



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT ELDORET

CAUSE NO.231 OF 2017

JONATHAN M. WAIGANJO.....CLAIMANT

VERSUS

UNGA GROUP LIMITED.....RESPONDENT

JUDGEMENT

The claimant filed the Memorandum of Claim on 29th August, 2017. The respondent was served and entered appearance on 29th September, 2017 but no defence was filed.

On 21st November, 2017 the matter came up in court for taking hearing directions, the respondent was served but remained absent. On 9th May, 2018 the matter came up for mention to take hearing dates and the respondent was served but remained absent. A hearing date was allocated for 29th June, 2018 the respondent was served and accepted service on 4th May, 2018 but there was no attendance on the scheduled date. There are returns filed by the claimant confirming service of mention and hearing notices upon the respondent. The claimant was heard on his case.

Claim

The claimant, an adult male was employed by the respondent in May, 2007 as a Carpenter. He served diligently until 30th June, 2017 when his employment was terminated. At the time the claimant was earning a salary of Kshs.32, 785.00 per month. That the termination of employment was unfair as there was no notice issued, the terminal dues were not paid being house allowances, leave travelling allowances, retirement benefits and compensation for unfair termination of employment.

The claim is also that despite the claimant being of good performance, with a clean record his employment was verbally terminated by the respondent for no good cause. There was no disciplinary case or any other matter to justify the summary action.

The claimant is seeking payment of notice, house allowances due, leave travel allowances and compensation and costs of the suit.

The claimant testified in support of his claim. Upon employment he claimant served diligently and his supervisor Mr Agaluki called him one evening and issued him with a letter of dismissal on 4th July, 2017. The claimant was directed to leave immediately. No notice or reasons were given for such summary action. This was unfair as there was no due process. The terminal dues were not paid. The claimant was unionised under Kenya Union of Commercial Food and Allied Workers and the applicable Collective Bargaining Agreement terms were not followed. There was leave travel allowance for Kshs.4, 000.00 which was not paid for the 10 years in the service of the respondent. the house allowance due was not paid. The union was not informed or invited for any hearing.

At the close of the hearing, the claimant filed written submissions.

The failure by the respondent to file any defence upon service and entering appearance is not excusable. The non-attendance at the hearing equally is not justified as the respondent was served with mention notices to take hearing directions and a hearing notice. Returns filed by the claimant confirm service upon the respondent. Such leaves the court with only the Memorandum of Claim and the evidence of the claimant.

Rule 11 of the Employment and Labour Relations Court (Procedure) Rules, 2016 requires that once a party/respondent is served with summons, a response to the claim be filed within the provisions of Rule 14. The respondent despite entering appearance on 29th September, 2017 did not file any defence.

The claims made shall be assessed on their merits and based on the applicable law.

In this case, by letter dated 28th June, 2017 the respondent write to the claimant letter stating that;

Re: END OF FIXED TERM CONTRACT

...

This is to inform you that your fixed term contract will be ending on 30th June, 2017 that will not be renewed. Your leave balance as at that date will be 0 days. You will receive payment of your accrued gratuity.

...

Total amount payable is Kshs.81, 627.48 subject to statutory deductions. This amount will be paid in the July 2017 payroll as your final dues. ...

The claimant testified that on 4th July, 2017 he was called by his supervisor and directed to leave immediately. That there was no notice or reasons given for his summary dismissal. His terminal dues were not paid.

The claimant has attached the letter set out above as part of his records. Where indeed the claim is based on this record, it is clear to the court that the claimant was under a fixed term contract and which ended on 30th June, 2017. The one month notice issued to the claimant dated 28th June, 2017 is reason enough that he was made aware that his fixed term contract would not be renewed.

Section 10(3) (c) of the Employment Act, 2007 allows an employer and employee to enter into a fixed term contract.

(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;

Where the claimant was under a fixed term contract with a start and end date, such end date ended his contract of service with the respondent. the term of the contract of service ended on its terms. Such end is lawful. The end is contemplated in the contract of service between the parties.

Despite there being no defence or appearance by the respondent, the fixed term contract of the claimant assessed visa-a-vies the applicable law ended on its terms. The claimant cannot claim this resulted in unfair termination of his employment.

I have gone through the CBA between the respondent and Kenya Union of Commercial Food and Allied Workers applicable for the term of the claimant's fixed term contract, and though the CBA attached to the claim relates to the period of 2004 to 2006, such agreement and subsequent ones allowed for fixed term contracts. Even where such may not have been expressly stated, by virtue of section 10(3) of the Employment Act, 2007 an employer is granted the prerogative of issuing a fixed term contract.

The claim for notice pay is also lost on the basis that a fixed term contract ends on its terms. Also by letter dated 28th June, 2017 the claimant was issued with the requisite notice indicating his employment contract would not be renewed upon lapse.

In the claimant's contract, leave due is addressed under clause 8. All leave due was to be taken within the period due. as noted above the CBA the claimant as attached is for a period outside the claimant's contract term, 1st July, 2016 to 30th June, 2017. This was not a benefit under the fixed term contract.

In the notice of 28th June, 2017 the claimant had zero (0) leave balance. I take this to be the true record of leave due.

On the claim for house allowance, the claimant in his own pleadings at paragraph 3 asserts that he was entitled to a gross consolidated salary of Kshs.32, 785.00 per month. The contract of employment attached to the claim at clause 4, the salary paid is stated to be a consolidated gross pay. As noted above the CBA with the benefit for house allowance is outside the term the claimant served under his fixed term contract.

The retirement benefits claimed are not justified noting the terms of the fixed term contract which is the foundation of the claimant's employment with the respondent. there is no provision for such a benefit save for gratuity which was dully paid to him.

On the above analysis, I find no merit in the claims made. There is no basis in law or on the terms agreed upon by the parties under the fixed term contract. I find no basis to read-on any other term into the fixed term contract.

Accordingly, the claim is hereby dismissed. As there was no defence or appearance by the respondent, no orders as to costs.

Delivered in open court at Eldoret this 12th day of July, 2018.

M. MBARU JUDGE

In the presence of:

Court Assistants: Nancy & Robert

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