



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

CAUSE NUMBER 2243 OF 2014

JACKSON ANGWENYI ABUGA.....CLAIMANT

-VERSUS-

MANMO CO-OPERATIVE SAVINGS AND

CREDIT SOCIETY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed this suit on 9th March 2015 alleging unfair termination of his employment by the respondent and withholding of his terminal benefits. He contended that his initial contract with the Respondent expired on 31/12/2013 but it was impliedly renewed as he continued working under the same terms till the time of his termination. He therefore sought the following reliefs:

- a) Kshs. 5,132,380/= as per paragraph 14 of his Memorandum of Claim.
- b) Certificate of Service be issued to the Claimant within 14 days.
- c) Costs plus interest at court rates.
- d) Any other relief which the court deems fit, just and expedient to grant.

2. The Respondent filed her Memorandum of Claim on 20th April 2015 in which she averred that the Claim is time barred and incapable of being sustained. In the alternative and without prejudice to the foregoing, she averred that the Claimant was terminated by the letter dated 21.8.2014 due to his advanced age that reduced his capacity to continue working.

3. The suit was heard on 23rd May 2017 and 19th November 2018 when the Claimant testified as Cw1 and James Kahawa Mwangi testified on behalf of the Respondent, as Rw1. Thereafter both parties filed written submissions. The issues for determination arising from the pleadings are:

- a) Whether the suit is statute barred.
- b) Whether the termination of the contract of service was unfair.
- c) Whether the reliefs sought should be granted.

Claimant's Case

4. Cw1 testified that he was employed by the Respondent as a Manager on 1/1/2011 but was never issued with a letter of appointment until 5/3/2013. He further testified that as at the time he was employed he was over 65 years and as such he was offered a three year renewable contract. That his starting salary was agreed at Kshs. 31,820 but he was only paid Kshs.18,150 as his basic pay per month and no house allowance. That his 2011 contract ended on 31/12/2013 and he was not given any termination notice. He however continued working until 31/8/2014 when he was informed that his contract had come to an end and then he was paid 3 months' salary.

5. He further testified that he was terminated while serving his new contract that commenced on 5/3/2013. That the terms and conditions of

service for the Respondent were improved in February 2014 increasing his salary 19,092 and granting him commuter allowance, medical allowance and gratuity at 25% of the basic pay per annum. He however testified that he was never paid the approved salary and the backdated arrears or enjoyed the other benefits. He also never went on leave or paid cash in lieu.

6. In cross-examination Cw1 testified that he was employed as Manager and given an employment card but not a letter of appointment until 5.5.2013. He observed that the letter of appointment had alterations but contended that he was also given terms and conditions of service together with the letter of employment.

7. He admitted that he was paid 3 months' salary after termination, which was more than the one-month notice period provided under the terms of service. He maintained that he was receiving kshs. 18500 as his monthly salary was 18,500 instead of the agreed kshs. 31,820 but admitted that he never wrote to the Respondent asking for the difference or house allowance. He contended that his contract of 3 years was to end in 2016 but it was prematurely terminated.

8. Cw1 further stated that he got his new terms and conditions of service on 5/3/2013 but they were not approved until February 2014 when they were signed. He further stated that he was given his letter of appointment in March 2014 but it was backdated to 2013.

Respondent's Case

9. Rw1 testified that the Claimant was employed by the Respondent in December 2011 as a Manager. He testified that the Claimant's salary was Kshs. 13,500 per month which was later increased to Kshs. 18,500 in 2013. That the claimant worked until August 2014 when he was terminated by being served with the termination letter. That upon termination, the Claimant was paid 3 months' salary in lieu of notice and he signed for the cheque.

10. Rw1 testified that the terms of service upon which the Claimant is basing his suit were not applicable to him because by his own letter he had deferred the terms to December 2014. He therefore prayed for the suit to be dismissed with costs.

11. In cross –examination he contended that the Claimant was never given any employment letter and that it was a verbal contract. He testified that the Claimant started working in December 2011 but he had been working informally from January 2011. That they used to issue employment cards to their employees and they had no written contract of employment. That the letter dated 21.8.2014 addressed to the Claimant was not terminating a written contract. He testified that the contract started in December 2011 but they never set any duration or fixed term. He testified that it is not true that the contract was to expire in December 2013.

12. He admitted that he authored the Memo dated 30/5/2013 which referred to the proposed terms of service that the management deferred to December 2013 because the Sacco could not afford the wage bill. He further admitted that the letter dated 1/1/2013 appointing the Claimant was from the Sacco and was a contract of service for the claimant indicating that the starting salary was 31,177 per month. He however admitted that the claimant used to draw Kshs.18,500 per month as his gross pay which was used to compute his 3 months' salary in lieu of notice totalling to Kshs.55,000. He contended that the Claimant was not entitled to any more dues.

Claimant's submissions

13. The Claimant submitted that since the Respondent refused to give notice of intention to terminate the initial contract at expiry on 31/12/2013 the contract is deemed to have been renewed by the Respondent for another 3 years. In respect of whether the Claimant's employment was based on an oral or written contract the Claimant it is the Claimant' submission that the employer ought to keep records of her employees and that the Respondent did not tender any evidence producing the Claimant's records of employment. The Claimant relied on sections 8 and 74 of the Employment Act to fortify his submissions.

14. The claimant further submitted that the termination of his renewed fixed term contract was unfair and unjustified because it was done before the expiry date, that is, 31.12. 2016, and because it violated the provisions of section 41,43, 44, and 45 (2) (c) & (5) of the Employment Act. He further submitted that the Respondent deliberately failed to implement the terms and conditions of service that had been approved by the Ministry and thereby caused the Claimant to lose his rightful salary and allowances amounting to Kshs.1,913,000 through underpayment. He therefore prayed for the said sum as arrears.

15. The claimant further submitted that his claim for monthly medical allowance of Kshs.9,000 plus house allowance backdated to the date of employment was not controverted by the Respondent and prayed for the same in addition to backdated monthly commuter allowance and annual leave allowance. Finally, he prayed for his gratuity totalling to Kshs.572,760 under Clause 7 –iii of the terms and conditions of service which provided for the payment of his gratuity at 25% of his annual salary.

16. In conclusion the claimant submitted that he is entitled to 12 months' salary as compensation for unfair termination of his contract of employment under section 49 (1) (c) of the Employment Act. The Claimant relied on **Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Limited [2013] eKLR and John Rioba Maugo v Riley Falcon Security Services Limited [2016] eKLR.**

Respondent's submissions

17. The Respondent in her submitted that the claim is time barred since the Claimant has sued for claims dating back to January 2011 in a suit filed on 9/3/2015. She relied on section 90 of the Employment Act and decisions in **Maria Machocho v Total Kenya Limited [2013] eKLR and Fred Mudave Gogo v G4s Security Services (K) Ltd [2014]eKLR** to fortify the submission that the suit is time barred.

18. The Respondent further submitted that the Claimant is not entitled to one month's salary in lieu of notice as he was paid 3 months' salary in lieu of notice, which he never denied. That the Claimant is not entitled to house allowance, medical allowance, commuter allowance, leave

allowance, gratuity, leave and underpayment for six years terming the claims as an attempt to gain unjust enrichment. That the Claimant has proved that he had a 3 years contract of service that was renewable and that he cannot claim benefits for years not worked between 2014 and 2016. She relied on ***Abraham Gumba v Kenya Medical Supplies Authority [2014]eKLR*** to support the foregoing submissions.

19. She further submitted that the Claimant having been present when the resolution was made for the improved terms of service in 2013, he cannot now claim that the said terms were applicable to him from 2011. She further submitted that the said terms were approved on 28.2.2014 and their implementation was deferred to December 2014 after the Claimant had left his employment. She relied on section 119 of the Evidence Act to contend that the claimant has not discharged his burden of proving that the said improved terms of service applied to him.

20. The Respondent further submitted that the Claimant's termination was substantively and procedurally fair and contended that he is not entitled to 12 months compensation. She submitted that the Claimant only worked for 3 years and awarding him 12 months salary would amount to unjust enrichment. She relied on the decision in ***John Benson Githinji v Attorney General & 4 Others [2014]eKLR***.

Analysis and determination (a) Whether the Claim is time barred.

21. The Respondent argued that the Claimant's claim is time barred for reason that the claim is in respect of a cause of action that arose in 2011. I however find the said contention incorrect because the respondent has admitted that she terminated the claimant's employment by the letter dated 21st August 2014 which took effect from 31st August 2014. The claim was filed on 9th March 2015 which is 7 months from the date of the Claimant's termination and as such I return that the suit is not time barred under Section 90 of the Employment Act because it was filed within 3 years after the termination of the contract.

(b) Whether the Claimant's termination was unfair.

22. Under section 45(2) of the Employment Act, termination of employees contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed. Valid and fair reason must be related to the employee's conduct, capacity and compatibility, or based on the employer's operational requirements. Fair procedure on the other hand, includes but not limited to, granting a fair hearing to the employee before termination.

Reason for the termination.

23. The respondent contended that she terminated the claimant's contract of service mainly on account of old age and frailty. The Claimant admitted that he was 65 years when he joined the respondent and contended that for the reason of his old age he was employed under 3 years contract up to 31.12.2013 but the same was impliedly renewed for a similar term. After careful consideration of the Appointment letter dated 5.3.2013, I agree with the respondent that the claimant was not employed for a fixed term but for an indefinite term terminable by notice or for a cause.

24. As already noted herein above, the reason for the termination was the claimant's old age and frailty. The said reason in my view does not *per se* amount to inability or incapacity to perform his contractual obligations. The respondent employed the claimant knowing his advanced age and enjoyed his services for over 3 years and as such, she was bound to prove on a balance of probability that the claimant was no longer capable of discharging his duties as her manager due to old age. However, Rw1 never tendered any evidence towards proving and justifying the reason cited for the abrupt termination of the claimant's contract of service and that rendered the termination substantively unfair.

Procedure followed

25. Section 41 of *the Employment Act* provides as follows:

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct ... explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee ...hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee, make."

26. The claimant contended that he was not accorded the foregoing mandatory hearing before the termination. Rw1 only stated that the claimant was paid 3 months' salary in lieu of notice but tendered no evidence to prove that the claimant was given a fair hearing before another employee of his choice before the separation on ground of old age and frailty. The termination of the claimant's contract of service herein was for a cause and as such it was subject to the mandatory procedure provided under the said section 41 of the Act. Consequently, the failure by the respondent to prove that a fair hearing was accorded to the claimant rendered the termination procedurally unfair.

27. Having found herein above that the respondent has failed to prove that the termination of the claimant's contract was substantively and procedurally fair as required by section 41, 43, 45 and 47 (5) of the Employment Act, I return that the termination was unfair and unjustified, the payment of salary in lieu of notice notwithstanding.

(c) Reliefs.

28. In view of the finding herein above that the termination of the claimant's services was unfair and unjustified, I award him 10 months' salary compensation for unfair termination under section 49 (1) of the Employment Act. In awarding the said compensation I have considered the period served before termination being 3 years, the fact that at the age above 65 years he may not secure another job, and finally the fact that he did not contribute to his termination through misconduct. The claim for one month salary in lieu of notice is dismissed because he admitted that he was paid 3 months' salary in lieu of notice after termination after termination.

29. The Claimant stated that he was issued with the terms and conditions of employment annexed to his letter of appointment dated 1.3.2013. The said terms and conditions were basically the general terms of the Respondent's staff made in 2013. However, Rw1 contended that by the Memorandum dated 30/5/2013 addressed to all the respondent's employees, the respondent deferred the implementation of the said terms and conditions up to December 2014.

30. I have carefully considered the evidence and the submissions on the applicability of the 2013 Terms and Conditions of service on the claimant herein. There is no dispute that the said terms were approved by the management on 28.2.2014 and that the effective date for salary increment was backdated to 1.6.2012. There is also no dispute that the claimant was made aware of his new backdated terms of service. There is however, no evidence to prove that the claimant was consulted about the deferment of the said terms of service to December 2014 and he accepted voluntarily.

31. Even if the claimant had been consulted, which has not been proved, any consent given did not mean a waiver of his benefits under the said terms but just a postponement of the date when he was to get the same in arrears. The respondent has not denied that she implemented the said 2013 terms and conditions of service from December 2014. Such implementation therefore entitles the claimant to the salary increment therein effective from 1.6.2012 because the increment was automatic as per the last paragraph of the introduction which provided as follows:

“The salaries are based on the structured scale, which give rise to automatic salary increase. The salary scale will apply to all employees of the society currently in service with effect from 1st June 2012 for the period of (2) years or as and when required before the next review.”

32. The claimant was the senior most officer of the respondent job group 9 under the said terms of service. His minimum basic pay was therefore Kshs.19,092 plus medical allowance of Kshs.9,000, house allowance of Kshs.10,000 and commuter allowance of Kshs.8,000 totalling to Kshs.46,092 gross pay per month from 1.6.2012. However, I will assess the award of the damages sought based on the pleadings because parties are bound by their pleadings. The claimant pleaded that his gross pay as at 2014 was Kshs.36,675 per month and I therefore assess his compensation for unfair termination to Kshs.366,750.

House, Medical, Commuter and Leave allowance for 2011- 2016

33. The Claimant sought the allowances from the Respondent for the period between 2011-2016. The said allowances were not part of the claimant's contract before the publication of the 2013 Terms of service. The house, medical and commuter allowances were part of the monthly salary and were supposed to be reflected on the payslip and as such they were backdated to 1.6.2012. He is therefore awarded the said allowances from 1.6.2012 to 31.8.2014 when he was terminated.

However, the leave allowance was an annual pay and it depended on whether the employee took his leave. In this case, the claimant never went for any leave and as such, the leave travelling allowance was forfeited.

Gratuity

34. The Claimant is entitled to gratuity at 25% of his annual basic pay by dint of clause 7 iii of the respondent's terms and conditions of service 2013. I therefore award him Kshs. $19092 \times 12 \times 25\%$ equalling to Kshs.171,828.

Underpayment

35. The Claimant's letter of appointment stated that he was to be paid Kshs. 19,092 but was paid Kshs. 18,500 which amount was confirmed by Rw1. However, the claimant never pleaded clear particulars of the alleged salary underpayment. It is not clear when the underpayment started, by how much and how was the sum prayed arrived at. Consequently, I dismiss that prayer.

Certificate of service

36. The Claimant is also entitled to a certificate of service under section 51 of the Employment Act.

Conclusion and disposition

37. I have found that the suit herein is not time barred as alleged by the respondent. I have further found that the termination of the claimant's contract of service was unfair and unjustified. Finally I have found that the claimant is entitled to some of the reliefs sought and awarded him the same. Consequently, I enter judgment for the claimant against the respondent as follows:

- (a) Compensation for unfair termination Kshs. 366,750
- (b) Gratuity for 3 years Kshs. 171,828

(c) House allowance	Kshs. 260,000
(d) Medical allowance	Kshs. 234,000
(e) Commuter allowance	Kshs. 208,000
Total	Kshs.1,240,578

(f) The claimant will also be issued with a certificate of service.

(g) He will also have costs plus interest at court rates from the date hereof.

(h) The award of damages is subject to statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 26th day of April, 2019

ONESMUS N. MAKAU

JUDGE