



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 194 OF 2018

SIMON GITAU MUGURE.....CLAIMANT

VS

BAHARI FORWARDERS LIMITED.....RESPONDENT

JUDGEMENT

Introduction

1. By a Statement of Claim dated 28th March 2018 and filed in court on the same date, the Claimant has sued the Respondent for unfair termination and payment of terminal dues. The Respondent filed a Response on 3rd July 2018 to which the Claimant responded on 24th July 2018.

2. When the matter came up for trial, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Shadrack Muthangya. Both parties also filed written submissions.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent as a Heavy Commercial Driver on successive contracts of six (6) months each from 3rd June 2013 until 30th November 2017. On 1st June 2014, the Claimant was admitted into the Respondent’s Pension Scheme.

4. The Claimant avers that he worked for the Respondent until 30th November 2017 when his employment was unlawfully and unfairly terminated. At the time of termination, the Claimant earned a monthly salary of Kshs. 34,000.

The Claimant states that he had a clean employment record.

5. The Claimant claims that during the subsistence of his employment with the Respondent he worked for 15 hours 7 days a week without any overtime compensation. He adds that he worked on public holidays also without compensation.

6. The Claimant’s case is that the Respondent unlawfully and unfairly terminated his employment and further failed to pay him his terminal dues.

7. The Claimant’s prayers are as follows:

- a) 1 month’s salary in lieu of notice.....Kshs. 34,000
- b) Unpaid overtime (Monday to Saturday).....1,472,625
- c) Unpaid overtime (Sundays).....534,375
- d) 41 unpaid public holidays.....175,625
- e) 12 months’ salary in compensation.....408,000
- f) Costs plus interest

The Respondent’s Case

8. In its Response dated 3rd July 2018 and filed in court on even date, the Respondent states that the Claimant was employed on a fixed term contract which ended on 30th November 2017 and was not renewed.

9. The Respondent admits that the Claimant's monthly salary was Kshs. 34,000.

10. The Respondent avers that the Claimant was paid all his terminal dues upon determination of his fixed term contract. The Respondent therefore maintains that the Claimant has no valid claim against it.

Findings and Determination

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

a) Whether the Claimant has made out a case of unlawful termination;

b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

12. The Claimant filed a letter dated 30th November 2017 by which the Respondent addressed him as follows:

“Dear Mr. Simon,

Re: End of term contract of service

The above matter refers.

As you are aware, your Term contract of service expires on 30/11/2017. Subsequently, I regret to inform you that the company is not renewing the same guided by clause no 4 of the Term contract of service letter dated 31st May 2017 which is within your knowledge.

You have been paid your salary for the month of November 2017 and your accrued leave of 1 day as at 30th November 2017 less statutory deductions. This payment has already been effected through your bank account.

Please ensure to hand over all the company property in your possession to the undersigned before your departure.

Wishing you luck in your future endeavours.

Yours faithfully

For: Bahari Forwarders Ltd

(Signed)

Shadrack Muthangya

Human Resource Manager

(Signed)

Saleem Chandbhai

Fleet Manager”

13. The Respondent's defence to the Claimant's claim is that the Claimant was employed on self-executing fixed term contracts, the last of which came to an end on 30th November 2017.

14. The fact that the Claimant worked on the basis of fixed term contracts is not in contention. The Claimant however maintains that because his employment contracts were successively renewed thus allowing him to work for a continuous period of 4 years and 6 months, he expected to continue working beyond 30th November 2017.

15. In his written submissions filed on 18th April 2019, the Claimant submits that based on the Respondent's conduct, he had acquired a legitimate expectation that he would continue working after expiry of his contract on 30th November 2017.

16. The basic principle regarding fixed term contracts was set out in ***Margaret A. Ochieng v National Water Conservation and Pipeline Corporation [2014] eKLR*** where my brother **Rika J** held that in general, fixed term contracts carry no expectation for renewal.

17. This remains good law but does not oust the concept of legitimate expectation.

18. In advancing his argument that he had a legitimate expectation that he would continue working for the Respondent after 30th November 2017, the Claimant relied on the South African decision in ***Dierks v University of South Africa [1991] 4 BLLR [LC]*** where the following criteria for establishing reasonable expectation for renewal of a fixed term contract was set out:

- a) Evaluation of all surrounding circumstances;
- b) Significance of contractual stipulations;
- c) Past practice or custom;
- d) Availability of the position;
- e) The purpose or reason for the concluded fixed term;
- f) Inconsistent conduct;
- g) Failure to give reasonable notice;
- h) The nature of the employer's business.

19. This too is good law and in arriving at its decision, the Court will bear in mind the specific circumstances of the case. The Claimant admitted that his employment with the Respondent was evidenced by successive fixed term contracts. He further admitted that the last such contract dated 31st May 2017 was to run from 1st June 2017 until 30th November 2017.

20. Clause 4 of the said contract reads in part:

“for purposes of this contract, the last month of this employment shall be deemed by both parties as the notice period, unless otherwise agreed in writing by the parties.”

21. This was as clear as could get. At the time the Claimant signed his last contract, he was aware of two things; first, that the contract would terminate by effluxion of time on 30th November 2017 and secondly, that he would not be entitled to any further notice of termination of employment.

22. That said, and the Claimant having served the full term of his contract, I see no reason why he complains that his employment was unlawfully and unfairly terminated.

23. The claims for compensation and notice pay are therefore without basis and are dismissed.

Other Claims

24. Regarding the claims for overtime and public holidays I will say this; these are special damages claims which must be specifically pleaded and proved.

25. All the Claimant has done is to literally throw figures at the face of the Court without any specifics in terms of actual dates and wage rates. The only conclusion to reach is that these claims were not proved and must be dismissed.

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

27. Each party will bear their own costs.

28. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 16TH DAY OF DECEMBER 2019

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JUDGE

Appearance:

Mr. Kalimbo for the Claimant

Mr. Akanga for the Respondent