



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT

AT MOMBASA

CAUSE 96 OF 2015

(Consolidated with ELRCC 585,586,587,588,611,638 and 926 of 2015

DONAS LOMBO

KEVIN MWAWAZA LOMBO

STANLEY STEPHENS OWIMBO JERA

JOTHAM SHITANDA KHAYECHA

MUNYIKA DALU SHIDUNDU

KAINGU KOMBE KITSAO

LOMBO JOSEPHAT KITATU

JOHNSON OUMA RAO.....CLAIMANTS

VERSUS

CIVICON LIMITED..... RESPONDENT

JUDGMENT

Introduction

1. All the Claimants, save for the 8th Claimant, were employed by the Respondent under fixed term contracts which either lapsed or were terminated through redundancy. Initially each Claimant filed separate claim but later on they were consolidated under this suit. The Claimants seek to recover accrued benefits from their employment contracts, damages from breach of contract plus compensation for unfair termination of their employment by the Respondent.
2. The Respondent has contended that she employed all the Claimants under fixed contracts but denies that she unfairly terminated their services. According to her, the 7th and 8th Claimants' fixed term contracts lapsed after the affluxion of time while the rest of the Claimants were lawfully terminated through redundancy and paid their separation dues.
3. The suit was disposed of by written submissions on the basis of pleadings, witnesses' statements

and documents filed.

Analysis and Determination

4. There is no dispute that all the Claimants were employed by the Respondent. There is also no dispute that the 1st, 2nd, 3rd, 4th, 5th and 6th Claimants were terminated through redundancy before their contract term expired. The issues for determination are:

- a. **Whether contracts of employment for all the Claimants were unfairly terminated by the Respondent.**
- b. **Whether the Claimants are entitled to any relief.**

Unfair Termination

5. There is no dispute that the contract of employment for the 1st, 2nd, 3rd, 4th, 5th and 6th Claimants were terminated by the Respondent on diverse dates in between September 2013 and August 2014. The reason for termination was redundancy due to completion of the projects which the Respondent was contracted to undertake. The said reason for termination has not been contested by the Claimants and as such the court makes the inference that the reason was valid and fair reason within the meaning of section 43 and 45 2(a) and (b) of the employment Act (EA).
6. The Claimants have however contested the procedure followed in terminating their services. They contended that the procedure for declaring positions redundant provided under the EA was not followed. The Respondent has in response contended that the procedure followed in laying off the Claimants was fair because she gave notice to the Labour Officer and paid the Claimants one month salary in lieu of notice.
7. I have considered the termination letter issued to each of the 6 Claimants and formed the opinion that that no prior notice of at least one month in writing was served on the Claimants' Trade Union and the Labour office as required under section 40 of the EA. Consequently, the foregoing default alone rendered the redundancy of the 1st, 2nd, 3rd, 4th, 5th and 6th Claimants unfair for violating section 40 of the EA.
8. As regards the termination of the 7th Claimant's contract, he pleaded that his services as turn boy was declared redundant on 2.2.2014 after which he was paid kshs. 13490 only for the days worked. According to him, the redundancy was unfair because it breached provisions of section 40 of the EA. He contended that redundancy cut short his fixed term contract by 5 months. The Respondent has however maintained that the 7th Claimant's contract lapsed automatically after effluxion of its fixed term.
9. After considering the pleadings, witness statement and the submissions, I find on a balance of probability that the 7th claimant was terminated by the Respondent through redundancy on 2-2-2014. That the premature termination cut short the 7th claimant's fixed term contract by 5 months as alleged by him and not disproved by the Respondent. Under section 10(7) of the EA, the employer has the burden of disproving by employment records, any terms of the contract alleged by the employee in legal proceedings like the ones before the court.
10. In this case the Respondent has not produced any record of employment to disprove the Claimants allegation that he was declared redundant 5 months before expiry of his fixed term contract. I therefore find that he was so declared redundant before the lapse of his fixed term contract. The said redundancy was in breach of section 40 of the EA because his trade union and the labour officer were not served with at least 30 days' notice in writing prior to the termination.
11. The 8th Claimant stated that he was employed by the Respondent in June 2000 as welder and worked up to 2002 when he was terminated. He was re-employed in April 2008 in the same capacity and worked until 27th March 2014 when he was verbally terminated without any prior notice.

12. The Respondent however denied that she terminated the Claimants services as alleged. Her witness, Mr. William Wekesa, an HR Officer, stated that the Claimants' fixed term contracts were fully served and expired. That his last contract was for 2 months period stating 3.1.2014 and expiring on 28.2.2014. I have considered the contract of employment produced by the Respondent, the statement filed by the respective witnesses and also the submissions by counsel, and on a balance of probability find that the Claimant was employed on fixed term contract basis. That the last such contract was for 2 months being January and February 2014. That the contract lapsed automatically after effluxion of time.
13. The foregoing notwithstanding, the Claimant continued reporting to work and the Respondent continued giving him work to do and paid salary in March 2014. On a balance of probability, I make the inference that the parties herein mutually renewed their contract under the same terms as the expired contract.
14. Flowing from the foregoing inference, the court makes a finding that the renewed contract was to lapse automatically on 30.4.2014. The Respondent however terminated the same before time without any prior notice. I take judicial notice of the fact that all the other Claimants herein were declared redundant around the same time due to completion of the projects which the Respondent was contracted to undertake and make a further inference on a balance of probability that the Claimants' services were no longer required. The termination was also in breach of section 40 of the EA. Consequently, I find and hold that the termination of the 8th Claimant's contract of employment was unfair.

Reliefs

Damages for Breach of Contract

15. In view of the findings made herein above, it is now common knowledge that all the Claimants were employed by the Respondent under fixed term contracts, all of which were prematurely and unfairly terminated by the Respondent. The said premature termination for no fault on the Claimants' part also amounted to breach of their fixed term contracts. The Claimant had the reasonable expectation of continuing to work and earn salary for the remainder of the term of their respective contracts. The Court therefore awards each Claimant the salary for unexpired period of their respective fixed term contract.

Leave

16. The prayer for leave has not been particularized and no evidence was led to prove it. Consequently, I dismiss it.

Severance Pay

17. The claim for severance pay was also not particularized in the pleadings and no evidence was adduced to prove the same. In any event, clause 10.2 of the Contract Agreements produced by the Respondent confirmed that the service gratuity was only available to the Claimants after serving for one complete year. In this case none of the Claimants was engaged in a contract for more than one complete year of service. That they all were serving in contracts of one year or less all of which were terminated prematurely. If at all the Claimants intended to claim for earlier contracts which had expired, no particulars or evidence of such claims were presented before the court. Consequently the said claim is dismissed.

Notice

18. The claim for salary in lieu of notice is also dismissed in view of the award of salary for Claimants unexpired period of their respective fixed term contracts. The maximum loss the Claimants would have incurred under their respective contracts, is their incomes for the unexpired period of their contracts. Consequently the Claimants will have to be contented with the salary awarded to them for the remainder of their contracts.

Summary of the Claimants' Award

19. The 1st Claimant (Donas Lombo) had 3 months before expiry of his contract and he is therefore awarded kshs. 66,810 based on his monthly salary of kshs. 22,270.
20. The second Claimant (Kevin Mwawanza Lombo) had 2 months remaining and he is awarded kshs. 50000 based on his salary of kshs. 25000 per month.
21. The third Claimant (Stanley Stephen Owimba) had 8 months remaining and he is awarded kshs. 137152 based on his salary of kshs. 17144.
22. The fourth Claimant (Jotham Shitanda Khayecha) had 11 months remaining and he is awarded kshs. 139700 based on his pleaded salary of kshs. 12700.
23. The fifth Claimant (Munyika Dalu Chidundu) had 5 months remaining and he is awarded kshs. 67450 based on his salary of kshs. 13490.
24. The sixth Claimant (Kaingu Kombe Kitsao) pleaded that he had 8 months remaining as at July when it was terminated but he did not state when the contract commenced. He pleaded that his salary was kshs. 12270 but used kshs 17144 to calculate his dues. The Respondent on the other hand contended that the contract commenced on 3.1.2014 and was to lapse on 20.12.2014. No documentary evidence was produced to support his allegation but she has submitted that kshs. 12146 was the Claimants' rightful salary. From July to December 2014 was 5 months. I will therefore award the Claimant kshs. 60730 based on the salary of kshs. 12146 for 5 remaining months.
25. The seventh Claimant (Lombo Josephat Kitatu) had 5 months remaining and is awarded kshs. 67450 based on his salary of kshs. 13490.
26. Lastly, the eighth Claimant (Johnson Ouma Rao) had only one month remaining in his renewed contract is awarded kshs. 31999 which he pleaded as his rightful monthly salary.
27. The award to the Claimants will not be reduced by the allowances allegedly paid to them as terminal dues. Such money was not explained to the Claimants and the court reads mischief due to the nomenclature 'allowance' rather than terminal dues. According to the claimants, the alleged payment were their rightful allowances for the services rendered.

Disposition

28. For the reasons stated above, I enter judgment for the Claimant in the aggregate sum of **Kshs. 616291** plus costs and interest. The sum will be shared as indicated above.

Signed, Dated and Delivered at Mombasa this 29th day of July 2016.

ONESMUS MAKAU

JUDGE