



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 865 OF 2015

BETWEEN

JOSEPH KISALUCHA KITANDICLAIMANT

VERSUS

MIDWORLD ENTERPRISES

INTERNATIONAL LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Omollo Onyango & Company Advocates for the Claimant

Kanyi J & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 16th November 2015. He states he was employed by the Respondent Company as a Security Guard, earning a last salary of Kshs. 12,128 per month. He was employed on various fixed term contracts which were renewable. On 1st February 2015, he was advised by the Respondent to go on leave. He reported back on 28th February 2015. He was told by the Respondent to go home, he would be recalled to work. He was never recalled. He considered his contract to have been unfairly terminated. He lodged a complaint with the Labour Office. There was no settlement. He filed this Claim seeking the following orders against the Respondent:-

- a) 1 month salary in lieu of notice at Kshs. 12,128.
- b) Gratuity for years worked at Kshs. 6,068.
- c) Unpaid leave for the period worked of 4 years at Kshs. 48,512.
- d) Compensation for unfair termination at Kshs. 145,536

- e) A declaration that termination was unfair.
- f) A declaration that the Claimant was entitled to one month leave after every year worked.
- g) Costs.

Any other suitable relief.

2. The Respondent filed Its Statement of Response on 28th January 2016. Its position is that it employed the Claimant on different fixed term contracts of 1 year. He was paid all his benefits. His last contract expired. He is not entitled to notice pay. All leave days were paid out. He is not entitled to compensation as the Respondent did not terminate his contract.

3. The Claimant gave evidence, and closed his case, on 20th February 2017. Respondent's Co-Director Joyce Kamau gave evidence for the Respondent on 22nd March 2017 when hearing closed. The matter was last mentioned on 22nd June 2017 when Parties confirmed the filing of their Submissions.

4. Kisalucha Kitandi told the Court he worked for 4 years and 4 months, under different contracts. The last contract issued on 16th January 2014. It was to lapse in January 2015. He worked up to 1st February 2015. The Respondent allowed him to go on working without a contract renewal. He was asked by Director Joyce Kamau to take 1 month leave. He took his leave, and returned on 28th February 2015. He enquired which shift he would work. Director Joseph Kamau told the Claimant to keep away; he would be recalled later by the Respondent. He was never recalled. He expected his contract would be renewed. There was no notice of termination. He was paid 24 days off duty and salary for January 2015. The Guards were paid Kshs. 2,000 to Kshs. 5,000 as bonus for extra duties.

5. The Claimant told the Court on cross-examination that his contracts were annual. Renewal depended on performance. He had received warnings from his Employer. He recalled he apologized at some point. He worked in January 2015. He did not have a contract. The Respondent had promised there would be renewal. He did not agree that he was paid above minimum wage. Gratuity was not provided for under the contract. Redirected the Claimant told the Court he was given warnings, he apologized and there were no further sanctions. He was not told his contract would be terminated. If there was no intention to renew, he would not have received January 2015 salary.

6. Joyce Ruguru Kamau told the Court the Claimant was on an annual contract which expired. Gratuity was not provided for under his contract. He was paid pending off duty days, at the end of every contract. He was allowed to work in January 2015 after his contract had expired, because he had school fees obligations. It was at the discretion of the Respondent to pay. He was issued 3 warning letters. On one occasion he had pretended to be the receptionist. Cross-examined, Joyce testified the Respondent allowed the Claimant to continue working in January, on humanitarian grounds.

The Court Finds:-

7. The Claimant was employed by the Respondent as a Security Guard. He worked under different 1 year term, renewable contracts. The last was renewed on 1st January 2014, to expire 1st January 2015.

8. The Claimant went on working in January 2015 without a written contract. He was paid his salary for January 2015. He worked up to 1st February 2015. He was asked by the Respondent to take 1 month of annual leave, which he did, returning to work on 28th February 2015. The Respondent advised him to go home, he would be recalled, to work on another date. He was not recalled, a default which he considered to amount to unfair termination, warranting the filing of this Claim.

9. In the view of the Court, the Respondent acted in a way that would lead the Claimant to legitimately

expect renewal of the contract on expiry in January 2015. The contract had been renewed after every year, for over a period of 4 years. If renewal was based on performance, it was not shown that good performance was lacking in the last year, to justify non-renewal. The warnings issued to the Claimant over the years, were specific to certain acts which were not stated to be relevant, in not granting the Claimant renewal. After expiry, the Claimant went on working. This would only have affirmed his expectation that there would be formal renewal. He was advised to go on leave in February 2015. He was not told his contract would not be renewed. He was eventually advised to go home, he would be recalled. At no time was he advised his contract would not be renewed. The Court is persuaded the Claimant legitimately expected there would be renewal, and non-renewal amounted to unfair termination of employment.

10. ***The Claimant is granted the equivalent of 4 months' salary in compensation for unfair termination at Kshs. 48,512.***

11. ***He is allowed the prayer for notice pay of 1 month at Kshs. 12,128.***

12. He did not explain clearly to the Court, how he arrived at a sum of Kshs. 6,068 as gratuity for the period worked. No clause in the contract, or wage instrument was cited. The item is rejected.

13. Respondent's Witness did not avail to the Court Claimant's annual leave records, contradicting his position that he did not go on annual leave for the period in service. ***He is granted annual leave pay based on the statutory minimum of 21 days a year, amounting to 84 days at Kshs. 39,182.***

14. ***It is declared termination was unfair.*** There is no material to warrant the Court to make a declaration that the Claimant was entitled to 30 days of annual leave, every year. The law grants him a minimum of 21 days. If there was a contractual clause granting him 30 days, that clause has not been shown to the Court.

15. ***Costs to the Claimant.***

IN SUM, IT IS ORDERED:-

a) Termination was unfair.

b) The Respondent shall pay to the Claimant: equivalent of 4 months' salary in compensation for unfair termination at Kshs. 48,512; notice pay at Kshs. 12,128; and annual leave pay at Kshs. 39,182- total Kshs. 99,822.

c) Costs to the Claimant.

Dated and delivered at Mombasa this 15th day of September 2017.

James Rika

Judge