



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.1261 OF 2015

FATUMA ABDI.....CLAIMANT

VERSUS

KENYA SCHOOL OF MONETARY STUDIES.....RESPONDENT

JUDGEMENT

1. On 2nd July, 2010 the Claimant was employed by the Respondent as a Front Office Receptionist/Cashier on a 3 months renewable contracts for the period 2nd July, 2010 ending 30th September, 2010. The monthly wage was Kshs.32, 000.00. each contract was extended due to satisfactory performance.

2. On 1st January, 2013 the Respondent promoted the Claimant to Assistant Head Receptionist which position was confirmed vide letter dated 10th January, 2013 and her wages increased to Kshs.37,000.00. On 31st December, 2014 the contract was extended for 6 months ending 5th July, 2015.

3. The contract terms were that either party could give a termination notice of 28 days or pay a gross wage in lieu thereof. On 29th June, 2015 the Respondent unilaterally and without due process terminated the claimant's contract without reasons. This was in breach of contract and this put the Claimant into grave mental strain. The Claimant was not paid her due entitlements in breach of her contract in that the Respondent failed to pay for notice as stipulated under the contract; there was no pay for contractual entitlements; and the termination of contract was unjustified.

4. The claim is for;

Notice pay at Kshs.37, 500.00;

Service pay at Kshs.108, 173.08;

12 months compensation Kshs.450, 000.00

Costs; and

Certificate of service.

5. The Claimant also testified in support of her claim. The Claimant was under different contracts of employment and when each lased, the human resource office would send a communication for the

Claimant to reapply. Sometimes it was a verbal notice. The last contract was to end on 5th July, 2015 but termination took place before on 29th June, 2015. The Claimant was called and told to clear and not to report back on 30th June, 2015. Her salary was paid up and until 5th July, 2015 for the full contract even for the days she was not at work was paid for.

Defence

6. In defence the Respondent admit they employed the Claimant on fixed term contracts. Each contract was extended at the discretion of the Respondent as the employer and such was not on a guarantee of future renewal. On 20th April, 2015 the Claimant was put under review for fraudulent activities a factor the Respondent would have to consider if it were to review the claimant's conduct throughout the employment of the claimant. There was no breach of contract and the Claimant was paid her dues. There was no termination of employment as the Claimant worked until the last date of her contract which was 5th July, 2015.

7. The contract issued to the Claimant dated 31st December, 2014 did not have a renewal clause and there was no obligation on the part of the Respondent to renew it. No notice was due to either party as the contract lapsed in its term.

8. Service pay is not due as the Claimant was registered with NSSF and NHIF. The claims made are not justified and the same should be dismissed with costs.

9. In evidence, the Respondent witness was Ciru Koinange the Manager Front Desk. The Claimant was under different fixed term contract. Each was renewed upon satisfactory performance. The last contract dated 31st December, 2014 has no termination or renewal clause and was for 6 months ending 5th July, 2015. Such contract lapsed and was not renewed. The Respondent was undergoing financial difficulties, a meeting was called and employees told that their contracts would not be renewed. Each employee was paid to the end of their contract. This was not unfair termination as contract lapsed and there was no obligation to renew.

Submissions

10. Both parties filed written submissions.

11. The Claimant submits that under her contract of employment a termination notice was due and this was not given by the respondent. By the conduct of the Respondent there was a legitimate expectation created for the renewal of the contract in favour of the claimant. By dint of section 35 of the Employment Act an employee must be given notice before termination of employment. The court has held that fixed-term contracts carry no expectancy for renewal as held in **George Onyango versus Board of Directors Numerical Machining Complex Limited & Others [2014] eKLR** but there are exceptions to the general rule where an employer creates expectancy for renewal as held in **Ruth Gathoni Ngotho-Kariuki versus the Presbyterian Church of East Africa & Another [2012] eKLR**.

12. The Respondent renewed the claimant's contracts over time and even promoted her creating an expectation for renewal and in the alternative, a notice before termination. An on-going contract creates an expectation for renewal as held in **Bernard Wanjohi Muriuki versus Kirinyaga Water and Sanitation Company Limited & Others, Cause No.1541 of 2010**. In this case the Claimant was not terminated over a valid reason and is entitled to the remedies set out in the claim.

13. The Respondent submits that the Claimant was under a fixed term contract with a definite commencement date and termination date. There was no ambiguity created to create an expectation of contract renewal by the Respondent issuance of a fixed term contract is an accepted mode of employment as set out in **Chacha Mwita versus KEMRI [2014] eKLR**. The contract terminated automatically when the termination date arrived. The Claimant was paid for the full term of her contract. Renewal of the same was not automatic as to infer that would undermine the purpose of a fixed-term contract as held in

Margaret Ochieng versus National Water Conservation and Pipeline Corporation [2014] eKLR.

14. The Respondent acted within the law in terminating the claimant's employment with the expiry of her fixed term contract. Other 78 employees were affected by the same since there was no longer work for the claimant. The remedies sought are therefore not due.

Determination

15. The Employment Act contemplates that parties can enter into a fixed term contract as a valid mode of employment. Section 10(3) (c) provides that

A written contract of service shall therefore contain; ...

(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;

16. Therefore, a fixed term contract of employment is a lawful mod of employment with a start and end date. In this case the Claimant made application for renewal of each contract and a new contract was issued for a fixed term. There was no time the Claimant worked without a written contract or went beyond any such written contract so as to create the expectation that even where a written contract was not issued, it would be renewed for another term. In the case of **Ruth Gathoni Ngotho-Kariuki versus the Presbyterian Church of East Africa & Another** it was a term of the contract that before the lapse of its term either party could give 3 months' notice for renewal. Unlike in the present case where renewal was not automatic, the case for Ruth Gathoni the employer failed to issue the due notice creating a legitimate expectation to her that the contract would be renewed upon lapse of its term.

17. Respondent in defence allege that the Claimant was involved in fraudulent activities and such was put into account in considering the renewal of her contract. In evidence, the Respondent witness Ms Koinange introduced another aspect, that the Respondent as faced with a financial difficulty and hence called its employees to a meeting with information that their contracts would not be renewed.

18. Even where an employee is under a fixed term contract, it is a fair labour practice for an employer to be forthright and truthful in addressing termination of the same. Where indeed the Claimant was involved in fraudulent activities, such is a serious allegation against her that warranted to be addressed in terms of the law and for the Respondent to give such a defence and then fail to prove it, the obvious stands out. That there as a reason leading to the termination of the Claimant but the Respondent used the easier way out to avoid scrutiny and failed to renew the contract.

19. On the other hand, where an employer is faced with financial difficulties, the law has adequately addressed the same at section 40 of the Employment Act. For an employer to fail to address termination of employment pursuant to the provisions of the law and ride on the technicality of a fixed term contract, such is to engage in unfair labour practice.

20. The Respondent witness testified that they were forced to terminate other employees, 78 in total due to no work. This evidence affirms that the Respondent was either faced with a financial crisis or matters taking place at the time of the claimant's termination of the nature contemplated under section 40 of the Employment Act. Even though the Claimant did not follow this line of argument, a termination of employment has to be for a valid reason that is genuine, fair and reasonable. Whatever forms of termination the employer contemplates, where on long term employment; fixed term contract or as the case maybe save for casual employment, termination has to follow a fair and valid reason. This is the very essence of section 43 of the Employment Act. For the unfair labour practice of not giving the valid reason leading to the termination of contract, an award of one month's pay is sufficient.

Remedies

21. On the Claimant for notice pay, save for the failure by the Respondent to give the real reason behind

the termination of the contract and relying on the convenience of an ending fixed term contract, it was a clear term between the parties that the contract would lapse on 5th July, 2015 unless it was renewed. Notice pay is thus not due.

22. Service pay is payable in terms of section 35 (5) and (6) of the Employment Act and where the employee is not registered with the NSSF and NHIF. Where the Claimant was not unionised and with without any agreement on payment of a service pay outside her fixed term contract, service pay is not due. Each contract issued to the Claimant had its term and each lapsed and a new employment relationship commenced. The claim for service pay going back to the first contract of 2010 has no basis. Such is declined.

23. Each termination of employment by whichever mode should be accompanied with a certificate of Service in accordance with section 51 of the Employment Act. Where such Certificate is not issued and as a result an employee is unable to secure new employment as the employee is not able to address their work history, there is a sanction against an employer. On the award for unfair labour practice addressed above, I find such sufficient to address the same.

Judgement is entered for the Claimant in the sum of Kshs.37, 500.00; a Certificate of Service shall be issued; costs awarded at 50%.

Dated and delivered in open court this 30th day of March, 2017

M. MBARU

JUDGE

In the presence of:

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