



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT**  
**NAKURU**

**CAUSE NO.161 OF 2018**

**JOHN OTIENO BARASA.....CLAIMANT**

**VERSUS**

**MUTSIMOTO MOTORS COMPANY LIMITED.....RESPONDENT**

**JUDGEMENT**

Issues in dispute

- a) End of contract
- b) Payment of gratuity
- c) Underpayment of wage

The claimant was employed by the respondent on 2<sup>nd</sup> August, 2012 and issued with an appointment letter. Upon completion of the probation period there was no employment are regulated under the Employment Act. He was issued with short term contracts. Worked for day time shifts from 7am to 3pm or 8am to 5pm or 10pm to 6pm.

The claimant was paid a wage of Ksh.7, 916.00 and Ksh.1, 187.00 house allowance all being ksh.9, 103.00 per month.

The claimant had a fixed term contract of 11 months but worked continuously without work stoppage and for the period without a contract was paid through vouchers on a daily wage.

The claimant worked on contract from 2<sup>nd</sup> August, 2012 to 30<sup>th</sup> November, 2016. The contracts were for the period of;

20<sup>th</sup> December, 2012;

28<sup>th</sup> November, 2013;

28<sup>th</sup> November, 2014;

29<sup>th</sup> November, 2015; and

Notice to end each contract was issued.

At the end of each contract the claimant was paid his gratuity as final dues. This was only meant to be salary for the month that the respondent refers to as the end of contract terminal dues but there was no stoppage of work. In total employment was for 4 years.

The claimant was member of Kenya Amalgamated Union of Kenya and was paying his union dues through check off system. There was a CBA regulating employment but there was no clause with regard to the issuance of short term contracts.

The claimant is seeking the payment of gratuity at ksh.43, 080.60;

- a) Underpayments ksh.15,069.60;
- b) Certificate of service;
- c) Costs;
- d) Ex gratia payments ksh.71, 120.30.

The claimant testified in support of his claims that he was employed as a general attendant from August, 2012 to 30<sup>th</sup> November, 2016. The entire period of employment was regulated under a written contract from January, to November each year and for December until the issuance of a new contract he would be retained on a daily wage paid through voucher. At the end of each contract he was paid a gratuity and then issued with a new contract. Each contract had an end of contract notice issued to him by the respondent.

The defence is that the claimant was initially employed by the respondent on 2<sup>nd</sup> August, 2012 and then issued with intermittent fixed term contracts of 11 months.

The claimant worked in shifts and the paid wage was reviewed from time to time in compliance with the prevailing Minimum Wage Orders and the CBA.

The fixed term contract automatically lapsed on their time and the claimant paid what was lawfully due to him. There was no continuity of employment as alleged as end of contract notice would issue or a new contract would be issued to the claimant.

The reliefs sought by the claimant are not justified, there was notice that employment would terminate on 30<sup>th</sup> November, 2016 by effluxion of time and the *ex gratia* payment of ksh.12, 008.00 was noted in the payment slip of 30<sup>th</sup> November, 2016. The terms of clause 16 of the CBA do not cover the claimant.

Geoffrey Chege Kariuki testified that he is the human resource manager for the respondent and worked with the claimant who was under fixed term contracts which ended and he was issued with a certificate of service and the referenced CBA clause 16 does not apply to him. The claim for 8% *ex gratia* payment is not due as this is premised on a good will of the parties and not based on the law. Gratuity is also not payable where claims are based on the applicable law. The claimant was not unionised and the referenced CBA does not cover his employment.

Agency fees were payable for the claimant who was not unionised but being unionisable and in the union environment such agency fees were due at 2%. The agency fee arose following ministerial order and gazette notice.

Both parties filed written submissions.

It is common cause that the party's employment and labour relations were regulated under fixed term contracts. The claimant was issued with contracts covering the following periods;

- 2<sup>nd</sup> August, 2012 to 30<sup>th</sup> November, 2012 as a general labourer;
- 2<sup>nd</sup> August, 2013 to 30<sup>th</sup> November, 2013 as Machine Operator;
- 2<sup>nd</sup> August, 2014 to 30<sup>th</sup> November, 2014 as Machine Operator;
- 2<sup>nd</sup> August, 2015 to 30<sup>th</sup> November, 2015 as Machine Operator; and
- 2<sup>nd</sup> August, 2016 to 30<sup>th</sup> November, 2016 as Machine Operator.

Each contract had terms and conditions of employment and the payable wage. It had a start date and end date.

It is also not lost to the court that at the end of each contract, the claimant was retained under a daily wage paid through payment by voucher and until he was issued with a new contract for a fixed term.

It is also on record with each end of contract, there as notice of the end and a certificate of service was issued covering each term. Notices of end of probation and end of contracts were issued and dated;

- 2<sup>nd</sup> November, 2012;
- 14<sup>th</sup> November, 2013;
- 14<sup>th</sup> October, 2014;

14<sup>th</sup> October, 2015; and

14<sup>th</sup> October, 2016.

The payment of final dues for each contract were that;

On 28<sup>th</sup> November, 2013 the claimant was paid ksh.14, 429.00;

28<sup>th</sup> November, 2014 payment of ksh.12, 665.00;

28<sup>th</sup> November, 2015 the payment of ksh.13, 916.00; and

30<sup>th</sup> November, 2016 the payment of ksh.23, 384.08.

With the payment of the final dues the claimant was also issued with Certificates of service dated;

30<sup>th</sup> November, 2012;

30<sup>th</sup> November, 2013;

30<sup>th</sup> November, 2014;

30<sup>th</sup> November, 2015; and

30<sup>th</sup> November, 2016.

These certificate are in compliance with the provisions of section 51 of the Employment Act, 2007.

Section 10 of the Employment Act, 20077 allow parties in employment and labour relations to regulate their employment terms and conditions by written contract. Where employment is meant to be for a fixed period section 10(3) (c) of the Act provides as follows;

*(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 the case of **Benson Maiyo versus AFC Cause No.482 of 2016** the court held the issuance of fixed term contract is allowed in law and that;

*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 mode 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 this case therefore, where the parties agreed to be bound by fixed term contract, the due wage was paid in accordance with the wage orders and the requisite notice

before end were issued, the respondent cannot be found to have acted outside the law. such employment is permissible within the law and the due certificates of service have since issued.

The claimant though unionisable was not unionised. This is evidenced by the payment statements submitted together with the memorandum of claim. Under the Labour Relations Act, where an employee who is unionisable and not unionised benefits from a CBA, an agency fee is due. with the paid wage being within the law, the claimant was subject to the due agency fees payable to Amalgamated Union of Kenya Metal Workers in accordance with the published notice by the Minister.

In this case the claim for the payment of gratuity at ksh.43, 080.60 on the basis that the claimant should have been paid in accordance with the job classification under the CBA and the general increase and with an increase of 8% is not due for the reasons that he was not unionised, he was under his fixed term contract and in lieu of any wage increases he was paid a gratuity at the end of each contract.

The claims for underpayments are lost as above set out. The claimant was not unionised and with each end of contract he received a gratuity.

The claims made for issuance of certificates of service are without basis. Each contract ended on its term and a certificate of service was issued to the claimant.

The claims for ex gratia payment of ksh.71, 120.30 on the grounds that this was agreed with the union is not justified. The claimant was not unionised. He was not covered under the CBA save for the payment of the agency fees for not being unionised. He cannot claim any benefit from an agreement he was not party to.

Had the claimant put into account the provisions of section 10(3) of the Employment Act, 2007 the fixed term contract he was placed under and the gratuity payments he received at each of his contract, the claims herein should not have arisen.

**Accordingly the claims made are found without merit and are hereby dismissed in the entirety. The claimant shall meet the costs of the respondent.**

**Delivered at Nakuru this 14<sup>th</sup> day of March, 2019**

**M. MBARU JUDGE**

**In the presence of: .....**

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