



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 2043 OF 2016**

(Before Hon. Justice Hellen S. Wasilwa on 28<sup>th</sup> October, 2019)

BANKING, INSURANCE AND

FINANCE UNION (KENYA).....CLAIMANT

-VERSUS-

KCB BANK (KENYA) LIMITED.....RESPONDENT

**JUDGEMENT**

1. The Claimant filed a Statement of Claim on 4<sup>th</sup> October 2018 alleging the unfair termination of the Nickson Ongeru Elijah, the grievant, who worked for the Respondent on a contractual basis from 22<sup>nd</sup> March 2011 to 5<sup>th</sup> November 2015.

2. It avers that the non-renewal of the grievant's employment contract was unfair and that the Respondent discriminated the grievant by paying him a salary that was contrary to the agreed CBA scale for clerical staff.

3. The Claimant therefore seeks the following prayers:

*1. The Honourable Court does reinstate the grievant back to work without loss of employment benefits and seniority in service and status.*

*2. The Honourable Court do order the Respondent to pay the grievant salary of Kshs. 938,592.*

*3. The Court do order the Respondent to pay the grievant the following terminal dues:-*

*a. Notice pay of Kshs. 78,216.*

*b. Leave pay*

*c. Leave allowance*

*4. The Court do order the Respondent to pay the grievant Kshs. 1,660,221 being underpayments in violation of the CBA which was in force and the subsequent one till the date of his exit.*

*5. Any other reliefs that the Honourable Court may deem justifiable to grant.*

*6. Costs of the suit.*

4. The Respondent filed its Response to the Statement of Claim on 16<sup>th</sup> November 2016. It avers that the grievant was employed on a fixed term contract and that he failed to present his degree certificate even after the extension of his contract to 5<sup>th</sup> November 2015. It avers that the Respondent's policy and procedure is that persons engaged at the clerical level must possess a degree certificate.

5. It avers that the CBA salary scale could not apply to the grievant as he was not covered by the CBA from the time he joined the

Respondent on 16<sup>th</sup> February 2011 to 30<sup>th</sup> April 2015 when his contract expired. It urged the Court to dismiss the claim.

### **Claimant's case**

6. Nickson Ongeru Elijah, Cw1, testified that he worked for the Respondent as an accounts clerk at the Leadership Centre in Karen. He testified that he was a contract employee and that he had worked for the Respondent from February 2011 when he was on a 10 day contract. It was his testimony that he earned Kshs. 1,000 per day which was paid as a monthly salary of Kshs. 32,481.

7. It was his testimony that his 2<sup>nd</sup> contract dated 9<sup>th</sup> August 2011 was for a period of 3 months and that he had cumulatively worked for the Respondent for 4 years. He testified that at that time he was not aware that there was a CBA which stipulated how clerks were to be paid. He contended that he was not paid in accordance with the CBA thus he was underpaid Kshs. 1,660,221.

8. He contended that he wanted to join the Union but was informed he could not join the union as he was on contract. He however joined the Union in May 2015 and paid his union dues in cash.

9. He testified that in March 2015 he was informed by the Human Resource Staff by way of an email that his contract would not be renewed unless he attached his degree certificate. He testified that after receipt of this letter he worked for 6 more months.

10. It was his testimony that at the time of joining the Bank he neither had a degree nor disciplinary issues. He testified that he had an expectation that his contract would be renewed as he continued working after receipt of the email.

11. He testified that on 5<sup>th</sup> November 2015 some employees were hired and he was told to handover and leave. It was his case that the Respondent was not fair to him as he had worked for 4 years.

12. In cross-examination, he testified he worked on contract and that work was temporary. He testified that he did not submit his degree certificate and that during the tenure of his contract he raised the issue of underpayment after he joined the union.

13. In re-examination, he testified that he submitted his documents to the bank but the bank did not ask for a degree. He however maintained that he did not have a degree certificate.

### **Respondent's case**

14. Robley Ngoje, the Respondent's Head of Employee Relations & Wellness testified as RW1. He testified that the grievant was employed on contract basis and that payment was as stipulated in the contract, which the grievant signed and accepted.

15. He averred that the grievant never raised any issue with the bank on payment and that all other contract employees earned the same pay.

16. He contended that the grievant's contract was not renewed for reason that he was engaged without the qualification and that his contract was extended purely on good faith. It was his testimony that the grievant was paid all his dues.

17. In cross-examination, he testified that in 2011 the grievant was given a job on account of his explanation that he was pursuing a degree. He contended that in the 4 years the grievant worked, he had no problems with his performance however, his performance was not examined.

18. He testified that the clerical duties stated in the CBA were not similar to those undertaken by the grievant. He testified that under the CBA the terms of renewal were based on performance and not possession of a degree. He testified that the grievant did not produce a degree certificate, which was a business need.

### **Claimant's submissions**

19. The Claimant submitted that it was convinced that the grievant was underpaid since he was a clerical staff whose role is captured in the preamble of the CBA. It submitted that the grievant ought to have been paid as per the CBA. In support of this, it relied on the decision in **East African Portland Cement Co. Ltd v Kenya Chemical & Allied Workers Union [2017] eKLR**.

20. It submitted that the grievant had legitimate expectation that his contract would be renewed as he continued working despite receiving the notice via email of the non-renewal of his contract.

21. It submitted that the contract was renewed close to 10 times and that his letters of appointment stated that the contract would not be renewed if there were reasons for poor performance or business needs.

22. It submitted that there was no proof of poor performance and that the requirement was not part of the terms of his contract. It was its submission that subjecting the grievant to inferior terms and conditions of service was discriminative and unfair. It relied on the decision in **Teresa Carlo Omondi v Transparency International Kenya [2017] eKLR**. It urged the Court to award the reliefs sought.

### **Respondent's submissions**

23. The Respondent submitted that the grievant was engaged on purely temporary basis and at no point did his terms change to permanent basis. It submitted that a fixed contract expires naturally on expiry date and termination does not constitute dismissal. In support of this

submission it relied on the case of **Margaret A. Ochieng v National Water & Pipeline Corporation [2014] eKLR** and **Rajab Barasa & 4 Others v Kenya Meat Commission [2016] eKLR**.

24. It submitted that in accordance with Section 47 (5) of the Employment Act, the Claimant did not prove that the grievant was unfairly terminated. It submitted that the communication to the grievant was clear that the contract would not be renewed and that the mere fact it kept renewing the grievant's contract was no basis for an automatic renewal. It relied on the case of **Stephen Kitheka v Kevita International Company Limited [2018] eKLR**.

25. It submitted that the grievant became a member of the union after an end date of his contract on 30<sup>th</sup> April 2015 had been officially communicated to him. It submitted that the Claimant was on affixed term contract thus the prayer for reinstatement cannot stand. It further submitted that the case of unfair termination had not been made proved.

26. It argued that the grievant was served with the notice via email and that the prayer for leave allowance should fail as the grievant was paid his full salary and leave days. With respect to underpayments it submitted that the grievant received his salary as agreed between the parties and that the grievant joined the Union in May 2015 after his engagement with the Respondent which came to an end in April 2015 and as such the CBA could only apply to him from May 2015.

27. It therefore submitted that the claim for underpayment should fail and urged the Court to dismiss the suit with costs to the Respondent.

28. I have examined all the evidence and submissions of the Parties herein. The issues for this Court's consideration are as follows:-

*1. Whether the Claimant was discriminated upon in his payment.*

*2. Whether the Claimant was unfairly terminated.*

*3. Whether the Claimant is entitled to the remedies sought.*

29. On the issue No. 1 above, the Claimant indicated that he served the Respondent on contract terms over a period of time.

30. His first contract was his Appendix 3(a) dated 16/2/2011 which indicates that the contract was for 10 days and his wages were 1000/= per day.

31. The 2<sup>nd</sup> contract was with effect from 10<sup>th</sup> August 2011 to 9<sup>th</sup> November 2011, a period of 3 months, and his salary was 32,481/= per month. The Claimant signed this contract accepting the terms thereto.

32. Another contract is dated 5/11/2013 (Appendix 4(a)). It ran from 15<sup>th</sup> October 2013 to 15<sup>th</sup> October 2014. It was indicated that it was on temporary terms and the salary payable was 32,481/= per month with no other benefits. There followed another contract dated 30<sup>th</sup> October 2015 running from 5<sup>th</sup> October to 5<sup>th</sup> November, 2015 for one month on terms as the previous contract and another from July 2015 to 5<sup>th</sup> November 2015 for 3 months.

33. The Claimant sustained other contracts within the same period. Cumulatively, the Claimant worked for the Respondent from 2011 to 2015 serving on various term contracts, which were indicated, to be temporary the last contract being one ending 5<sup>th</sup> November 2015. What is obvious is that the grievant signed all these contracts submitting to their terms.

34. The Claimant contends that he was discriminated against, as he was not paid as other banks clerks as per the CBA between the Claimant and Respondent. The claimant however told Court that he became a member of the Claimant union in May 2015. He started working for the Respondent in 2011. He could therefore not have enjoyed payment as a unionisable employee when he was not a member of the union.

35. The Claimant's contention that he was discriminated against in payment of his salary and wages does not therefore hold any water.

36. On the issue of unfair termination, the Claimant has told Court that he served on several term contracts, which were renewed at some periods in time, the last one ending in 30<sup>th</sup> April 2015. He was informed on 5/3/2015 that the contract was not going to be renewed. However, it was renewed again between 4<sup>th</sup> May 2015 to 3<sup>rd</sup> July 2015 (Appendix 2) and on 6<sup>th</sup> October 2015 to 5<sup>th</sup> November 2015.

37. The Claimant signed the other last 2 contracts and as per the very last contract, it was terminable by giving 1 weeks' notice. The Respondent does not seem to have given the grievant the requisite notice, which I find, is the only remedy available to the grievant. I therefore award him as follows: 7/30 x Kshs.32,481= Kshs. 7,579/=

38. The Respondent will pay costs of this suit.

**Dated and delivered in open Court this 28<sup>th</sup> day of October, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Odero for Claimant – Present

Mathenge for Respondent – Present