



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

CAUSE 1538 OF 2014

JOSEPHAT RUBIA OYANGI.....CLAIMANT

-VERSUS-

KENYA EDUCATION MANAGEMENT

INSTITUTE (KEMI).....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for terminal benefits and damages for unlawful and/or wrongful dismissal of the Claimant from employment by the Respondent on 28th February, 2014. The Respondent admits having employed the Claimant herein but avers that the Claimant was employed on a contractual basis for a period of three (3) years. It is further defence case that the Claimant's Contract of service ended on 28th February, 2014 by effluxion of time pursuant to the terms of the Contract.

2. The suit was heard on 17th April, 2018 when the Claimant testified as CW1 and the Respondent called one witness RW1 testified on the same date. Thereafter both parties filed written submissions which I have carefully considered herein alongside the evidence tendered.

Claimant's Case

3. The Claimant in his testimony stated that he was employed by the Respondent from 18th February, 2011 as a caretaker security Officer, on a contractual basis which contract was to run for a period of three (3) Years. It was his testimony that upon completion of the 12 months' probation period the Claimant was issued a letter confirming his employment on 10th August, 2012. It was his evidence that his salary was Kshs. 13,577 and the contract was terminable by one month notice or salary in lieu of notice.

4. Cw1 further testified that on or about 28th February, 2014 the Respondent unlawfully terminated his Contract of service pre-maturely and without issuance of a month's notice or payment in lieu thereof. He contended that he worked upto 31.3.2014 but when he went to the bank he found no salary. He contended that the termination was unfair and prayed for compensation by 12 months salary, one month salary in lieu of notice, salary for the remainder of the contract term, 44 leave days not taken among other reliefs pleaded in his claim.

5. On cross examination the Claimant stated that he served the entire period of the Contract of Service having commenced work from 1st March, 2011 to 28th February, 2014. He further stated that after 28th February, 2014 was paid his gratuity by the Respondent. He further confirmed that he was paid all his salary for that contract period but clarified that the salary for February 2014 was delayed by 3 months. He also admitted that the contract did not provide for automatic renewal. He however contended that his contract started running after the confirmation, from which time he served for 18 months. In conclusion,

he maintained that the he was entitled to one month notice before termination.

6. In his written submissions, the Claimant urged that the contract starting running upon successful completion of the probation period of twelve (12) months. In support of this the Claimant relied on the case of **Trust Bank Limited Vs Amalo Industries Limited & 2 Others** where Havelock J. relied on learned authors Chitty on Contracts, Volume 2, 28th edition (1999) and stated as follows:

“...These are essentially questions as to the true construction of the Contract in each particular case, and it is sufficient here to indicate the general approach of the Courts to these questions and to draw attention to some of the principle types of difficulty which have arisen....the general approach seems to be that contracts of this kind must be strictly construed in favour of the surety and that no liability is to be imposed on him which is not clearly and distinctly covered by the contract...the reason for this strict construction are that, in general, the surety receives no benefit from the contract which is, so far as he is concerned, gratuitous; and secondly in that most cases these days, the contract is drafted by the creditor and in accordance with the contra proferentem maxim, is accordingly to be construed in favour of the surety in cases of doubt...”

7. The Claimant further submitted that the Respondent acted in violation of section 35 and section 36 of the Employment Act by failing to issue him with any notice of termination or salary in lieu of such notice. He further submitted that having been terminated before the lapse of the contract period with the Respondent he is entitled to the benefits and dues claimed under the Memorandum of Claim.

The Respondent's Case

8. Kepha Owino testified as **RW1** and stated that he is a Human Resource Officer at the Respondent Institute. He confirmed that the Claimant was indeed employed by the Respondent as a caretaker on a contractual basis for a fixed term of three (3) years commencing 1st March, 2011 and was to lapse automatically on 28th February, 2014. He further testified that the Claimant's contract was subject to a probation period of twelve months which was within the contract period. He further testified that during the probation period the Claimant enjoyed all the employment benefits such as monthly salary, allowances and other dues payable under the Contract.

9. Rw1 denied that the contract term started running from the time of confirmation and maintained that the term started running from 1.3.2011. He denied the claim for salary in lieu of notice and compensation for unfair termination and maintained that the contract lapsed automatically by effluxion of time.

10. He further testified that upon termination of the Contract the Claimant was paid gratuity equivalent of 31% on the basic salary drawn by him during the contract period amounting to Kshs. 125,950.20 which was made on 29th April, 2014 through the Claimant's bank account.

11. In her submissions, the Respondent relied on a total of 8 authorities to support its case and prayed for suit to be dismissed in its entirety with costs to the Respondent.

Analysis and determination

12. The Issues for determination herein are:

- a. Whether the Claimant was unlawfully and/or wrongfully discharged.
- b. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant was unlawfully and/or wrongfully terminated from employment.

13. The Claimant alleges that he was terminated without any reason and without any prior notice and prematurely before the lapse of the Contract term. He contended that after 28.2.2014 he was not paid his salary for that month and continued to work until the end of March 2014 but when he went to the bank, he

again found no salary until after 3 months. The Respondent has denied the allegation of unlawful and/or wrongful termination and maintained that the Claimant was employed on a fixed term contract that lapsed after the effluxion of time.

14. After considering the foregoing rival contentions by the two parties, I am of the view that indeed the Contract was not terminated pre-maturely but it lapsed by effluxion of time. From the pleadings and evidence before this Court it is clear that the Claimant was employed under a fixed term contract and he commenced work at the Respondent Institute on 1st March, 2011. Consequently, the fixed term of three (3) years lapsed on 28th February, 2014. The argument advanced by the Claimant that the probationary period is not within the Contract period is baseless and it is dismissed. In addition, the allegation that he continued working after 28.2.2014 until end of March 2014 is without any proof and is likewise dismissed.

Whether the Claimant was entitled to the reliefs sought.

15. Having found that the Claimant was not unfairly terminated, I dismiss the claim for salary in lieu of notice and compensation for unfair termination.

Likewise I dismiss the claim for salary for the remainder of the contract term because there was no outstanding contract term. The claim for service pay is also dismissed because the claimant paid gratuity. The claims for accrued house allowance, accrued medical allowance and commuter allowance have not been proved and are also dismissed. Finally the claim for general damages is dismissed for lack of any legal basis.

Conclusion and disposition

16. I have found that the claimant's contract of service was not unfairly terminated by the respondent but it ended automatically by effluxion of time. I have also found that the claimant is not entitled to the reliefs sought in his claim. Consequently, I dismiss the entire suit with no order as to costs.

Dated, Signed and Delivered in Open Court at Nairobi this 16th day of November, 2018

ONESMUS N. MAKAU

JUDGE