



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 2090 OF 2012**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 8<sup>th</sup> March 2016)**

**MICHAEL OTIENO AUMA.....CLAIMANT**

**VERSUS**

**EGIS BECOM KENYA LIMITED..... RESPONDENT**

**JUDGMENT OF THE COURT**

1. The Claimant filed his Memorandum of Claim on 10.10.2012, through the firm of S. Ogeto Ongori & Company seeking damages for unlawful termination. The Claimant states that on or about 30<sup>th</sup> January, 2008, he was employed by the Respondent vide an appointment letter of the same date at a monthly salary of Kshs. 21,000/=.

2. He alleges that the said appointment letter was withheld from him upto 10.2.2009. During the intervening period of 1 year, the Respondent only paid the Claimant Kshs. 12,000/= and unduly withheld Shs. 9,000/=.

3. The Claimant alleges that his services were terminated by the Respondent upon carrying out unnecessary redundancy as the Respondent still exists and the Claimant's position was taken over by another person.

4. He further alleges that he has suffered as a result of the Respondent's change of terms of employment in that he ought to have been confirmed on permanent basis rather than on contract. Therefore prays for the following:

***a) Salary arrears @9,000/= per month for between 1<sup>st</sup> January, 2008 and February, 2009 amounting to Shs. 108,000/=.***

***b) House allowance not paid between January 2008 and June 30<sup>th</sup> 2012 @ 7,500/= for fifty four (54) months amounting to Shs. 405,000/=.***

***c) Medical allowance for one year between January 2008 and February 2009 at Shs. 21,000/= per month amounting to Shs. 252,000/=.***

***d) Leave allowance between January 2008 and June 2012 @ 27,000 x 4 years 6 months = Shs. 121,500/=.***

***e) Overtime worked for 3 hours each day for five days in a week and 6 hours on Saturday amounting to 5708 hours.***

***f) Service for year 2008-2009 in arrears.***

***g) Gratuity using pay for 4 years 6 months between January 2008 and June 2012.***

***h) Compensation for redundancy.***

5. Parties agreed to dispose of the matter by way of written submissions.

6. The Claimant in his submissions states that he was employed as a driver by the Respondent commencing 30.1.2008 and he commenced duties immediately but was not issued with an appointment letter until 10.2.2009 and as such an oral employment contract existed between the Claimant and Respondent during this period as provided in the Employment Act, 2007.

7. In the same breath he states that the Claimant worked for the Respondent continuously for a period of twelve (12) months before being issued with a contractual appointment letter and it can therefore be presumed that an oral employment contract existed and as thus enjoyed rights and privileges under Section 37 of the Employment Act.

8. He further states that the Respondent in an effort to subvert the provisions of the Employment Act introduced a contractual form of employment by a letter dated 10.2.2009 a year after he had commenced his duties which was renewable every 12 months. The said contract was renewed in February 2010, further in December 2011 but on 31<sup>st</sup> December, 2012 the terms of the contract were changed without his consent for a further period of 6 months.

9. The Claimant states that he was terminated on 23.5.2012 on the ground of expiry of contract. He states that this was in bad faith because on 24.1.2012, he made a complaint against a team leader one Mr. Yves Le Texier whom he used to drive. Later on 23.5.2012 the said team leader made a complaint against him that he had proceeded on leave without his authority and asked the Human Resource Manager to dismiss him. On the same day the team leader made a complaint is the day that he was notified of termination of his services.

10. The Claimant also states that there was discrepancy in his salary as he was employed in January 2008 and his letter of appointment withheld until 10.2.2009 when he discovered that there were discrepancies in his salary payment.

11. During the year 2008-2009 the Claimant was paid Shs. 12,000/= per month and the balance of Shs. 9,000 was withheld for no reason. He submits that he is entitled to be paid for all withheld sums for the period he was in employment.

12. The Claimant also claims for N.H.I.F deductions that were never remitted in particular for the months of February 2008 – June 2008, January 2009 – June 2009 and June 2010 to June 2012.

13. He also states that N.S.S.F deductions of Shs. 400/= for the months of January, February 2008, September 2008, November 2011 and January 2012 which were deducted from his salary and never remitted.

14. The Claimant also states that he worked for 30 days per month without any off days when picking and dropping guests, site visits and he was not paid overtime for the 5 years worked. He alleges that he was engaged between 7 am and 7 pm making a total of 3 hours per day a total of 90 hours per month.

15. On Service pay the Claimant states that he worked for the Respondent for 5 years but he was never paid service for the year 2008 and 2009 contrary to provisions of the Employment Act which provides that an employee is entitled to service pay after 12 months of continuous employment.

16. The Claimant also states that he is entitled to leave allowance once he proceeds on leave. He was never paid leave allowance for the entire period he was in employment and seeks for the Court to award it to him.

17. The Claimant in conclusion states that to terminate his contract on the grounds of redundancy is unlawful because he has already proved that the termination was due to the malice of one of the team leaders. He also seeks medical allowance for the year 2008, transport allowance and house allowance.

18. The Respondent filed a memorandum of Defence on 12.2.2013 and states that the Claimant was never terminated unfairly from employment but instead the Claimant's fixed term contract lapsed by effluxion of time and the same was not renewed on expiry after due notice to him which is a valid ground for termination of employment relationship. This fact the Respondent submits has been admitted by the Claimant in paragraph 2 of his submissions.

19. The Respondent further submits that the Claimant's contract was coming to an end on 30.6.2012 and on 23.5.2012 he was informed that his fixed term contract was coming to an end on 30.6.2012 and the same would not be renewed.

20. The Respondent submits that the claim by the Claimant of unlawful termination must fail for want of proof. On this they rely on the case of **David Getare Nyangau Vs Houseman General Contractors Limited (2013) eKLR.**

21. The Respondent also submits that non-renewal of a fixed term contract cannot amount to unlawful termination. They rely on the authority of **Isaiah Makokha Vs Basco Products (K) Limited Case No. 206 of 2013.**

22. They also state that reducing a contract into writing does not convert an employment relationship into a permanent relationship. On this they cite the case of **Godfrey Kisemei Mutisya Vs USIU Africa Case No. 1667 of 2014.**

23. The Respondent states that an employer is not bound by the provision of Section 41 of the Employment Act 2007, on disciplinary procedures where a contract has come to an end.

24. On Salary discrepancy, N.H.I.F. deductions, Overtime, leave allowance, medical allowance and transport allowance the Respondent submits that they have not been proved and therefore they should not be allowed. On Service, the Respondent states that the Claimant was registered with N.S.S.F and the deductions made were respectively forwarded.

25. On Redundancy the Respondent states that non-renewal of the Claimant's contract does not fall within the provisions of Section 40(1) (g) to entitle the Claimant to severance pay.

26. The Respondent also states that house allowance was paid as part of his gross salary and refers to Appendix 1 of the Defence (the Claimant's contract).

27. The Respondent prays for the claim to be dismissed with no orders as to costs.

28. The Court has considered evidence of both parties. The issues to determine are whether:

***1) The Claimant was terminated or his contract expired.***

***2) The Claimant is entitled to prayers sought.***

29. On the 1<sup>st</sup> issue, the Claimant allege she was employed on vide an appointment letter dated 9.5.2008 which spelt out his terms and conditions of service. The Appointment letter exhibited in Court is dated 30.1.2008 and states that the contract was for 1 year renewable starting 30.1.2009 to 29.1.2010.

30. It also indicates that the salary will be 21,000/= consolidated with no overtime claim during the period or probation. It also indicated that there will be no overtime payable as the remuneration was considered as covering any and all overtime required.

31. This contract expired and was renewed on 1.1.2010 to run upto 31.12.2011. Salary was now increased to 23,500/= gross monthly and it was also indicated that “salary is a consolidated remuneration which includes all rent or housing/accommodation allowance.

32. On 13.12.2011, the Claimant was informed that his contract was being renewed for a further 6 months upto 30<sup>th</sup> June 2012. The terms and conditions of service remained as in the previous contract.

33. On 23.5.2012, the Claimant was now informed vide a letter that the contract would no longer be renewed and it was to end on 30.6.2012. He was also told he would be paid his salary upto that day and all outstanding leave days plus 15 days salary as service pay in respect of each year of service.

34. The Claimant contends that he was unlawfully declared redundant in this respect. I have considered that there is a contract on record showing that Claimant was on a fixed term contract which expired and Respondent declined to renew it. Whatever the reason that led Respondent not to renew the contract is not material in this respect as the contract came to an end. The claimant’s assertion that he was either terminated or declared redundant is therefore not true.

35. In terms of prayers sought, Claimant prays for salary arrears stating that he was not paid his full pay between 1.1.2008 to February 2009. The Claimant annexed his payslip for January 2008 showing his gross pay was 27,000/= through the contract had indicated 21,000/=. This shows that there was no salary underpayment.

36. In terms of his claim for house allowance- the contract was also clear that the remuneration package consolidated and included house allowance and this is in tandem with Section 31 of Employment Act which states as follows:

***“(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.***

***(2) This section shall not apply to an employee whose contract of service:***

***(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or***

***(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a)”.***

37. Claimant’s claim for house allowance is therefore not payable. This also goes for the claim for medical, leave allowance, overtime which were all covered in the contract.

38. At time of exit, the Claimant was paid his service pay of 15 days for each year worked and even for the time of 2008 to 2009 that he claims service pay he was a member of NSSF and is therefore not entitled to payment of service pay as claimed as provided for under Section 35(6) of Employment Act.

39. It is this Court’s finding that the Claimant is not entitled to prayers sought and his claim is dismissed accordingly.

There are no orders as to costs.

Read in open Court this 8<sup>th</sup> day of March, 2016.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for Respondent

No appearance for Claimant