



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 64 OF 2018

(Before D. K. N. Marete)

VINCENT KIPNGETICH LANGAT.....CLAIMANT

VERSUS

THE COUNTY GOVERNMENT OF BOMET.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of Claim dated 20th June, 2018. It does not disclose an issue in dispute on its face.

The respondent in a Statement of Response dated 13th July, 2018 denies the claim and prays that the same be dismissed with costs.

This cause is consolidated with ELRC Cause Nos 57, 58, 59, 62 and 63/2018 with this as the lead case.

The claimant's case is that on or about October, 2013, he was employed by the respondent on a temporary basis in the position of a driver in the Transport department. This was a two year renewable contract as may be determined by the respondent. This contract was issued with a purported extension dated 27th September, 2017 and this was received on 6th October, 2017.

The claimant's further case is that he served the respondent with loyalty and diligence until 31st October, 2017 when he was wrongfully and unlawfully dismissed him and also denied payment of terminal dues. Then, he earned kshs.17,870. The terminal benefits are;

- a) *One month salary in lieu of termination notice* *Kshs.17,870/=*
- b) *Gratuity/service pay (Kshs.17870* 3 yrs)* *Kshs.53,610/=*
- c) *Unpaid salaries from May 2015 to September 2015 (Kshs 17,870 * 5 months)* *Kshs.89,350/=*
- d) *12 months wages compensation as per Section 15 of the Labour Institutions Act (12 mths * 17,870/=)*

Kshs214,440/=

TOTAL ***Kshs.375,270/=***

The claimant in further support of his case avers as follows;

12. *The claimant avers that the termination was unlawful, unfair and/or illegal on the following grounds:*

- a) *The Respondent, terminated the Claimant's employment without following the procedure laid down in the Employment Act;*
- b) *The Respondent terminated the Claimant's employment without proving the reason for the termination was valid;*
- c) *The Respondent did not give the Claimant termination notice as provided in the Employment Act as the payment in lieu of notice that was paid was less than the monthly salary that the claimant received.*

d) *The Respondent under paid the claimant for the duties and work she offered under the two contracts that were issued to her and were running concurrently.*

e) *The Respondent failed or neglected to give the Claimant a Certificate of Service as required by the Employment Act.*

He prays as follows;

- a) *A declaration that the claimant be employed on permanent and pensionable terms by the respondent.*
- b) *Reinstatement back to his job at the respondent.*
- c) *A declaration that the respondent carried out unfair labour practices against the Claimant.*
- d) *Kshs.375,270/=*
- e) *Interest at court rates.*
- f) *Certificate of Services*
- g) *Cost of this suit.*

The respondent's case is a denial of the claim. It is their case that the purported appointment of the claimant was unlawful *ab initio* as it contravened part VII of the County Government Act, 2012 and particularly section 59 on the functions and powers of the County Public Service Board.

The matter came to court variously until 23rd July, 2018 when the parties agreed on a determination by way of written submissions.

The issues for determination therefore are;

1. Was there a termination of the employment of the claimant by the respondent?
2. Was the termination of the employment of the claimant was wrongful, unfair and unlawful?
3. Is the claimant entitled to the relief sought?
4. Who bears the costs of this claim?

The 1st issue for determination is whether there was termination of the employment of the claimant by the respondent. The claimant in his written submissions dated 26th September, 2018 reiterates his case and submits a case of unlawful termination of employment.

It is his case that he was a legitimate employee of the respondent whose termination of employment was in violation of section 41 (1) of the Employment Act, 2007. This was also a contravention of section 44 (4) of the Act which provides for summary dismissal. These are as follows;

41 (1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

Again,

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

a) *without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;*

b) *during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;*

an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

d) *an employee uses abusive or insulting language, or behaves in a manner insulting; to his employer or to a person placed*

in authority over him by his employer;

(e) an employee knowingly fails, or refused, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.

(f) in the lawful exercise of any power of arrest given by or under anywritten law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or

(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

The claimant further sought to rely on the authority of **Teresa Carlo Omondi vs Transparency International Kenya, Cause No. 863 of 2015** where it was held that;

“... the respondent had an obligation to respect the claimant's right to serve her full term, in accordance with the terms and conditions agreed between the parties and with due regard to the law governing that contract. There was an obligation to treat the claimant fairly up to the very end. Fair dealing between employers and employees is not to be ignored on the ground that a fixed term contract is anyway coming to an end. The departure of the employee is not to be hastened. The claimant was hastily pushed out and treated like one who had committed an employment offence, but was not told what her offence was. What did the respondent stand to lose by holding out until 30th September 2012. The court agreed with the claimant that her outgoing contract was terminated by the respondent prematurely and unfairly.”

The respondent in her written submissions dated 31st August, 2018 denies the claim. It is her submission that the claimant was not properly and lawfully employed by the County Public Service Board, Bomet County and therefore the futility of this claim. On this, the respondent cites Article 235 (1) of the Constitution of Kenya, 2010 which empowers a County Government in dealings with her work force. This is as follows;

235 (1) “ A county government is responsible, within a frame work of uniform norms and standards prescribed by an Act of parliament, for – (b) appointing persons to hold or act in those offices, and confirming appointments.

She further relies on section 59 (1), (b) of the County Governments Act, 2012 which provides as follows;

59 (1), (b) *The functions of the County Public Service Board shall be, on behalf of the county government, to- (b) appoint persons to hold or act in offices of the county public service including in Boards of cities and urban areas within the county and to confirm appointment.”*

Section 59 (1) of the County Governments Act, 2012 delineates the functions of the County Public Service Board as follows;

59 (1) *The functions of the County Public Service Board shall be, on behalf of the county government, to –*

a) establish and abolish offices in the county public service;

b) appoint persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm appointments;

This being the case, the employment of the claimant by any other authority other than the county Public Service Board or her delegated authority is nullity in law. This applies to the claimant's appointment and employment.

The respondent further submits that there was no termination of the employment of the claimant. The claimant's contract, which was fixed term in nature was extinguished by effluxion or lapse of time. This being the case, no termination of employment ensued. This is expressed as follows;

... herein, it is rather clear that the contracts herein, are in fact illegal, however, if the same were legal, same which is hereby denied, there would still be no cause of action to aid the petitioner by virtue of having contracts that have been terminated by the lapse of time.

In reference to the claimant's appendix I and II referred to at paragraph 3 and 4 of the claim, it is rather clear that the said contracts of employment were fixed term contracts with defined terms of service for fixed period of time.

Where does this lead us? It cannot be any other way. This is a case of no termination of employment. This is because, in the first place, there was no lawful employment of the claimant by the respondent. Secondly, whatever the nature of the subsisting employment *inter partes*, this lapsed on expiry of the term contract. I therefore find a case of no termination of employment and hold as such. This answers the 1st issue for determination.

The 2nd issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. In a situation of no termination of employment, this issue is relegated to the periphery. It becomes a non-issue.

The 3rd issued for determination is whether the claimant is entitled to the relief sought. He is not. Having failed on a case of unlawful termination of employment, he becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their costs of the same.

Delivered, dated and signed this 9th day of October, 2018.

D.K.Njagi Marete

JUDGE

Appearances

- c) Mr. Mugumya instructed by P. Sang & Company Advocates for the claimant.
- d) Mr. Cosmas Koech instructed by County Attorney's Offices for the respondent.