



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO 96 OF 2017**

**THOMAS OSIEKO AMULELE.....CLAIMANT**

**VERSUS**

**CATHOLIC DIOCESE OF NAKURU.....RESPONDENT**

**JUDGEMENT**

The claimant was employed by the respondent, a Christian organisation registered under the Societies Act. employment commenced on 30<sup>th</sup> May, 1995 in the position of Mechanic Grade II.

The claim is that the claimant worked for the respondent until 16<sup>th</sup> July, 2015 when he was issued with a letter of retirement.

The claimant had worked diligently since the year 1995 until 1<sup>st</sup> August, 1999 when the respondent introduced short term contracts of employment. Based on these contracts, payments were derived from the gazetted government minimum wages but fell below the recommended minimum wage at the time which was Ksh.7,265.00 plus Ksh.1,475.00 housing allowance.

The contract between 1<sup>st</sup> August, 1999 to 31<sup>st</sup> July, 2000 ended as was stated and another short term contract was issued effective 1<sup>st</sup> May, 2000 to 30<sup>th</sup> April, 2003. The salary was increased to Ksh.8,660.00 plus Ksh.1,750.00 house allowance all gross at Ksh.10,410.00 per month.

Another contract was issued for the period of 1<sup>st</sup> January, 2004 to 31<sup>st</sup> December, 2005 and a gross pay of Ksh.10,410.

Another contract was issued for the period of 1<sup>st</sup> January, 2011 ending 31<sup>st</sup> December, 2012 at a gross salary of Ksh.11,588. The claimant continued to ear such pay until December, 2014. No new contract was issued until the claimant was issued with letter of retirement on 30<sup>th</sup> July, 2015 and where the respondent paid Ksh.8,867.00 through cheque dated 20<sup>th</sup> July, 2015.

The claim is that the claimant was retired through bad faith as there was no explanation into the circumstances leading to the same. Despite retiring on 20<sup>th</sup> July, 2015 the same was backdated to 31<sup>st</sup> December, 2014. The due underpayments over the years were not paid. There were untaken leave days which ought to have been computed and paid but the respondent failed to do so.

The claims are for;

**Underpayments**

*between 1<sup>st</sup> May 2006 up to 30<sup>th</sup> April, 2009 Ksh.1,276.20*

*between 1<sup>st</sup> May 2009 up to 30<sup>th</sup> April, 2010 Ksh.22,988.40*

*between 1<sup>st</sup> May 2010 up to 30<sup>th</sup> April, 2011 Ksh.37,782.00*

*between 1<sup>st</sup> May 2011 up to 30<sup>th</sup> April, 2012 Ksh.43,983.60*

*between 1<sup>st</sup> May 2012 up to 30<sup>th</sup> April, 2013 Ksh.67,965.60*

*between 1<sup>st</sup> May 2013 up to 30<sup>th</sup> April, 2015 Ksh.290,847.60*

claims for annual leave;

*2009 Ksh.12,366.90*

*2010 Ksh.13,603.80*

*2011 Ksh.15,304.60*

The claimant is also seeking payment for the period from January, to July, 2015 and costs of the suit.

The claimant testified that by letter dated 16<sup>th</sup> July, 2015 the respondent retired him from service for no due case and without notice. The last salary paid to him was on 31<sup>st</sup> December, 2014 and soon after that he would report to work on an ad hoc basis as he was not allocated work. The claimant would report to work daily but the human resource manager told him to wait for the Bishop. In July, 2015 he was issued with letter of retirement without payment of his terminal dues.

The claimant also testified that from the year 1995 he took his annual leave until the year 2009 when such stopped. He was not paid in lieu of not taking leave until the year 2015. The due salary was not paid in accordance with the wage guideline and the underpayment should be paid.

From the year 1999 the respondent started the practice of issuing short term contract and at the end of each a new contract would issue.

The defence that the claimant retired on medical grounds is not true as the claimant was forced to write a letter when his salaries were stopped. The claimant had hoped to rely on the same to get his terminal dues. This was after he was hit by a motor cycle on 11<sup>th</sup> March, 2015 by this time he had no money to use for treatment and thus requested to retire on medical grounds..

On cross-examination the claimant testified that the letter dated 20<sup>th</sup> May, 1995 was for the interview as a mechanic and not a letter of appointment.

In March, 2015 the claimant applied for retirement and in response the respondent wrote later dated 16<sup>th</sup> July, 2015 for retirement. The claimant applied and said he was sick and had no ability to work following an accident in the year 2014. In the year 2014 the claimant was on and off work due to sickness and for days he was absent from work. He had no sick leave granted. Upon retirement the claimant was paid his terminal dues without a breakdown of what was paid for.

Upon retirement the claimant went to the NSSF to seek for his dues and was sent to the respondent for a letter to confirm he had retired. The respondent was required to indicate the date of retirement and the NSSF paid him noting he had retired from 31<sup>st</sup> December, 2014.

#### Defence

In response the defence is that the claimant was first employed on 30<sup>th</sup> May, 1995 as Mechanic Grade II. From 18<sup>th</sup> November, 2014 the claimant failed to report to work until January, 2015 when he was required to give reasons for his absence from work. The claimant wrote a letter seeking to retire on medical grounds on 11<sup>th</sup> March, 2015 and in reply vide letter dated 16<sup>th</sup> July, 2015 the respondent wrote the letter noting retirement was from 31<sup>st</sup> December, 2014 to assist the claimant get his dues from NSSF.

The respondent introduced contract employment and upon lapse of each, a new contract would issue. The claimant was paid within the minimum wage orders together with a house allowance which was lawful and with no underpayments. The last such contract ended in December, 2014 and the claimant was paid all his dues at Ksh.8,867.00 in full and final settlement.

The defence is also that from January, 2015 the claimant did not attend work as alleged and despite all efforts to have him explain his whereabouts from November, 2014 he failed to do so and opted to tender his application on 11<sup>th</sup> March, 2015 seeking to retire on medical grounds and inability to work. The letter dated 16<sup>th</sup> July, 2015 was meant to confirm the date when the claimant stopped work with the respondent and to the NSSF as the claimant had already applied to retire and had not been on contract of at work since.

The claims made for underpayment, due leave and days worked are without merit and the claims should be dismissed with costs.

Mr Gimna Kimani Mwangi the Human Resource Manager for the respondent testified that he worked with the claimant who was a mechanic/General worker and was under a written contract of employment. The claimant failed to report to work from November, 2014 and when he came back in January, 2015 he was required to show cause as to his whereabouts. The claimant indicated he had been sick but had no medical certificate and was required to produce one.

In mid-March, 2015 the claimant applied to retire on the grounds that he had had an accident. He was required to submit his medical certificate to confirm sickness. The claimant retired on his own volition and was paid his terminal dues.

From January to July, 2015 the claimant was not at work as alleged and when he applied to retire on medical grounds he failed to produce the necessary documents. Later the claimant tried to access his benefits from the NSSF but could not as he had not letter from his last employer. he then requested the respondent to issue him with letter confirming retirement to enable him assess such benefits and this was done vide letter dated 16<sup>th</sup> July, 2015. The purpose was to help the claimant get his NSSF benefits and the date he last worked for the respondent was

correctly stated at 31<sup>st</sup> December, 2014 when he was last paid despite being absent from work since November, 2014.

Mr Mwangi also testified that the claims made by the claimant are without merit and should be dismissed as his final dues have since been paid in full.

Both parties filed written submissions.

The claimant submits that the respondent acted with malice and without due regard to the rights of the claimant when terminating his employment. Despite the respondent having a human resource manager, no work records were submitted contrary to section 74 of the Employment Act, 2007 to confirm the period and terms of employment. Such conduct is telling with regard to the attitude and approach taken by such an officer with regard to claimsmade by the claimant for underpayment, not taking annual leave and the fact that he was at work from January, 2015 to July, 2015 when he was retired. Such owing dues should be paid as particularised in the memorandum of Claim.

The respondent submits that the claims for underpayment going back to periods outside the provisions of section 90 of the Employment Act, 2007 should not be addressed as they are time barred as held in the case of **Patson Musembi Kitolo versus Kin Jin Lee & another [2015] eKLR**. the claims for leave outside the limitation period should also not be addressed as held in the case of **Nyanamba O Steve versus TSC [2016] eKLR**.

In considering the matters herein the court has put into account the pleadings, the evidence and the written submission and the issues which arise for determination are whether there is a case for unfair termination of employment and whether the remedies sought are due to the claimant.

In the Memorandum of Claim, the claimant has set out that he was employed under various contracts with term limits. The last such contract was for the period of 1<sup>st</sup> January, 2011 to 31<sup>st</sup> December, 2013. There is no contract produced for the period of 1<sup>st</sup> January, 2014 to the alleged last day of employment said to be July, 2015.

The respondent did not file any work records save for the letters dated 11<sup>th</sup> March and 16<sup>th</sup> July 2015 one the claimant seeking to retire on medical grounds and the other the respondent's letter of retirement to the claimant and taking effect from 31<sup>st</sup> December, 2014.

In the last contract issued to the claimant, paragraph 3 describes him as the Mechanic Cum Driver. In the preamble to the contract, the same position is given emphasis that the claimant was working as the mechanic cum Driver for the respondent.

The payable wage was Ksh.9,638.00 being basic pay, Ksh.1,950.00 house allowance and ksh.1,400.00 as medical allowance all gross at ksh.12,988.00.

The period after 31<sup>st</sup> December, 2013 is not covered under any written contract. He claimant testified that he continued to work for the respondent under the same terms and conditions as under his last contract.

Putting the above into account, each contract period gave the claimant a new employment relationship with the respondent. each term contract was served on its terms and conditions and the last period where there is no written contract having been under the same terms and conditions but unwritten is regulated under the provisions of section 8 of the Employment Act, 2007 (the Act).

## **8. Oral and written contracts**

### ***The provisions of this Act shall apply to oral and written contracts.***

Under such provisions, the claimant became protected under the Act.

However, with regard to claims made, noting the various fixed term contracts issued to the claimant over the years, filing suit over the same must abide the provisions of section 90 of the Act.

The Memorandum of Claim was filed on 25<sup>th</sup> April, 2017. In view of the mandatory time limitations, the court can only address claims arising from the claimant's employment for the period ending 24, April, 2014. This relates to the period where there was no written contract and effectively claims outside this period are time barred as held in the case of **Beatrice**

### **Kahai Adagala versus Postal Corporation of Kenya [2015] eKLR;**

*Section 90 of the Employment Act 2007 which we have quoted verbatim herein above, is in mandatory terms. A claim based on a contract of employment must be filed within 3 years. As this Court stated in the case of **Divecon Limited -vs- Samani [1995-1998] 1 EA P.48, .... in Josephat Ndirangu - vs - Henkel Chemicals (EA) Limited, [2013] eKLR**, the limitation period is never extended in matters based on contract.*

The claimant testified that in November, 2014 he got sick with malaria and was absent from work seeking medical attention. Section 30 and 34 of the Act allow an employee who is sick and requires medical attention to be allowed such time off subject to the production of a medical certificate upon resumption of duty and while away to ensure the employer is fully informed of such absence. the law is generous to the extent that upon sickness and where an employee is unable to attend work, a third party is allowed to make a report with the employer for and on behalf of the employee.

In the case of **Stephen Kariuki and another versus Michael Njoroge and Sandstone Logistic Limited/Cylinder Works Limited, Cause No.888 of 2010** the court held that;

*[where an employee is sick and away from work] Upon resumption of duty, an employee who has been sick must submit a medical certificate from an authorised medical practitioner. The essence of section 30 and 34 of the Act is essentially to give an explanation for absence from work by providing the requisite documents as otherwise, absence from work without a just cause is a subject for summary dismissal under section 44(4) of the Employment Act, 2007.*

In this case were the claimant was absent from work due to sickness, no medical certificate is produced. Such certificate should have been submitted to the employer to justify absence from work. Apart from such failure, the claimant did not report or cause to be reported the fact of his sickness save to state that fellow mechanics visited him at home while sick and therefore the respondent ought to have known that he was sick. Far from it, the law vests the duty upon the employer to ensure a report is lodged with the employer as otherwise such absence should result in summary dismissal under the provisions of section 44 of the Act.

The above notwithstanding, the respondent opted to pay the claimant for and until December, 2014.

Despite their being no written contract to confirm the nature of employment after this period, the claimant avers that he reported to work but was not allocated work. This led him to apply for retirement vide letter dated 11<sup>th</sup> March, 2015.

There is no acceptance of such application until letter dated 16<sup>th</sup> July, 2015 backdating the date of retirement to 31<sup>st</sup> December, 2014.

The respondent as the employer had the mandate to summon the claimant to show cause why he had failed to report to work in January, 2015. Where the claimant was of the practice of absenting himself from work, the respondent had good basis to bring him to account. This was not addressed. The claimant was left at large.

From the evidence, it is apparent that the claimant was on and off work from November, 2014 to his letter seeking to retire on medical grounds on 11<sup>th</sup> March, 2015. He confirmed that he was not at work since such date. He was busy processing his benefits with the NSSF.

The respondent having failed to address the claimant's absence from work should pay the wages due up and until the 11<sup>th</sup> March, 2015. Without any work records to confirm that the claimant took his annual leave for the last year of work, such leave should be paid for the year at 21 days.

Employment terminated on the basis of the claimant's application to retire. Such did not result in unfair termination of employment.

on the gross wage payable to the claimant at Ksh.14,578.00 the pay due for the period of January to 11<sup>th</sup> March, 2015 is Ksh.34,502.00.

For the last year in service the leave pay due is ksh.10,204.60.

The claimant has since been paid the sum of Ksh.8,867.00 in terminal dues and which would be put into account in paying him the above awards.

**Accordingly, the claimant shall be paid the due wages amounting to ksh.34,502.00 and leave pay due at Ksh.10,204.60 less ksh.8,867.00 and together with 50% of his costs. The claimant shall be issued with a Certificate of Service in accordance with section 51 of the Employment Act, 2007.**

**Dated and delivered at Nakuru this 6<sup>th</sup> day of December, 2018.**

**M. MBARU JUDGE**

In the presence of:

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