



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NO 753 OF 2017**

**ABEI OMUNGU ABUOR.....CLAIMANT**

**VERSUS**

**SHREEJI ENTERPRISES LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant’s claim brought by a Memorandum of Claim dated 15<sup>th</sup> September 2017 and filed in court on even date is for unfair termination of employment and failure to pay terminal dues. The Respondent filed a Memorandum of Response on 23<sup>rd</sup> October 2017.

2. At the trial, the Claimant testified on his own behalf and the Respondent called its Mombasa Branch Human Resource Manager, Mark Odhiambo Otieno. The parties also filed written submissions.

**The Claimant’s Case**

3. The Claimant states that he was employed by the Respondent as a Fork-Lift Driver earning a monthly salary of Kshs. 28,434, effective 2<sup>nd</sup> May 2015. He was retained on renewable annual contracts with the last one scheduled to run from 2<sup>nd</sup> May 2017 until 1<sup>st</sup> May 2018.

4. On 26<sup>th</sup> August 2017, the Claimant received a phone call from his family, informing him that his spouse was admitted at St. Paul Mission Hospital in Homa Bay County, where he was needed urgently. The Claimant sought and was granted permission to travel to Homa Bay. He was also given an advance of Kshs. 5,000.

5. Upon arrival in Homa Bay, the Claimant found that his spouse’s condition was deteriorating, causing the Hospital to refer her to Port Florence Hospital in Kisumu County. The Claimant left Kisumu for Mombasa on 3<sup>rd</sup> September 2017 and upon arrival on 4<sup>th</sup> September 2017, his employment was terminated verbally. He was paid Kshs. 39,000. The Claimant’s spouse later passed away.

6. It is the Claimant’s case that the termination of his employment was unlawful and unfair in that there was no justifiable cause and he was not afforded an opportunity to be heard. He claims the following:

- a) One month’s salary in lieu of notice.....Kshs. 28,434.00
- b) Accrued leave for 28 months.....46,442.20
- c) Salary for August 2017.....28,434.00
- d) Maximum compensation unfair termination.....341,208.00
- e) 8 months’ salary being remainder of contract period.....227,472.00
- f) Less amount paid.....(39,000.00)
- g) Certificate of service
- h) Costs plus interest

## **The Respondent's Case**

7. In its Memorandum of Response dated 18<sup>th</sup> October 2017 and filed in court on 23<sup>rd</sup> October 2017, the Respondent states that the Claimant's last employment contract was for four months running from 1<sup>st</sup> May 2017. The Respondent adds that the said contract expired on 30<sup>th</sup> August 2017.

8. The Respondent denies owing the Claimant any leave dues and states that upon expiry of his contract, he was paid a one month's salary gratuity.

## **Findings and Determination**

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

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

## **Unlawful Termination?**

10. The Claimant states that the Respondent terminated his employment unfairly on 4<sup>th</sup> September 2017. In denying this claim, the Respondent states that the Claimant's fixed term contract lapsed by effluxion of time on 30<sup>th</sup> August 2017. In support of its case, the Respondent produced a contract of employment dated 20<sup>th</sup> May 2017. On the face of it, this contract shows that it was to run from 1<sup>st</sup> May 2017 until 30<sup>th</sup> August 2017.

11. While acknowledging his left and right thumbprints affixed on the second page of the contract, the Claimant testified that he was not shown the first page. He therefore understood that he was executing a one-year contract as usual. To buttress this point, the Claimant made reference to Clause 5 of the contract which provided for service pay upon completion of one year service.

12. The Court was unconvinced. First, although in his list of documents dated 15<sup>th</sup> September 2017, the Claimant lists his last contract as item number 2, he did not produce it. Second, there was no evidence of any prior complaint by the Claimant that he had been made to execute an incomplete contract. He did not even plead such an issue in his Memorandum of Claim. Third, clause 5 which provided for service pay upon completion of one year did not in any way negate the possibility of a contract for a lesser period.

13. In the final submissions filed on behalf of the Respondent on 5<sup>th</sup> February 2019, reference was made to the decision *in Samuel Chacha Mwita v Kenya Medical Research Institute [2014] eKLR* where it was held that barring an illegality, a court should construe a written contract of employment in the terms and conditions expressed by the parties.

14. In line with this principle, the Court finds and holds that the contract of employment issued to the Claimant on 20<sup>th</sup> May 2017 was for a fixed term commencing on 1<sup>st</sup> May 2017 and terminating on 30<sup>th</sup> August 2017. The Court found nothing to suggest any extension of contract in the Claimant's favour beyond this date.

15. It seems to me therefore that the Claimant's employment with the Respondent came to an end by effluxion of time and as held in *Bernard Wanjohi v Kirinyaga Water and Sanitation Co Ltd & another [2012] eKLR* and *Rajab Barasa & 4 others v Kenya Meat Commission [2016] eKLR* once a fixed term contract lapses, the obligations of the parties also dissipate.

16. The Court therefore finds the Claimant's claim for compensation for unfair termination and notice pay to be without merit and proceeds to dismiss them. From the evidence on record, the Claimant was paid his final dues based on his last contract. The claims for accrued leave and salary for August 2017 are therefore without basis and are dismissed.

17. In the end, the Claimant's entire claim fails and is dismissed.

18. Each party will bear their own costs.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 14<sup>TH</sup> DAY OF MARCH 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Mathare h/b for Miss Katu the Claimant

Mr. Siminyu for the Respondent