attendance. The claimant is not one of such employees.

When the matter was reported to the labour officer, the respondent was directed to pay an amount which such office had found appropriate and to settle the matter, the respondent complied and offered to pay the same but the claimant declined. The amount of Ksh.140, 506.00 was deposited with the labour officer.

Upon close of the hearing the court directed the respondent to file the work records with regard to the claimant. There was compliance and this has assisted the court in analysing the claims made.

The claimant also confirmed to the court that from the year 2011 he was retained as a casual employee on a needs basis until 31st May, 2016 when he was advised not to report back to work.

The Employment Act, 2007 allow for employment under fixed term contracts. Section 10(3) (c) of the Act provides that;

(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;

In this case, the claimant was issued with various written contracts for *casual employment* and even though *casual* employment is defined under the Act as being work done and paid at each of day, the term contracts issued to the claimant clearly spelt out the intentions of the parties to it. Whatever name was assigned to the nature of employment, the purpose and term of the employment as clear. It was temporary employment for a fixed period.

The claimant testified that he was paid for the 3 days stipulated under his contract. This arrangement subsisted until may, 2016 when the claimant was called and advice that his employment had terminated. There was no contract renewed.

The respondent has filed a detailed work attendance register as noted above and as directed by the court. from this record various employees have attended and clocked in their time in and time out. A random check on the register is evident that the claimant was not one such employee. A keen look at the register on specific dates and especially June, 2011 and December, 2013 the claimant is not registered therein.

The rationale is that the claimant's employment was regulated differently and under his fixed term contracts. Such fixed term contracts are legitimate mode of employment.

In **Fatuma Abdi versus Kenya School of Monetary Studies [2017] eKLR** the court held that;

... a fixed term contract of employment is a lawful mod of employment with a start and end date. In this case the Claimant made application for renewal of each contract and a new contract was issued for a fixed term. There was no time the Claimant worked without a written contract or went beyond any such

written contract so as to create the expectation that even where a written contract was not issued, it would be renewed for another term.

in **Margaret A. Ochieng versus National Water Conservation and Pipeline Corporation [2014] eKLR**, the court held that an employee on fixed term contract should not expect an automatic renewal. The flip side is that a fixed term contract is not inimical to renewal. Ultimately, the Court will consider the legitimacy of the employee's expectation based on the unique circumstances of each case.

In this regard, where the claimant was retained on fixed terms and he confirmed payment of his due wages as agreed and for the duration of 3 days' work each week, there was no expectation created that he became a full time employee. Even where the claimant may have remained within the premises of the respondent and became available for allocation of various duties, for the entire duration of his casual employment from the year 2011 to 2016, he was constantly paid a wage amounting to 3 days worked for each week. Such offering of self did not change the fixed term contracts between the parties.

The offer by the respondent to pay and settle the matter before the Labour officer was in good stead. Where the claimant had received all his due wages under each contract term, nothing remained outstanding and due at the end of each such contract. The offer made should have been welcome as the claims made for underpayments, notice, allowance; gratuity and statutory payment are not lawfully due.

Accordingly, the claims are found without merit. Claims dismissed with costs to the respondent.

Delivered at Nakuru this 31st day of January, 2019.

M. MBARU

JUDGE

In the presence of: