



**REPUBLIC OF KENYA**

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

**CAUSE NO.1008 OF 2015**

**RICHARD MAINA MWANGI ..... CLAIMANT**

**VERSUS**

**1. JOHN KAGUCHIA – CHAIRMAN MUKURWE-INI CONSTITUENCY**

**DEVELOPMENT FUND COMMITTEE..... 1<sup>st</sup> RESPONDENT**

**2. MUKURWE-INI CONSTITUENCY DEVELOPMENT FUND**

**COMMITTEE.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

Issues in dispute-

1. Service gratuity
2. Unpaid salary
3. Overtime
4. Unpaid leave
5. Terminal dues
6. Underpayment

1.The Claimant, Richard Maina Mwangi filed his claim on 10<sup>th</sup> June, 2015. The claim is against the 1<sup>st</sup> Respondent as chairman of the 2<sup>nd</sup> respondent, a legal entity mandated to manage Mukurwe-ini constituency development fund.

2.The claim is that, the Claimant was employed by the Respondents as the Coordinator/Driver for a period of 2 years on a renewable contract commencing on 8<sup>th</sup> April, 2013 and ending 8<sup>th</sup> April, 2015. It was a term of the contract that his monthly pay was Kshs.45, 000.00. The Claimant worked diligently but on 1<sup>st</sup> march, 2015, while the Claimant was on annual leave, the 1<sup>st</sup> Respondent sent him a renewal application for his signature but he declined to take the offer of a new contract. The offer had been frustrated by the Respondent in not paying the agreed salary and other allowances like overtime.

3.That the Respondents have violated the labour practices for failing to apply the Employment Act and

the constitution and the Claimant is seeking general damages for unlawful frustration of his contract of employment. The Respondents withheld his salaries and allowances contrary to fair labour practice. The Claimant had to work overtime and during weekends and was never paid for the over time. The Claimant only took one (1) years leave while he was entitled to 21 days annual leave for the 2 years of employment with the respondents.

4.The Claimant is seeking;

- a) *Unpaid salary for 21 months at Kshs.427,000.00;*
- b) *Unpaid leave allowance Kshs.44,169.00;*
- c) *Gratuity as per contract of employment Kshs.356,400.00;*
- d) *Compensation at Kshs.540,000.00;*
- e) *Overtime for 100 days Kshs.200,000.00; and*
- f) *Costs*

5.In evidence, the Claimant testified that upon employment by the Respondent he worked diligently. THz due salary of Kshs.45, 000.00 was paid for 3 months but in July, 2013 the salary was paid less by Kshs.20, 000.00. When the Claimant asked for the reasons, the Respondents said that the Constituency Development Fund Board (CDF Board) had issued a circular advising them on salaries payable. That there was a contract between the Claimant and the Respondents entered into before the circular and the Respondent could not go against it.

6.The Claimant also testified that the Respondent was to communicate with the CDF Board on the reasons why he was to be pad Kshs.4, 000.00 and in the interim he was to be paid in accordance with the circular.

7.On 20<sup>th</sup> September, 2013 the Fund Manager made a withdrawing of Kshs.40,000.00 to pay the Claimant to cover for July and August, 2013 underpayment but the 1<sup>st</sup> Respondent directed the officer to re-bank the monies.

8.The Claimant also testified that his contract was due to end in April, 2015. In March, 2015 he proceeded on annual leave and while away the Accountant sent to him an email with a new contract seeking to extend his employment. Upon reading the new contract, the Claimant noted that it took away all his entitlements of gratuity, pay for work on weekends with Saturday being made a normal working day. That this was to avoid paying him for overtime on weekend work.

9.The Claimant therefore replied and told the 1<sup>st</sup> Respondent hat there was breach of his employment terms and the new contract was done without good faith and therefore he declined to sign it. There was no reply.

10.On 9<sup>th</sup> aril, 2015 the Claimant asked for a Certificate of Service to be able to source for new employment. That the Respondent I sin breach of contract of employment and further frustrated the Claimant in his employment and should be paid the dues set out in the claim.

## **Defence**

11.In response, the Respondent case is that they did not unfairly terminate the claimant's employment. His performance came under criticism on a number of occasions while the 2<sup>nd</sup> Respondent held its meetings as the Claimant was found to be poor in keeping time, absenteeism and failure to obey lawful instruction from his superiors.

12. The 2<sup>nd</sup> Respondent established under section 24 of the Constituency Development Fund, 2013 comprising 10 persons. The 1<sup>st</sup> Respondent is the chairperson and elected at the 2<sup>nd</sup> Respondent first seating and therefore cannot be personally held accountable for the actions of the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> Respondent acts to secure assets and property bought by the Fund.

13. The Claimant was recruited by the 2<sup>nd</sup> Respondent for 2 years ending 8<sup>th</sup> April, 2015. By letter dated 2<sup>nd</sup> April, 2015 the Claimant indicated that he did not wish to renew his contract.

14. The contract issued to the Claimant was materially altered by circular issued by the CDF Board on 24<sup>th</sup> June, 2013 affecting all Fund Account Manager on the recruitment of CDFC staff. The circular was meant to harmonise staff salaries. This circular was shared with the Claimant and an explanation made that the 2<sup>nd</sup> Respondent was bound to follow the circular. The Claimant chose to remain in employment with reduced salary but enhanced benefits.

15. The defence is also that the Claimant chose to remain in the employment of the Respondent under the new terms and condition per the circular and the contract between the parties was amended by the conduct of the parties. There were no withheld salaries and no such claim exists. There was no underpayment. Where the Respondent was in breach of contract, the Claimant never resigned from his position but continued to serve under the new terms and in accordance with the issued circular that was binding upon the 2<sup>nd</sup> Respondent and its officers. The 2<sup>nd</sup> Respondent was bound by the CDF Board regulations in disbursed funds which had to be used to their set purposes and the 1<sup>st</sup> Respondent could therefore not authorise cash withdrawals payable to the Claimant over his salary. This would amount to a criminal offence under section 48 of the CDF Act.

16. The claim for leave allowance was not contractual and not due to the claimant. There was no overtime due or payable. The contract expired by effluxion of time and therefore not unlawfully terminated.

17. In evidence, the 1<sup>st</sup> Respondent testified that he is the former chairperson of the 2<sup>nd</sup> Respondent which ended on 19<sup>th</sup> February, 2016. The Claimant was employed by the 2<sup>nd</sup> Respondent and had a contract. The 2<sup>nd</sup> Respondent is allowed to hire staff in accordance with the CDF Act. When the Claimant was hired, there were no guidelines of the CDF Board on how to pay salaries. All the cash due to the 2<sup>nd</sup> Respondent is allocated by the CDF board and thus there is a clear link on what the 2<sup>nd</sup> Respondent can do or not do. All funds expenditures are with the advice of the CDF Board.

18. The Claimant had a 2 years contract. The contract was renewable based on acceptance of the claimant. The Claimant served his term contract to the end. When he was issued with an extension, he declined.

19. On the contract issued to the Claimant on 8<sup>th</sup> April, 2013, the intention was to pay Kshs.45, 000.00 as a consolidated pay. This salary was paid for 3 months until the 2<sup>nd</sup> Respondent was issued with circular by the CDF Board that all fund managers had to comply with.

20. Under the CDF Act, the 2<sup>nd</sup> Respondent must follow an approved budget and all administrative costs should be based on a set budget. The CDF Board circular was therefore a normal operation requirement issued to all fund managers to implement. The intention was to address and audit question due to lack of harmony on the employment of staff at CDF committee across the country. The Auditor General was concerned with the disparity and the CDF Board human resource was directed to address the same by harmonisation and to avoid legal challenges, the circular was issued.

21. The circular gave directions on the employment of staff, the range and scale of salaries and the Claimant fell in one such scale. It was established that the Claimant had been overpaid. This was discussed with the Claimant and it was agreed that there was need to comply with the set circular.

22. In a meeting of the 2<sup>nd</sup> Respondent on 30<sup>th</sup> July, 2013 the Claimant was informed of the new changes.

The board resolved that the circular had to be followed. The Respondent obeyed a government circular.

23.Mr Kaguchia also testified that the Claimant was not unfairly terminated as his contract expired and he declined a new contract. The question of underpayment was never raised while the Claimant was in employment. When the Claimant worked overtime he was paid by voucher. When the Claimant attended the 2<sup>nd</sup> Respondent meetings he was no entitled to a seating allowance as he was a full time employee. When engaged of hours, he Claimant was dully compensated and no overtime pay is due. When the Claimant accompanied the areas Member of Parliament to various sites, this was on voluntary basis and cannot ask the Respondents for payment or allowances. All the work records were maintained by the Claimant and the records that remained with the Respondent on paid dues have been submitted.

24.On gratuity claimed, the circular issued by the CDF Board set out a 31% of annual pay for 3 years' service. The Claimant only served for 2 years.

### **Submissions**

25.The Claimant in submissions reiterated his case and the evidence adduced and asserted that his claims should be paid by the respondents.

26.The Claimant relied on the Employment Act, and **Cause No.79 of 2014, Charles Maina Nyaruai versus Kieni Constituency Development Fund Committee (Nyeri, ELRC)**

27.The Respondent submits that upon the employment agreement between the parties herein, there was a government circular issued to the 2<sup>nd</sup> Respondent with the effect that it had to be complied with. Circular dated 24<sup>th</sup> June, 2013 by the CDF Board was directed to all CDF Committee to ensure harmonisation of payable salaries to employees. In **Robert Muriithi Ndegwa versus Minister for Tourism [2012] eKLR**; the court held that issuing of circulars was to communicate a cabinet decision. In this case the Claimant was aware of the circular changing his terms of employment as the 2<sup>nd</sup> Respondent was answerable to the CDF Board.

29.The Respondent also submits that there was no frustration by the Respondent of the claimant's contract of employment. The employment contract lapsed. The Respondent denied on the case of **Davis Contractors Ltd versus Fareham U.D.C. (1956) A.C.** the doctrine of frustration does not apply in this case. In **Jackson K Berege versus Masaai Mara University [2015] eKLR**; that contracts of employment can be varied by parties to it and in this case, the Claimant was aware of the variation and continued to serve. The contract was not automatically renewable as set out in **Margaret A Ochieng versus national Water Conservation & Pipeline Corporation [2014] eKLR**; **Bernard Wanjohi Muriuki versus Kirinyaga Water and Sanitation Co. Ltd & others.**

30.That the remedies sought are not due to the claimant.

### **Determination**

31.It is common cause that there was an employment contract between the parties herein running from 8<sup>th</sup> April, 2013. The contract was for two (2) year. This contract was not renewed and thus lapsed on end date.

32.Under the contract of employment parties agreed that the Claimant would be paid a salary of Kshs.45,000.00; work from 8am to 5pm from Monday to Friday; earn 21 days of leave each year; and gratuity be paid per the CDF rate.

33.In **Chacha Mwita versus Kemri [2014] eKLR** the court held;

*Where there is a written contract between parties, this court is to construe it in the terms and conditions outlined as between the parties unless there is an illegality or a matter subject to interpretation. Where there is a fixed-term contract, parties are to outline the exact terms as required under section 10 of the*

Employment Act. Under section 10(3) the law is outlined thus;

*(b) [In a written contract] the length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment;*

*(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;*

**34. In Rajab Barasa & others versus Kenya Meat Commission [2016] eKLR;**

*Where the intention of the parties is to have the contract for a fixed term, upon expiry, either party can opt out or invite the other to a new contract as the previous one has ended. The relationship must be renewed under a new contract. Otherwise, there would be no need for a fixed term contract.*

35. Therefore, where parties have an employment contract, the court will enforce its terms as set out by the parties.

36. In this case the Respondent has heavily relied on the circular of the CDF Board of 24<sup>th</sup> June, 2013. This circular came after the claimant's employment and a contract of employment issued to him. The circular sets out that;

*1. Recruitment*

*Recruitment of CDFC staff shall be competitive to afford all candidates equal opportunity and ensure the most qualified persons are hired ...*

*2. Terms of service.*

*CDFC staff shall be employed on contract terms for a 3 year period, which may be renewable subject to performance.*

....

*7. Remuneration and salary scales*

*The remuneration for the CDFC staff shall be benchmarked to the prevailing Civil Service salary scale*

37. What is apparent from the reading of the circular, many of its terms did not apply to the claimant. Fundamentally this is a document that found the Claimant already under his specific term contract. The salary had been negotiated and its terms set out. Despite the circular coming to the respondent, there is no written notice to the Claimant with regard to any change or variation to his contract of employment.

38. Where the circular did not apply to the Claimant on reduced salary, it should equally not apply to the set out benefits. On the other hand where the Claimant chose to apply the circular in his case, this goes with the set salary and benefits therein. The Claimant was bound by a contract of employment, this came into force before the subject circular of 24<sup>th</sup> June, 2013 and his contract was not amended so as to follow the new terms and conditions introduced by the circular. The Respondent has not submitted any review of contract terms communicated to the Claimant so as to negate the provisions and terms of the contract agreed upon with the claimant. The employment contract is a crucial document for any employer and employee and unless there is a case that the same was entered into through unlawful means, this court is bound to confirm its terms and conditions.

39. Section 10(1) and (5) of the Employment Act provides that;

*(1) A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection (3), be given in instalments and shall be given not later than two months after the beginning of the employment.*

40. There must be a written contract of employment, which can be given in instalments and issued not later than 2 months upon commencement of employment. Once employment has commenced, section 10(5) applies;

*(5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.*

41. Section 10(5) provisions are mandatory. Any revision of an employment contract done upon commencement of such employment, the changes must be made in consultation with the employee setting out the changes or revision. Such changes must be made in writing. The rationales are that, once there exists a written contract of employment, the employer cannot suo motto make changes and file the contract away and expect the employee to follow. Fair labour practice dictates that the subject employee must be consulted and notified and the same put into writing. Where the employee wishes to contest the revision to his contract, the rights exists.

42. As submitted by the Claimant, the court in **Charles Maina Nyaruai versus Kieni Constituency Development Fund Commission** captured the matter partly that;

*... The circular dated 24.06.2013 ... the court finds that it was issued long after the claimant's employment by the letter dated 30.06.2011. At termination of the claimant's employment, the court finds that the provisions of the circular had not been incorporated into the claimant's contract of service. The court finds that the circular did not apply retroactively and he same did not affect the claimant's service. Accordingly the court finds that the prayers for gratuity and underpayment based on the circular must will fail.*

43. As set out above, the Claimant remained on a fixed term contract that had its own terms and conditions separate from the circular of 24<sup>th</sup> June, 2013. Where the circular was received by the 2<sup>nd</sup> Respondent and found to affect the terms agreed upon with the Claimant, there was no written review of his contract either by consultation or notification. I therefore find that the 2<sup>nd</sup> Respondent remained bound by the terms of the contract between the parties.

44. On the other hand, where the Claimant remained under his fixed term contract, he cannot claim outside the same. To do so would be to negate his very document that he is relying upon.

## **Remedies**

45. On the claim for underpayments or unpaid salaries for 21 months, on the finding that the fixed term contract was lawful and its terms agreed upon and there was no variation in accordance with the provisions of section 10 of the Employment Act, the unpaid salaries are due. I find no justification that the circular of 24<sup>th</sup> June, 2013 changed the contract between the parties. Where the circular was issued, the 2<sup>nd</sup> Respondent did not follow the applicable law, section 10 of the Employment Act to notify the Claimant of a variation in writing. The Claimant testified that out of the agreed Kshs.45, 000.00 salaries for each month, Kshs.20, 000.00 was withheld. The total due for the 21 months is Kshs.420, 000.00 and not Kshs.427, 000.00 as claimed.

46. The claim for unpaid leave allowance is on the basis that the Claimant did not take his annual leave in his first year of employment. It is the duty of an employer to keep work records and where there is a contest, the employer is required to file with the court such records in terms of section 10(6) and (7) of the Employment Act;

(7) *If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.*

47. Where the Claimant took his annual leave as due, such records should have been submitted by the Respondent as the employer. The position of the Claimant is immaterial here. The duty is upon the employer to ensure safeguards to records for all employees while serving. Where the Claimant was the keeper of such records, then he should have been well supervised and appraised in terms of his work duties to ensure that he kept all required records. However, what the Claimant is seeking here is not pay for leave days but pay for *unpaid leave allowance*. Where the leave days were agreed at 21 days, there was no agreement to payment of a leave allowance. The Claimant has not justified the source of such a claim. Such is declined.

48. Gratuity under the employment contract was agreed as payable in terms of the CDF rate. The claimant's evidence is that the *CDF rate* is the one set out under the circular of 24<sup>th</sup> June, 2013. However as at the time of employment no such *CDF rate* existed. The rate set out under the circular is conditional and only applicable to employees who have served for a period of over 3 years. These provisions must therefore be read in the context of the entire circular which requires that employees employed under its terms be employee don 3 years contracts with a renewal clause. The Claimant was thus not covered under such terms. He cannot place himself on a document that confers benefits but fail to take its responsibilities. The claim is declined.

49. On the claim for compensation for unlawful termination and frustration of the contract of employment and also the claim that the Respondent was in breach of the employment contract, on the finding that the Claimant was on a fixed term contract that lapsed, such claims must fail. Equally, the Claimant was invited to a new contract the fell within the circular of 24<sup>th</sup> June, 2013 but declined. It can therefore not be the case that the claimants were in breach, frustrated of acted unfairly. The claim is declined.

50. Claim for overtime is made on the basis that the Claimant worked on weekends and was not paid. Indeed the contract of employment sets out the time and days of work. However, the employer has submitted records setting out the days worked and allowances earned by the claimant. I take the records of the Respondent as the employer to be true.

51. In submissions the Claimant introduced the claim for house allowance. This was not a term of his contract. As set out above, where parties agree to terms and conditions that govern their employment relationship, the court will not interfere unless there is an illegality. Such has not been set out in terms of the wage payable and the claim for a house allowance. Such is declined.

52. In the penultimate, the claim only succeeds in terms of unpaid salaries only. Such claim is only due against the 2<sup>nd</sup> Respondent as the employer. The suit against the person of the 1<sup>st</sup> Respondent lacks merit.

**In conclusion, claim against the 1<sup>st</sup> Respondent is dismissed for lack of merit. Judgement is entered for the Claimant against the 2<sup>nd</sup> Respondent for the sum of Kshs.420, 000.00 subject to the provisions of section 49(2) of the Employment Act. Each party shall bear own costs.**

Judgement read in open court at Nairobi this 2<sup>nd</sup> February, 2017.

**M. MBARU**

**JUDGE**

In the presence of:

.....

