



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.4 OF 2016

TOM IGANJI LUVIALUVICLAIMANT

VERSUS

CATHOLIC DIOCESE OF NAKURURESPONDENT

JUDGEMENT

1. The claimant is a male adult and holder of National Identity Card No.11474764 a resident of Nakuru. The respondent is a registered church and religious organisation registered under the Societies Act.
2. The claimant was employed by the respondent in January, 2006 as a Cook at the respondent's Café at St Mary's Pastoral Center Café and paid a wage of Kshs.5,000.00 per month, a house allowance of Kshs.1,000.00 and Kshs.1,400.00 being medical allowance all being Kshs.7,400.00 per month. In 2010 the wage was increased to Kshs.5,480.00; house allowance Kshs.1,000.00 and medical allowance Kshs.1,400.00 per month. On 30th April, 2013 the wage was increased to Kshs.9, 217.00; house allowance Kshs.1, 383.00 and Kshs.1, 400.00 medical allowance per month and all being Kshs.12, 000.00 gross pay.
3. The claimant worked for 8 years until his employment was terminated on 31st December, 2013 on allegations that the employment contract had expired.
4. The claim is that the claimant was made to sign short term contracts by the respondent and running for a period of two (2) years each. The first contract expired in December, 2007, the next expired in 2009, the next expired in December, 2010 and the next contract for the period of January, 2011 ending December, 2013.
5. The respondent issued the claimant with letter notifying him of the end of the contract. The contract was ending on 31st December, 2013. At the end the claimant was paid Kshs.20,679.00 as final dues.
6. The claimant was entitled to annual leave every year and at the end of his contract he was entitled to his annual leave for the year. This was not paid.
7. The short term contracts issued to the claimant cumulatively were for 8 years and therein were different provisions. It was a term that termination of employment would be by notice of one (1) months upon service of one year; notice for two (2) months upon service of 2 years; and notice of 3 months upon service of 3 years. Having served for the long period the claimant was entitled to three (3) months' notice or payment in lieu thereof. The different contracts issued to the claimant violated the law for making unfair provisions to the disadvantage of the claimant.
8. The claimant was not paid the due minimum wage. The due underpayments are owing. The claimant earned overtime for not being allocated a lunch hour due and was not paid in lieu thereof. The respondent failed to adhere to the wage regulations in the hotel and catering trade sector.
9. The claimant is seeking payment of gratuity based on the correct minimum wage for the years worked for 8 years; the underpayments derived from the wage regulations applicable for each year of service; and compensation under section 49 of the Employment Act for refusal by the respondent to pay the correct value for work as provided for by the government in the wage orders. The due overtime pay.
10. Gratuity due for 2009 Kshs.2, 622.70; Year 2010 Kshs.2, 943.60; Year 2011 Kshs. 5,377.25; Year 2012 Kshs.24, 663.60; and Year 2013 Kshs.28, 166.10.
11. The underpayments due; Year 2009 Kshs. 9,061.20; Year 2010 Kshs.11, 437.80; Year 2011 Kshs.22, 552.20; Year 2012 Kshs.35, 692.80; and Year 2013 Kshs.2, 135.40.

12. Overtime pay due;

The year 2007 Kshs.5, 538.50; Year 2008 Kshs.5, 538.50; Year 2009 Kshs.6, 506.60; Year 2010 Kshs.7, 156.60; Year 2011 Kshs.8, 051.80; Year 2012 Kshs.105.60; and Year 2010 Kshs.10, 381.50.

13. The claimant is also seeking compensation based on his last lawful wage of Kshs.12, 177.95 all being Kshs.146, 135.40.

14. The due notice pay is also claimed at one (1) month at Kshs.9,372.15 and overtime pay for work on Saturdays all being Kshs.43,279.10 and costs of the suit.

15. The claimant testified in support of his case. The evidence is that the claimant was serving under written contracts of service and the last such contract was for the period of 1st January, 2011 to 31st December, 2013 and the respondent issued a letter notifying the claimant that his contract had come to an end but there was no notice of 3 months. Under the various contracts issued the respondent failed to pay the due legal wage and thus the claim for underpayments and the gratuity due over the correct wage. The claimant also testified that he worked over the lunch hour when he was supposed to be taking time off for lunch as the nature of his duties required him to be at work over the lunch hour and he was not compensated for the same. The claimant also testified that he was made to work over Saturday for longer hours than required in his contract and he was not paid for the overtime hours.

16. In cross-examination the claimant testified that on 2nd December, 2013 he was issued with notice that his contract was due to expire on 31st December, 2013.

He read it and did not apply for the renewal of the contract. The respondent paid terminal dues but there are claims for underpayments, overtime and gratuity not paid. The notice pay was due for 3 months and not paid.

17. The claimant also compromised paragraph 20 of the memorandum of claim on the basis that the claim for unfair termination is not due.

Defence

18. In response, the respondent's defence is comprised of denials or admissions without any material. The witness statement thereto gives more clarity in that Mr Jimna Kimani Mwangi the Human Resource Manager with the respondent avers that the claimant worked for the respondent as a cook from January, 2006 to 31st December, 2013 when his contract ended and he did not apply for renewal. A letter dated 2nd December, 2013 was issued to the claimant informing him that his contract would expire as stipulated. The claimant was paid Kshs.20, 679.00 as final dues and by which time the claimant had taken all his annual leave days and final dues paid included service gratuity and notice pay.

19. Mr Mwangi also testified in support of the respondent's case.

20. At the close of hearing, both parties filed written submissions.

In addressing matters herein, the court has taken into account the pleadings, the evidence of both parties, the written submissions and the applicable law. The questions which emerge for determination are;

Whether the claimant is entitled to benefits in the various contracts of service between him and the respondent;

Whether the claimant had unfavourable terms and conditions of service;

Whether the remedies sought are due.

21. The claimant conceded to the claims that there was unfair termination of employment. Such concession then removes the various questions before court and reduces such to the remedies sought for underpayments, overtime, gratuity and costs. Despite this concession, the claimant has extensively proceeded and made written submission on the question of compensation payment under the provisions of section 49 of the Employment Act, 2007. Such should not arise where the claimant through his evidence confirmed that he had no case for unfair termination of employment.

22. Both parties agree that the claimant was an employee of the respondent under written contracts covering the period of January, 2006 to 31st December, 2013. There were distinct contracts issued to the claimant;

one covering the period of 2006 to 2007;

the next contract expired in December, 2009, the next expired in December, 2010;

and the next contract for the period of January, 2011 ending December, 2013.

23. It is trite that every employee should be issued with a letter contract of service upon employment. Upon employment on oral terms, the employer should ensure that within two months of such employment, the employee is issued with a written statement spelling out the terms and conditions of employment in accordance with section 8, 9 and 10 of the Employment Act, 2007.

24. Even where the employee is not issued with a written contract of employment, the Employment Act, 2007 recognises the various forms of employment, casual employment, and contract for a specified task/work or piecework under section 9, contract for unspecified period and on a fixed term contract. In this regard, section 10(1) and 3(c) of the Act provides that;

10. *Employment particulars*

(1) *A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection (3), be given in instalments and shall be given not later than two months after the beginning of the employment.*

...

(c) *where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end*

25. A fixed term contract of service therefore has a start date and an end date.

26. In the case of **Kennedy Ouru Okise versus James Finlays (K) Limited [2016] eKLR**, the court held that;

... *an employment contract for fixed term terminates automatically upon expiry of the period unless the parties agree, expressly or tacitly, to renew it. In this case the parties did not agree to renew the contract and a notice was issued informing the claimant that the contract would not be renewed.*

27. In addressing a similar question the court in **Anne Theuri versus Kadet Limited Cause No.368 (N) of 2009**, held that;

... *the claimant was on a fixed term contract would not benefit notice pay as he was aware that the contract was coming to an end. There was no legitimate expectation for renewal of the contract. The same applies to this case.*

28. The claimant admitted that he was on a fixed term contracts for the 8 years he was in the service of the respondent. such contracts ended and a new one was issued spelling out the terms and conditions of employment and the last contract ended on 31st December, 2013.

29. The defence was also that on 2nd December, 2013 the claimant was issued with letter advising the claimant on the end of his contract. The letter also advised the claimant that;

If you wish to renew the contract make a formal application and address it to the Personnel Director.

30. The claimant did not apply for the renewal of the contract. He was paid his final dues being for service gratuity and notice pay. Such notice pay was paid despite the fact of the fixed term contract having a start and end dates. The end of contract and payment of terminal dues is not challenged by the claimant.

31. Each employment contract issued to the claimant formed the basis of a separate and distinct work engagement, terms and conditions and in each contract, the wages due were revised and paid to the claimant.

32. Each contract issued to the claimant started employment and upon lapse, such employment ended pursuant to the provisions of each fixed term contract and in accordance with section 10(3)(c) of the Employment Act, 2007.

33. It is therefore common cause that the claimant's employment ended as of 31st December, 2013.

34. The suit herein was filed on 11th January, 2016.

35. By operation of section 90 of the Employment the claims made by the claimant can only go back to three (3) years of his employment history with the respondent. where there were underpayments, overtime due, service gratuity not paid, such claims can only lawfully be made in the context of section 90 of the Act and not outside the same. Claims going back to 10th January, 2013 and which arose within the continuous employment of the claimant within his fixed term contract are the only claims the court can address. All other claims falling outside the limitation period and going back this period of 3 years are time barred.

36. In addressing the question of filing claims traversing the years, the Court of Appeal in the case of **E.Torgbor versus Ladislaus Odongo Ojuok [2015] eKLR** ... held that;

[the] Employment and Labour Relations Court in so far as limitation of actions is concerned under Sections 4 (1) of the Limitation of Actions Act as read with Section 90 of the Employment Act. Whenever a cause of action is statute barred, a court has no jurisdiction to deal with the matter.

37. Therefore and based on the above, the only claims the court can address are those emanating from the last contract of service issued to the claimant for the period of 1st January, 2011 to 31st December, 2013.

38. With regard to the alleged underpayments for the subject period, the claimant was issued with a written contract setting out his due wage as 5,400.00 being basic wage, house allowance at Kshs.1, 000.00 and medical allowance at Kshs.1, 400.00 per month. The claimant had a benefit of service gratuity at 25% of the basic wage.

39. The salary paid was not a graduated wage from any other previous contract. The claimant contract was not *renewed*. The contract was issued for its term and which was fixed. Probation was set of 3 months and terms and conditions thereof set out. The claimant signed the contract in acceptance. This contract run its course and ended.

40. In the year 2011, the applicable Wage Orders for Nakuru area provided for a wage of Kshs.4,676.00 per month. This was exclusive of the house allowance.

41. The claimant wage was kshs.5,400.00 plus a house allowance of Kshs.1,000.00 all being Kshs.6,400.00 per month instead of the minimum wage due at Kshs.4,676.00 and of which a house allowance of 15% would be Kshs.701.40 all being Kshs.5,377.40 per month. The paid wage was therefore over the minimum payable.

42. Based on the Wage orders for 2012 and 2013, the graduated wages paid to the claimant were above the minimum wage and with which he was paid a gratuity as agreed in the contract of service. such benefit is over and above the statutory due remitted by the respondent.

43. I therefore find no case for underpayments.

44. Claims for overtime are on the basis that the claimant worked over the lawful hours and was not compensated thereof. That the claimant worked on Saturday's overtime and was not compensated.

45. The claimant testified that in his contract his work hours for Saturday were to work for 6 hours but he would be made to work for over 10 hours each Saturday. It was agreed He would start work at 8am to 2pm but would work from 7am to 4pm being an extra 3 hours each Saturday. In 2011 the claim is for Kshs.8,015.80; the year 2012 the claim is for Kshs.9,160.80 and in the year 2013 the claim is for Kshs.10,389.50.00.

46. In the contract of service between the parties, clause 4 on work hours it was agreed that the claimant would be at work from 7.30am to 5pm on weekdays and on Saturday work from 8am to 2pm. It was also agreed that *due to the nature of the work, you are not entitled to remuneration for any overtime worked*.

47. As noted above, the wage paid to the claimant over the subject contract period, 2011 to 2013 was slightly higher than the minimum wage. Though this is not graduated from the previous contracts issued to the claimant as a comparison, where the respondent as the employer met the set terms and conditions of the contract of service, such cannot be faulted.

48. Gratuity claims are made on the basis of the claim that there were underpayments and where such is redressed; automatically the claims for gratuity accrue. However, on the findings that there was no underpayment, the computations made by the respondent on the basis of the basic wage paid to the claimant under his contract of service are on point nothing arises therefrom in unpaid gratuity.

49. The claim for notice pay is made on the basis that the contract of employment stipulated under clause 10 on how the contract was to terminate.

50. In my reading of clause 10, the contemplated termination provisions related to ending the contract before the due end date and whereupon where the claimant had worked for one year, a notice of 1 month or pay in lieu would have applied. This also applied where he had worked for two years or for three years. The termination clause is specific to the extent that *either party may terminate this employment contract before the stated period in clause 1*. The requisite notices then apply.

In this case the contract came to an end. The claimant did not apply for renewal despite notice to this effect. He elected to have the contract lapse on its terms. Notice was not due as the contract was fixed and ended on its term. The respondent has however made a final notice pay. I take this as extra payment.

Accordingly, the claims made by the claimant have no justification and are hereby dismissed. The matters between the parties raise salient legal questions and as such, each party should pay own costs.

Delivered in open court at Nakuru this 30th day of July, 2018.

M. MBARU JUDGE

In the presence of:

Court Assistants: Nancy & Martin

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