



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE 277 OF 2017

ARITON KOMBO MUKABANA.....CLAIMANT

VERSUS

WONDER FEEDS LIMITED.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent company as a general worker and issued with a contract. The claimant started work in the year 2007 as a Causal labourer and was confirmed in December, 2012 to January, 2015 when the employment was terminated.

The claim is that the termination of employment was wrongful as no notice was issued, no reasons were given and the claimant was not allowed a chance for hearing. Terminal dues were not paid.

The claimant did not take annual leave and was not paid in lieu thereof. The service gratuity was also not paid and the same is due.

The claimant is seeking the following;

- a) *Underpayments Kshs.57,030.00;*
- b) *Leave allowances Kshs.51,204.30;*
- c) *Service gratuity kshs.51,888.00;*
- d) *Notice pay Kshs.10,377.70; and*
- e) *Compensation for unfair termination of employment.*

The claimant testified that he was employed by the respondent and issued with one year contracts ending December and would be renewed. He rained a casual employee for the entire duration of his employment. His pay was very low and the other employees agitated them to join the union in the year 2014. The respondent was surprised that the claimant had joined the union and in December when signing the new contract, he was called on 24th November, 2014 together with all those who had joined the union and directed to reapply for employment. The claimant opted not to reapply. He did not see the need to reapply as all through the years he had not been required to reapply and the contract would be renewed. The respondent said that since he had not applied for the job he should not report back to work after 24th December, 2014 when his then contract was ending.

All those who applied for work were taken. The claimant was not taken and his terminal dues were not paid.

Defence

The defence comprise denials save for admission that there are no other proceedings between the parties.

The respondent though filed a detailed record of the claimant's employment.

In evidence the respondent called Edwin Wekesa the Assistant Human Resource and Administrative officer and who testified that the claimant was employed on contract and the last was ending in December, 2014. On 24th November, 2014 the respondent issued him with notice on the end of his contract with the option to reapply for renewal but he opted not to apply. At the end of the contract, the claimant was paid his terminal dues. At the time the claimant was earning a gross wage of Kshs.10, 379.00 with a house allowance, was paid in lieu of taking leave and overtime and these payments are acknowledged.

At the clause of the hearing both parties filed written submissions.

Determination

Section 8 of the Employment Act, 2007 (the Act) provide for oral contracts of employment. However, section 10 (1) of the Act requires that where such employment continues for periods over two months, a written contract must issue.

Section 37 of the Act also allows for the conversion of causal employment into full time employment.

Further, section 10(3) (c) allow parties in an employment relationship to have fixed term contract and provides that;

(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;

This then becomes a valid and legitimate mode of employment.

Where the claimant commenced work with the respondent as a causal employee, such was addressed and converted to fixed term contract and renewed annually from the year 2012. Such written contracts are produced by the respondent as the employer.

At the time employment terminated in December, 2014 the claimant was serving under a fixed term contract for the period 2nd January, 2014 to 21st December, 2014.

The claimant testified that on 24th November, 2014 he was called and directed to reapply for employment but declined on the basis that previously he had not been required to reapply and in this case he did not see the need to. So he did not put an application but those how did were issued with new contracts and remain in the service of the respondent.

Effectively, the claimant out of choice and with notice that his fixed term contract was ending opted not to apply for employment with the respondent. the respondent was not bound to keep the claimant in its employment. Such would amount to servitude which is specifically prohibited under section 5 of the Act.

For the duration of employment, where claimant was under fixed term contracts from the year 2012 to 2014 and he filed his claim on 29th June, 2017 he can only make claims going back three (3) years in accordance with section 90 of the Act. That takes the claimant back to 28th June, 2014. This therefore translates to his last employment contract for the period of 2nd January, 2014 to 21st December, 2014. Other claims outside this time period are time barred by operation of the law.

Claims of underpayments as outlined in the memorandum of claim relate to the years 2011 to 2012. Such period is removed by operation of the law.

Claims for leave pay allowances relate to the periods from the years 2008 to 2013.

Such period is removed in time.

The claims for service gratuity are on the basis that the claimant should have had protection of his employment for the 8 years he was in the service of the respondent. under the applicable fixed term contract covering 2nd January, 2014 to 21st December, 2014 service gratuity was not a benefit agreed upon by the parties. The claimant has submitted payment statements and therein is deductions with regard to NSSF and NHIF. The claim for service pay is hereby not justified.

On the claim for general damages, the basis is not established. The claims made by the claimant relate to the provisions and rights under the

Employment Act, 2007 and which make provision for various remedies under section 49. To claim outside the available remedies, the claimant ought to have established the basis which is not done. Such remedy is not due noting the circumstances leading to termination of employment resulting from the end of fixed term contract and to which the claimant failed to apply for new employment with the respondent. the respondent cannot be faulted for such lapse with payment of damages.

Accordingly, the claim must fail and is hereby dismissed. Costs to the respondent.

Dated and delivered at Nakuru this 1st day of November, 2018.

M. MBARU

JUDGE

In the presence of: