



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1075 OF 2014

ATHMANI IMBWANA ADENYACLAIMANT

VERSUS

KENYA BUS SERVICE MANAGEMENT ... RESPONDENT

Claimant in person

M/s Oyombe for Respondent

JUDGEMENT

1. The suit was commenced by a memorandum of claim filed on 1st July 2014. The Claimant seeks damages for unlawful termination of employment and terminal benefits set out in the memorandum of claim as follows;
 - i. Payment in lieu of three months' notice (26,498 x 3) Kshs.79,494
 - ii. Payment in lieu of 1 year annual leave not taken Kshs 26,498
 - iii. Gratuity equivalent to 50 months' salary Kshs.1,324,900.
 - iv. Unpaid salary for the month of November 2013
 - v. Service payment for 3 years (3 x 747.15 x 15) Kshs.33,658.50

Facts of the case

2. On or about the 9th February, 2012, the Claimant was employed by the Respondent in the position of Driver instructor at a salary of Kshs 18,000. On 20th August 2013, the salary was adjusted to Kshs.26, 498 effective 1st August, 2013.
3. The Claimant worked diligently until 10th January 2014 when the Respondent terminated the employment of the Claimant without notice or reasons to justify the termination. The claimant states that the termination was malicious and unlawful and as a consequence thereof he has suffered loss and damage.
4. The Claimant states that he is entitled to damages and terminal benefits set out in the memorandum of claim. The Claimant relies further on a bundle of documents filed on 14th October 2014 including the Employment contract dated 1st March 2012 for a period of 3 months. A second contract of Employment dated 1st June 2012 to end on 30th November 2012 for a period of 6 months. A third contract dated 1st December 2012, to end of 31st May 2013 for a period of 6 months and a final contract dated 1st June 2013 to end on 31st May 2014 for a period of 1 year.

5. The Claimant relies on payslips which show that as at the time he left employment he earned Kshs 26,498, gross monthly salary. The Claimant was on diverse dates disciplined for various infractions during the tenure of the various short contracts. He was warned and even summarily dismissed twice and re-employed. The Claimant states that these actions constituted harassment after the increase of his salary from Kshs 18,000 to Kshs 26,498 with a view to getting rid of him.
6. The Claimant states that inspite of the short contracts given to him he had worked continuously and should therefore be treated as a permanent employee for purposes of computing terminal benefits and award him damages for unlawful and unfair termination of employment.

Defence

7. The Respondent filed a memorandum of defense on 7th October, 2014 in which the Respondent states that the Claimant was employed as a driver/instructor on various fixed term contracts from 1st March, 2012. That his last contract of employment was from 1st June 2013 to 31st May 2014 at a salary of Kshs 14,737 per month and house allowance of Kshs 2,211.
8. That on 29th April 2014, the Respondent wrote to the Claimant informing him that his employment contract was coming to an end on 31st May 2014. The Claimant was informed that the contract would not be renewed and that he would be paid in lieu of his May 2014 salary and accrued leave upto May 2014. That the last working day would be 30th April 2014. The letter is attached to the statement of defense and marked appendix 2.
9. On 2nd May 2014, the Claimant protested non-renewal of his contract of employment and stated in the letter that the Human Resource Manger had a vendetta against him. The letter dated 2nd May 2014 is attached to the statement of defence as appendix '3'.The Claimant failed to clear with the company as requested and also failed to collect his dues.
10. From the payslips produced by the Claimant he was registered with NHIF and NSSF and the statutory contributions were remitted. The Respondent summarizes the disciplinary history of the claimant from paragraph 7-12 of the statement of defense. The Respondent depicts the claimant as an employee with a bad employment record including various warnings given to him for misconduct and was summarily dismissed on 30th October 2013 and 3rd February 2013 for misconduct but was reinstated on both occasions upon seeking forgiveness.
11. The Respondent states that it was entitled not to renew his last contract of service upon its expiry without giving any reason at all except that the contract had expired and was not automatically renewable. Respondent prays the suit be dismissed with costs for lack of any merits.

Submissions

12. The parties filed final written submissions on 8th July 2015 and 9th November 2015 respectively. The parties had by consent agreed not to call any witnesses and to rely on the documentary evidence filed and written submissions.

Determination

13. The issues for determination are;
 - i. Whether the termination of the employment of the Claimant was unlawful and unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.

Issue i

14. It is not is dispute that the Claimant was given various short term contracts between 1st March

2012 to end 31st May 2014. The last contract was for a period of one year from 1st June 2013 to 31st May 2014. On 29th April 2014 the Claimant was notified of the eminent expiry of the contract of employment and was offered one month salary in lieu of notice for the month ending 31st May 2014. His last day at work was 30th April 2014.

15. The previous record of the claimant may have contributed to the non-renewal of the contract but the totality of the evidence before court shows that the employment of the Claimant came to an end by effluxion of time. The contract did not provide for automatic renewal of contract and therefore the respondent was not obliged to renew his fixed term contract from the totality of the facts before court.

16. The court agrees with the finding in *Bernard Wanjohi Muriuki Vs Kirinyaga Water and Sanitation Company Limited and another [2012] eKLR*, to the effect;

“In the view of the court there is no obligation on the part of an employer to give reasons to an employee why a fixed term contract of employment should not be renewed”.

17. Whereas, I agree with the finding of the court above, I will as a matter of caution state that the practice of an employer keeping employees on very short contracts as in this case for 3 months then 6 months and then 1 year contract is not conducive to career development and welfare of an employee who is offering good services to an employer.

18. Indeed, in certain cases this practice has been found to constitute unfair labour practice in that it hinders the welfare of employees especially because they are unable to access loan facilities from the banks for their personal growth by fact of the short nature of the contracts. The Claimant has not in this suit pleaded that the employer was engaged in unfair labour practices given the terms of employment he was given.

19. The Claimant has also not advanced any evidence that he protested the short term contracts he was given by the employer. This is therefore not an appropriate case to make such a finding. The court finds that the Claimant has not proved on a balance of probabilities that his employment was unlawfully and unfairly terminated by the Respondent and the same is dismissed.

Terminal Benefits

20. The claimant has established that he is owed;

- i. Kshs 26,498 in lieu of one month's notice
- ii. And Kshs 9,274 in lieu of 10.5 leave days not taken.

21. The contract of employment of the claimant did not provide for payment of any gratuity as claimed at all. The claimant was also registered with NSSF and contribution were duly made by the employer and therefore the Claimant is not entitled to payment of gratuity in terms of **Section 35(5) and 6(d) of the Employment Act 2007**.

22. The Claimant had been dismissed from 30th October 2013 and was reinstated upon appeal on 12th November, 2013. This means that the Claimant had been wrongfully stopped from working by the Respondent for the period and is entitled to Kshs 9,780 being unpaid salary for the month of November 2013 and the court awards him accordingly. The Claim for severance pay is misconceived and same is dismissed.

23. In the final analysis, the Claimant is awarded Kshs 45,552 as against the Respondent. The same is payable with interest at court rates from date of filing suit till payment in full. The Respondent is also to pay the cost of the suit.

Dated and delivered in Nairobi this 1st day of April, 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE