



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NO. 2242 OF 2012

(BEFORE HON. LADY JUSTICE HELLEN S. WASILWA ON 24TH OCTOBER, 2016)

ISAIAH OKODE NYAMUNDHE.....CLAIMANT

VERSUS

KENYA INSTITUTE OF EDUCATIONRESPONDENT

JUDGMENT

1. The Claimant filed his suit through the firm of J.A.B Orenge & Company Advocates on 6th November, 2012, wherein he claims that his services were terminated prematurely and unlawfully and seeks redress from the Court.
2. He states that he was appointed as a senior clerical officer by the respondent vide a letter of appointment dated 30th May, 1990. That through a Government directive issued on 20th March 2009 the retirement age was raised from 55 years to 60 years.
3. He states that on 9th July 2010, he wrote to the Respondent quoting the directive and gave the respondent notice of his intention to continue service till he was 60 years age. His contract was due to expire on 31st December, 2010, to which he did not receive a response.
4. Through a letter dated 21st December 2010 his contract was terminated with effect from 31st December, 2010, when his contract was deemed to have expired.
5. He avers that he wrote to the Respondent severally stating that he had a right for his contract to be renewed as he had not attained age of retirement as at the time the Contract expired but the Respondent did not respond until 21st December, 2010, when they stated that they would not be renewing his contract.
6. It is the Claimant's contention that failure to renew his contract was malicious, capricious, wrongful, unlawful, unfair and discriminatory and was contrary to the terms and conditions of his employment as the operative Government policy and directives.
7. As a result, the claimant lodged this claim on the 6th November 2012 against the respondent in which he claims that the refusal and on failure to renew his contract and subsequent termination of his contract was malicious, capricious, wrongful, unlawful, unfair and discriminatory and contrary to the terms and of his employment as well as the operative government policy and directives.
8. The Claimant states that his colleagues contracts in similar positions set to expire at the same time were

all renewed except his which demonstrates discrimination bias and malice.

9. He contends that the respondent failed refused and on neglected to give him adequate and reasonable notice on any at all that his contract would not be renewed. He further contends that the Respondent thwarted his legitimate expectation to serve till he attained the age of 60 years like other public servants.

10. The Claimant avers that the respondent allowed or caused him to act and alter his financial position to his detriment by failing to give adequate notice that the contract of employment would be renewed which in his view violated his fundamental rights under articles 27(2), 28, 41(1) and 47(1) of the Constitution of Kenya.

11. The claimant also alleges that the respondent failed to pay him his benefits even under the expired contract as required by law.

12. Consequently , the claimant prayed for:

(i) Immediate reinstatement to his position as at 31st December 2010.

(ii) Payment of salary allowances, terminal dues and benefits from the date of termination to the date of reinstatement.

(iii) In the alternative and without prejudice to the foregoing payment of the sum of salaries/wages he would have earned from the date of termination until age 60 when his contract would be law not be renewed including all allowances and benefits.

(iv) Compensation and general damages for wrongful termination of employment.

(v) An order that the respondent settles in full the outstanding loan borrowed by the claimant together with interest thereon.

(vi) Costs of the suit.

(vii) Interest on (i) – (vi) above

(viii) Any other or further relief this Honourable courts deems fit an just to grant.

13. The Respondent filed a memorandum of response on 18th December 2012, wherein they admit that there was a government directive in 2009 raising the mandatory retirement age in the public service but denied that the directive changed the terms of the contract of employment between the claimant and the Respondent.

14. The Respondent further admits that the contracts expiring before the attainment of the age of 60 years were to be renewed in accordance with the provisions of the contracts but denies that the said contracts were renewable as a matter of right.

15. They state that the decision to renew a contract or not was discretionary and the contract did not impose an obligation on the Respondent to ensure that the Claimant worked until he was the age of 55 years but prescribe an age limit for the which the Claimant could work for the Respondent.

16. It is the Respondent's contention that there was no reasonable basis for the Claimant to expect that his contract would be renewed.

17. The Respondent states that it failed to renew the claimant's contract on the basis that his performance was wanting and he had received warnings over the same and there was prior disciplinary action against.

18. The Respondent states that the Claimant all along was aware that his contract would expire on 31st December, 2010, and therefore notice was not required. They further deny that there was legitimate expectation that the Claimant would continue to work until the age of 60.
19. They state that non-payment of the Claimant's terminal dues has been occasioned by failure by the Claimant to clear with the Respondent's various departments. They pray for the Claim to be dismissed with costs.
20. The Parties disposed of the matter by way of written submissions.
21. The Claimant submits that termination or dismissal has to comply with the Employment Act to the effect that the same must not be done unfairly or wrongfully. The Claimant alleges that his dismissal by refusal to renew his contract was unfair and wrongful.
22. They state that Section 47(5) of the Employment Act ought to have been complied with and rely on the case of **George Onyango Akuti vs- G4S security services Ltd** where the Court reiterated this position in its judgment.
23. The Claimant further submits that his constitutional right to fair administrative action and legitimate and reasonable expectation were breached. He also states that his termination was discriminatory as his colleagues who were serving under the same terms and in same position had their contracts renewed. He was singled out for dismissal.
24. It is also submitted on behalf of the claimant that he had worked for the respondent with no complaint or problem till he was elected as a secretary of the union of Kenya Civil Servants KIE chapter and he started executing that position which entailed representing unionsable employees on matter and grievances affecting their terms and conductions of service within the institution.
25. As to the allegation of prior disciplinary issue the claimant states that he was victimized as a result of voicing out the employees grievances by virtue of being the secretary general of the staff union.
26. The Claimant also submits that the respondent did not give any notice in writing to the claimant that his contract would not be renewed or had come to an end. This according to the Claimant did not comply with section 35(2) and (3) of the Employment Act of 2007 which position was restated in **Cause No. 905/2010 Ruth G. Ngotho Vs Presbyterian Church & another.**
27. The Claimant states that the allegation of poor performance is unfounded as he had never received any warning letters and that his appraisals scores were very high.
28. It's the claimant submission that he has proved that he had legitimate expectation that his contract would be renewed and that the respondent never gave him an opportunity to defend himself before dismissal. He prays for his claim to be allowed.
29. The Respondent in submissions state that the government directive dated 20th March, 2009, was a renewal of contracts. They refer to paragraph 5(b) of the said circular which provided:
- “Employees serving on contract as at 5th March, 2009, after the attainment of the age of 55 years will however continue to serve for the duration of these contracts. Contracts expiring before the attainment of the age of 60 years will be renewed in accordance with the provisions of the contracts.”***
30. They state that the Claimant was not retired from the public service but his employment ended when they refused to renew his contract of employment with good reason. They rely on the case of **Margaret A. Ochieng vs. National Water Conservation & Pipeline Corporation (2014)eKLR** where the Court stated that the general principle is that fixed term contracts carry no expectation of renewal.

31. They submit that the Claim lacks merit and ought to be dismissed with costs.

32. Having considered the submissions of both parties, I will refer to the contract of employment between Claimant and Respondent signed on 1.5.2005 where Claimant was initially employed on a 3 months renewable contract. Subsequently the Claimant and Respondent entered into other short time contracts and the last is dated 1.9.2008 and was to end on 31.12.2010 (Appendix 8).

33. Under this contract, the claimant was entitled to gratuity of 31% of total salary paid to him during the period of the agreement. He was also entitled to leave but the contract could be terminated by giving the other party 3 months' notice or 1 months' salary in lieu of notice.

34. The Respondents have indicated that they failed to renew this contract because the Claimant was not performing his duties well and had been involved in disciplinary issue.

35. To this, the Claimant's position is that he was performing his duties well as evidenced from his staff performance appraisal forms at page 10 of his documents. He was involved in a disciplinary issue for being absent from duty but he was absolved from blame. His appraisal for renewal of contract 2009/1010 indicated that the contract could be renewed but he needed a training, close monitoring and supervision.

36. The question however is whether this contract fell under the terms of the government circular dated 20th March 2009 from the Office of the Present. The circular was headed "Review of the Mandatory Retirement Age for Public Servants".

37. The circular raised the mandatory age of retirement from 55 to 60 years. Paragraph 2 on the 2nd page of the contract state as follows:

"---Employees serving on contract as at 5th March 2009 after attainment of the age of 55 years will however continue to serve for the duration of those contracts. Contracts expiring before the attainment of the age of 60 years will be renewed in accordance with the provisions of the contract.

Employees who had already received retirement notices or had their pension claims already prepared but had not attained the age of 55 years as at 5th March 2009 will continue to serve until they attain the age of 60 years if they so wish".

38. My understanding of this circular is that those people serving on contract but who had not attained 55 years have to continue to serve for the duration of the contracts but the contracts could be renewed in accordance to the provisions of the contract.

39. It is my position that the Claimant who had not attained at 55 years at 5th March 2009 was to continue serving and the contract would be renewed in accordance with the provision of the contract.

40. Under the contract in question:

"The contract could only be terminated with 3 months' notice or payment of one month's salary."

The wording of the contract:

"Notwithstanding the provision of Clause 1(1) hereof, this agreement shall not be renewed after the employee attains the age of fifty five (55) years shows that this contract was renewable and now in addition to the government circular, it could be renewed until the employee attains 60 years".

41. The Claimant had not reached retirement age of 60 years as at 5th March 2009. The contract he was

serving was to expire on 31st December 2010 hence he had expectation that it could be renewed as per this government circular. He even wrote to the Respondent on 9th July 2010, indicating that he wished to have his contract renewed.

42. The Respondent chose not to reply until 21st December 2010 (page 17) indicating that the contract would not be renewed. The timing of this letter is an indicating that the Respondents were still going to renew the contract. They had not given the 3 months' notice that they would not renew it and the Claimant had a legitimate expectation that the contract was going to be automatically renewed.

43. On 20th March 2009 just after the government circular, the Claimant had even applied for a loan and the application was recommended by his Head of Department (HOD) one Mr. Muteti who knew the contract was to expire in December 2010. This approval of the loan even made the Claimant's expectation more plausible.

44. Having found as above, it is this Court's finding that the none renewal of Claimant's contract was in breach of a valid government circular and the same contract of service which made Claimant have a legitimate expectation that his contract would be renewed automatically.

45. If for any reason the Respondent felt they could not renew the contract, for any disciplinary reason, they should have subjected the Claimant to a disciplinary process which they did not.

46. I find the non-renewal of contract as unlawful termination and I declare it so. I accordingly award the Claimant as follows:

(1) 3 months salary as notice for non-renewal

$$= 3 \times 52,107 = 156,321/=$$

(2) 12 months salary as compensation for unlawful

$$\text{termination} = 12 \times 52,107 = 625,284/=$$

(3) Gratuity under the last contract being 31% of all earned salary as per the contract being 31% of 1,250,568 = 437,698.8

$$\underline{\underline{\text{TOTAL} = 1,219,303.8/=}}$$

(4) Respondent to pay costs of this suit plus interest at Court rates with effect from the date of this judgment.

Read in open Court this 24th day of October, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nyabura holding brief for Miss Kamau for the Respondent – Present

Claimant – Present