



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 875 OF 2013

YOVINALIS ACHOKI.....1ST CLAIMANT

WINNIE NDUNGE NJOROGE.....2ND CLAIMANT

PAULINE WAVINYA MUTISO

(suing on behalf of Stephen Malei Mutiso (Deceased)....3RD CLAIMANT

VERSUS

AIR KENYA LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By this claim, the Claimants seek compensation for unlawful termination of employment and payment of final dues. The claim is contained in a Statement of Claim filed in court on 14th June 2013. The Respondent filed a Memorandum of Reply on 26th June 2013.

2. By the time this matter came up for trial, Stephen Malei Mutiso had passed away and by an order of the Court (**Nduma J**) granted on 19th September 2016, he was substituted by Pauline Wavinya Mutiso. At the hearing, the 1st Claimant, Yovinalis Achoki testified on his own behalf and his co-claimants.

The Respondent called its Human Resource Officer, Joan Wanja Githinji. Both sides also filed written submissions.

The Claimants’ Case

3. The Claimants were employed by the Respondent on diverse dates between 4th July 1988 and 1st February 2005. They claim that the Respondent terminated their employment on 3rd May 2012, on account of their membership with Aviation and Allied Workers Union. They now claim the following:

1st Claimant-Yovinalis Achoki

- a) Salary for April 2012..... Kshs. 55,377.00
- b) Salary for days worked in May.....5,537.00
- c) Leave pay.....44,829.00

- d) Leave and prorata allowance for 2011 and 2012.....11,250.00
- e) Service gratuity.....242,274.40
- f) 12 months' salary in compensation..... 664,524.00
- g) Certificate of service

2nd Claimant-Winnie Ndunge Njoroge

- a) Salary for April 2012.....Kshs. 102,747.90
- b) Salary for 3 days worked in May 2012.....10,274.80
- c) Leave pay.....107,640.65
- d) Leave allowance for 2011 and 2012.....90,000.00
- e) Service gratuity.....899,044.10
- f) 12 months' salary in compensation.....1,232,947.80
- g) Certificate of service

3rd Claimant-Stephen Malei Mutiso

- a) Salary for April 2012.....Kshs. 50,786.00
- b) Salary for 3 days worked in May 2012.....50,786.60
- c) Leave allowance.....24,183.80
- d) Service gratuity.....761,790.00
- e) 12 months' salary in compensation..... 609,432.00
- f) Certificate of service

4. The Claimants also claim costs and interest

The Respondent's Case

5. In its Memorandum of Reply dated 26th June 2013 and filed in court on even date, the Respondent states that the 1st Claimant was employed on 4th May 2006 on a three year contract which was renewed for a further three years from 1st May 2009. On 28th March 2012, the Respondent notified the 1st Claimant that his contract would not be renewed.

6. With regard to the 2nd and 3rd Claimants, the Respondent states that they were employed on similar fixed contract terms as the 1st Claimant. They were similarly notified that their contracts would not be renewed by letter dated 28th March 2012.

7. The Respondent further states that the Claimants were paid all their terminal dues.

8. The Respondent denies the Claimants' claims for unlawful termination and avers that their employment contracts expired by effluxion of time and the Respondent gave the requisite notice to the Claimants and

duly paid what was owed to them.

9. The Respondent pleads that the Claimants have filed this case with the full knowledge that there is a pending matter being Cause No 1256 of 2011 in which the Respondent has challenged recognition of the Claimants' Union. The Respondent maintains that the present suit is premature.

Findings and Determination

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

- a) Whether the Claimants have made out a case of unlawful termination of employment;
- b) Whether the Claimants are entitled to the remedies sought.

Unlawful Termination?

11. The Claimants claim that their employment was terminated without justifiable cause and in violation of due procedure. While denying this allegation, the Respondent states that the Claimants' employment came to an end by effluxion of time.

12. From the evidence on record, the Claimants were initially employed by Air Kenya Aviation which is currently under receivership. The Claimants' employment with the Respondent commenced on 1st May 2006, when they

were issued with three year contracts. The contracts were renewed for a further three years from 1st May 2009 and on 28th March 2012, the Respondent wrote to the Claimants as follows:

“RE: EMPLOYMENT CONTRACT

Your Employment Contract with Airkenya Express will be expiring on May 3rd, 2012. We wish to notify you that the contract will not be renewed.

We advise you to plan for your future insurance needs as Airkenya shall not maintain insurance coverage for you beyond the date of termination. You will be required to complete the clearance check-in list herewith attached, prior to our transmission of your final dues. We shall give you the month of April off duty to allow for these activities.

We thank you for your service with Airkenya Express Ltd. and wish you all the best in your future endeavours.

Yours faithfully,

Airkenya Express

(Signed)

Capt. Dino Bisleti

General Manager”

13. From this letter, it is evident that the Claimants served the full term of their employment contracts initially issued on 1st May 2006 and subsequently renewed on 1st May 2009. The only question before the Court therefore is whether the Claimants were entitled to automatic renewal of contract or an explanation for non-renewal.

14. This issue is now well settled. In *Teresa Carlo Omondi v Transparency International-Kenya [2017] eKLR*, Rika J restated the general principle that fixed term contracts do not carry rights, obligations, or expectations beyond the expiry date. Exceptions to this rule would obtain where by conduct, an employer creates a legitimate expectation in the mind of the employee that the contract will be renewed. The burden of proving such legitimate expectation always rests with the employee. Further, in *Oshwal Academy (Nairobi) & another v Indu Vishwanath [2015] eKLR*, the Court of Appeal affirmed that there is no obligation placed on an employer to give reasons for non-renewal of an employment contract.

15. In the case before me, the expiry date of the employment contracts was clear to the Claimants and the Respondent went further to issue notice that the contracts would not be renewed. In my view, the Respondent fully discharged its obligation and there was nothing more to be done.

16. Consequently, this Court finds and holds that the Claimants' claim for unlawful termination is without basis. Regarding the other claims I have this to say; the Respondent tabulated the Claimants' final dues but the Claimants declined to receive them under the mistaken belief that they were entitled to more. No evidence was led to support these claims which therefore fail.

17. Overall, the Claimants' entire claims fail and are dismissed.

18. In light of the fact that the 3rd Claimant has since passed away, the Court will not burden his estate with costs. I therefore direct that each party will bear their own costs.

19. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF JANUARY 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Nyabena for the Claimants

Mrs. Makau for the Respondent