



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 30 OF 2016

BETWEEN

ABDULRAHMAN OMAR.....CLAIMANT

VERSUS

KENYA RED CROSS.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Marende Birir Shimaka & Company Advocates for the Claimant

Obura Mbeche & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on 27th January 2016. He avers he was employed by the Respondent NGO as a Truck Driver, in the year 2007, at a monthly salary of Kshs. 40,000. He suffered serious back injuries while on duty, on 3rd April 2012. He was advised by his Doctor that he should only undertake light duties after the injury. The Respondent continued to assign the Claimant heavy duties exacerbating Claimant's back problem. The Respondent denied the Claimant sufficient time for treatment. In November 2013, the Respondent notified the Claimant that his contract would be terminated in December 2013. The Claimant prays the Court to find termination was unfair, and grant him Judgment against the Respondent for:-

- a) 12 months' salary in compensation for unfair termination, at Kshs. 480,000.
- b) Severance pay at 15 days' salary for 7 years worked, at Kshs. 140,000.
- c) Costs and interest.
- d) Any other relief the Court deems fit to grant.

2. The Respondent filed its Statement of Response, on 13th December 2016. Its position is that the Claimant was employed by the Respondent as a Driver, Medium Vehicles on 8th February 2008. The contract was for 3 months, ending 30th April 2008. His starting salary was Kshs. 23,500. He was placed under another contract as a Heavy Commercial Driver, to work for the Respondent in a donor funded project at Eldoret, from January 2009 to 31st December 2009. His salary was Kshs. 34,000 per month. He was subsequently placed under various contracts, working for the Respondent at Makueni, and Dadaab. Renewal of his contracts depended on donor funds. He was notified of his end of contract at Dadaab in a letter dated 27th November 2013. He collected all his terminal dues without complaint. His contract was not terminated unfairly. It was not terminated on medical grounds. The Respondent urges the Court to dismiss the Claim, with costs to the Respondent.

3. The Claimant gave evidence, and rested his case on 8th November 2017. Respondent's Regional Logistics Officer, North-Eastern Region, Abdulkakim Otula gave evidence on the same date, bringing the hearing to a close.

4. The Claimant restated the contents of his Statement of Claim and Witness Statement, in his evidence. He restated his employment history

with the Respondent, and his terms and conditions of service. He was injured in April 2012, while he was changing a tyre. The Doctor recommended he is assigned light duty and stops long-distance driving. The Respondent ignored this recommendation, and continued to allocate the Claimant heavy duty. He requested the Respondent for transfer, or assignment of light duty. He was moved in circles by the Respondent. In December 2013, he was informed his contract had come to an end.

5. Cross-examined, the Claimant explained he is a resident of Nairobi. He filed the Claim at Mombasa because his relatives reside at Mombasa, and he would have proper medical care at Mombasa. He is aware Respondent's Head Office is at Nairobi. At the time of filing the Claim, he resided at Mombasa, and was undergoing treatment at Mombasa.

6. He executed various contracts with the Respondent. He was not offered these contracts, depending on the availability of donor funds. He wrote a letter of complaint to the Respondent. He wrote e-mail to the Respondent, asking to go on leave. He did not say he was tired. He said he was stressed, and needed rest. He continued to work after his injury in April 2012. On 27th May 2013, there was change of contract terms. The changes were favourable to the Claimant. He did not conceal this from the Court. He was notified there would be no renewal. The Claimant did not apply for pension dues as shown in the letter dated 28th February 2014, at page 19 of Respondent's Documents. He did not sign the letter. He received pension dues of Kshs. 38,254.90. The Claimant made complaint to all his Supervisors. He filed Claim for work injury at the High Court in Mombasa.

7. Abdulhakim Otula told the Court he worked with the Claimant for the Respondent, at Dadaab Refugee Camp. Otula coordinated Respondent's fleet of vehicles, and oversaw movement of goods and people. Drivers and Logistic Assistants make this work possible.

8. The Respondent advertises for vacancies. Interested persons apply for these jobs and if successful, are employed on contracts, depending on donor funds and specific projects. If donor stops funding, the involved Employee's contract comes to an end. The Respondent operates on short term, and long terms contracts. Short term contracts range 3 to 8 months. In short term contracts, benefits are restricted to the Employee alone. Long term contracts run for more than 1 year, and have benefits extended beyond the individual Employee, to include Employee's family.

9. The Claimant was initially employed on a short term contract, earning a monthly salary of Kshs. 23,500. He subsequently was employed at Dadaab Refugee Camp, and paid a monthly salary of Kshs. 40,000. The Respondent was funded by UNHCR. The donor determined what Employees working under its projects would be paid.

10. The Respondent gave the Claimant improved terms as shown in the letter dated 27th May 2013. The Respondent did not mistreat the Claimant on account of his injury. He was assigned tracing duties, which involved shorter working hours. He drove from 7.30 a.m to 11.00 a.m. He was still unwell and would wake up complaining. The only place he could continue working at, was Dadaab. At other projects outside Dadaab, Drivers earned Kshs. 23,500 monthly. Transfer would mean the Claimant earns less salary than he earned at Dadaab.

11. Cross-examined, Otula testified that transfer was not a good option for the Claimant. He still drove even when on light duty. Otula told the Court on redirection that there were no other roles, beyond a Driver's role, that the Claimant could discharge.

The Court Finds:-

12. The Certificate of Service dated 29th October 2014 issued upon the Claimant by the Respondent, indicates he was employed by the Respondent as a Driver with effect from August 2008 to 31st December 2013.

13. The Claimant worked under various fixed term contracts. He first earned a monthly salary of Kshs. 23,500. He served the Respondent in various stations including Kisumu, Eldoret, Makeni and lastly Dadaab Refugee Camp, in North-Eastern Kenya. Dadaab was his last post. He earned a salary of Kshs. 40,000 while at Dadaab.

14. The Claimant states his contract was terminated by the Respondent, as a consequence of the injury he sustained in the course of duty, on 3rd April 2012. He was advised by his Doctor to undertake light duty. The Respondent compelled the Claimant to continue doing arduous work, exacerbating Claimant's back injury. He was denied adequate opportunity to recuperate and continue driving. In November 2013, the Respondent notified the Claimant that his contract, due to expire on 31st December 2013, would not be renewed.

15. The Respondent's position is that Employees were offered fixed term contracts, depending on availability of donor funds. The Respondent did not mistreat the Claimant, and decline to renew his contract, based on his work injury. He could not be transferred, or assigned other roles, since he was a Driver, restricted to the driving role. Employees' salaries were determined by Donors. Continuity of service depended on availability of donor funds, in specific projects.

16. The Respondent cites the decision of the Court in ***Benard Wanjohi Muriuki v. Kirinyaga Water & Sanitation Company & Another [2012] e-KLR***, in urging the Court to find that, there was no obligation on the part of the Respondent, to renew Claimant's contract, after it expired on 31st December 2013.

17. The Court held in ***Margaret A. Ochieng' v. National Water & Pipeline Corporation [2014] e-KLR***, that fixed term contracts carry no rights and obligations beyond the date of expiry. The Employer has the discretion to renew or not to renew.

18. This discretion can however be challenged on limited grounds. In ***Ruth Gathoni Ngotho – Karuiki v. Presbytery Church of East Africa & Another [2012] e-KLR***, the Court held Employer's prerogative to renew or not to renew, can be challenged where it is shown the Employee had legitimate and reasonable expectation of renewal.

19. In *United Nations Appeals Tribunal (UNAT) Case No. 2010 – 125 between Frenchon v. the Secretary-General of the United Nations*, Employer's right to renew or not renew Employee's contract of employment was held to be challengeable, where decision not to renew is based on improper motive; where the actions of the Employer lead the Employee to expect his contract would be renewed; or where there are countervailing circumstances.

20. The Claimant worked for the Respondent from the year 2008 to December 2013. In all these years, he worked on various fixed term contracts. Each contract was renewed after the other. There is no evidence placed before the Court to show that renewal depended on donor funding, and was pegged to any specific project.

21. In particular, it was not shown by the Respondent, that failure to renew Claimant's contract after 31st December 2013, was occasioned by withdrawal of any donor funding, or the winding up of a specific project. The UNHCR did not cease operations at Dadaab. It was not shown that donor funding was a consideration in not renewing Claimant's contract, which had been renewed without fail, from the year 2008.

22. The Court can think of no other reason, why the Respondent declined to continue employing the Claimant, than the fact that he was injured, and unable to discharge driving duties in full. He was injured in April 2012. He continued working while on treatment. The doctor recommended the Claimant be placed on light duty. The Respondent was not able to find suitable light duty, and claims it could not transfer the Claimant to another station, because it would mean he earns less than the monthly salary of Kshs. 40,000 available at Dadaab. What informed the Respondent's decision not to continue employing the Claimant, was that he had become impaired through work injury, and it was unsuitable to keep the Claimant on the payroll. His productivity was diminished. He would be an expensive Employee to retain at Red Cross in Dadaab.

23. In the *UNAT Case of Frenchon*, the Employee worked on a fixed term contract for the International Criminal Court for Rwanda (ICTR) in Arusha, Tanzania. She sustained service-incurred injuries, before her contract expired. She was compelled to extend her sick leave, to give herself time to heal sufficiently. The Employer let Frenchon's fixed term run out, and did not renew on expiry. UNAT held:-

- a) The Employee's fixed term contract was ended because of her service-incurred injuries.
- b) The contract was in fact, terminated by the Employer.
- c) It was disingenuous of the Employer to argue that the contract was allowed to run until the end of the term, and was not renewed on medical grounds.
- d) The decision was informed by improper motive.
- e) Non-renewal was separation initiated by the Employer.
- f) The Employer was intent on avoiding its legal obligation to the Employee.

24. The Court is content that in the Claim filed herein, the Respondent's decision not to renew Claimants' contract of employment, was informed by an improper motive. Non-renewal was separation initiated by the Respondent. The decision was informed by the Claimant's injury, and diminished productivity. It was unfair termination of the employment relationship.

25. ***The Claimant is allowed the prayer for compensation for unfair termination, equivalent of 12 months' salary, at Kshs. 480,000.***

26. His position was not declared redundant. Severance pay for 7 years worked, at 15 days' salary per every complete year of service, would only be considered in a redundancy situation, under Section 40 of the Employment Act. If the Claimant intended to ask for service pay, rather than severance pay, he is not eligible for service pay under Section 35 (6) of the Employment Act 2007. He was actively subscribed to the N.S.S.F as shown in his pay slip.

27. ***He is granted the prayers for costs, and interest at 14% per annum from the date of Judgment till payment is made in full.***

IN SUM, IT IS ORDERED:-

- a) ***Claimant's contract of employment was terminated unfairly.***
- b) ***The Respondent shall pay to the Claimant, the equivalent of 12 months' salary in compensation for unfair termination, at Kshs. 480,000.***
- c) ***Costs to the Claimant.***
- d) ***Interest granted at 14% per annum from the date of Judgment, till payment in full.***

Dated and delivered at Mombasa this 20th day of March 2018.

James Rika

Judge

