



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABORU RELATIONS COURT OF KENYA
AT NAIROBI
CAUSE NO.931 OF 2013

GEORGE MAKAU.....1ST CLAIMANT
REUBEN KAMAU MWANGI.....2ND CLAIMANT
SHADRACK SOO.....3RD CLAIMANT

VERSUS

LABEL CONVERTERS LIMITED.....RESPONDENT

JUDGEMENT

1. The issue in dispute is the unlawful and unfair termination of the Claimants from their employment with the Respondent and refusal to pay terminal dues.
2. The Claimants filed their claim on 19th January 2013. The claim was amended and filed on 25th June 2014.
3. On 12th March 2008 the Claimants were employed by the Respondent as Rewinders at a monthly wage of Kshs.10, 500.00. That since such employment, rom 2008 and 2009 they were paid a daily wage as casual workers at kshs.250.00 a day in 2008 and Kshs.300.00 in 2009. In 2008 the Claimants were made to register with the NHIF as members.
4. On 1st March 2013 the Respondent terminated the claimants' employment without valid reasons or notice or payment in lieu thereof. The Claimants were also unlawfully declared redundant without any justification and contrary to the provisions of section 40, 41, 43 and 45 of the Employment Act. The Respondent engaged in unfair labour practices to the detriment of the claimants.

The 1st claimant;

Date of employment is 12th March 2008

Position held was Rewinder

Termination date as 1st March 2013

Basic pay was Kshs.10, 500.00

Claims

- a. One months' notice pay Kshs.10,500.00
- b. Leave = 2008-2009 leave days not taken, 21 days = Kshs.11,578.00
2009-2010 leave days not taken, 21 days = Kshs.11, 578.00
2010-2011` leave days and underpayment = Kshs.2, 637.00
2011-2012 leave days and underpayment = Kshs.2, 849.00
`2012-2013 leave days and underpayment = Kshs.3, 150.00
- (c) House allowance
2010 at 15% and not paid kshs.3, 876.00
2011 at 15% and not paid kshs.3, 540.00
2012 at 15% and not paid Kshs.4, 404.00
2013 e amount Kshs.734.00
- d. Overtime
March 2008 to April 2009 unpaid Kshs.3, 445.00
May 2009 to January 2010 unpaid kshs.2, 599.00
February 2010 to January 2011 unpaid Kshs.5, 227.00
February 2011 to January 2012 unpaid kshs.6, 237.00
February 2012 to February 2013 unpaid Kshs.6, 930.00
- e. Underpayments
2008 unpaid dues kshs.20, 800.00
2009 unpaid dues kshs.23, 280.00
2010 unpaid dues Kshs.25, 836.00
2011 unpaid dues kshs.23, 748.00
2012 unpaid dues kshs.29, 400.00
2013 unpaid dues Kshs.4, 900.00
- f. Service pay for 2008 and 2009 Kshs.126,000.00
- g. 12 months compensation Kshs.126,000.00

2nd claimant;

Date of employment is 12th March 2008

Position held was Rewinder

Termination date as 1st March 2013

Basic pay was Kshs.10, 500.00

Claims

- a. One months' notice pay Kshs.10,500.00
 - b. Leave days due Kshs.31,794.00
 - c. House allowance Kshs.12,554.00
 - d. Overtime Kshs.24,436.00
 - e. Underpayment Kshs.128,044.00
 - f. Service pay Kshs.11,010.00
 - g. 12 months compensation Kshs.126,000.00
 - h. Damages for unfair labour practices
- Total Kshs.344, 338.00

3rd claimant;

Date of employment is 12th March 2008

Position held was Rewinder

Termination date as 1st March 2013

Basic pay was Kshs.10, 500.00

Claims

- a. One months' notice pay Kshs.10,500.00
- b. Leave days due Kshs.31,794.00
- c. House allowance Kshs.12,554.00
- d. Overtime Kshs.24,436.00
- e. Underpayment Kshs.128,004.00
- f. Service pay Kshs.11,010.00
- g. 12 months compensation Kshs.126,000.00
- h. Damages for unfair labour practices

5. That the Claimants made effort to claim their dues from the Respondent who failed to oblige. The Claimants are therefore seeking for a declaration that they were unlawfully and unfairly terminated from their employment and should be compensated and awarded costs. The Claimant are seeking for compensation for being unlawfully declared redundant.

6. In evidence the Claimants witness was George Makau the 1st Claimant who testified that upon employment by the respondent, the 3 Claimants were paid a daily wage of Kshs.250.00. this wage was increased to Kshs.300.00 in 2009. In 2010 the Claimants were issued with contracts and confirmed the Claimants as full time employees and were entitled to a salary and allowances. The salary was Kshs. 6,948.00.

7. Mr Makau also testified that they would report for work at 8am until 1pm when they took a lunch break of ½ hour and then resume until 5.30pm hence working for 9 hours instead of 8 and with an overtime of 1 hour for 5 days a week.

8. On 1st March 2013, while the Claimants were at work, the Respondent called them. Hiran gave them pay slips and said that their contracts were not renewable. There was no prior notice. The Claimants had written to the Respondent noting that their contracts were about to lapse and wanted them renewed. There was no reply. Hiran wrote on the contract document that it was not renewable.

9. The Claimants seek compensation for unfair termination. They served the Respondent for 5 years and should not be dismissed. The Claimants were never given a hearing.

10. For 2 years the Respondent never paid house allowance and each day work was for 9 hours. Overtime was never paid and no leave was taken or paid for in lieu. The Claimants were entitled to 21 days of leave each year. Before the contracts were issued, the Claimants were paid as casual workers. Based on the General Wage Guidelines, there was an underpayment in wage, salary and house allowance and this differences should be paid.

11. The Claimants have relied on the computations set out in the amended memorandum of claim. Further that the NSSF and NHIF were not paid and service pay should be awarded. Compensation should be paid for unfair termination and damages for unfair labour practices. The termination was not based on any known reason and this affected the Claimants in their personal lives. Upon termination, the Respondent retained casuals and also brought in foreigners to take over their positions.

12. The 2nd Claimant is seeking a total sum of Kshs.342, 338.00 and the 3rd Claimant Kshs.344, 338.00.

13. Upon cross-examination, the Claimant testified that at the time of termination of his employment he was paid in accordance with his contract of employment. Before the contract ended, he wrote to the Respondent seeking a renewal. The Respondent had indicated the last contract date and where there was a renewal, this was to be issued by the respondent. The contract had not been renewed by 1st March 2013. In the last pay slip the Respondent stated that the contract would not be renewed. That after working for the Respondent for 5 years, upon the lapse of the contract, there was a duty to write back stating why the contract would not be renewed. Despite an application and request to renew contract, the Respondent did not reply. There was no termination notice.

Defence

14. In defence, the Respondent case is that upon the employment of the claimant, they were serving on a 1 year-term contract and working as Rewinders. The last contract commenced 1st march 2012 and were ending on 28th February 2013. The fixed-term contracts came to an end at an agreed time and there was no unfair termination as alleged.

15. That there was no reason or ground to issue the Claimants with a show cause letter or notice as the terms and conditions of the contracts referred to were clear as to the duration and lapse.

16. When the Claimants sent a demand letter to the respondent, there was a reply that no terminal dues were owing as the Claimant knew they had a fixed-one-year contract ending 28th February 2013. There was no notice owed or payment in lieu of notice in this case. The salary paid in February 2013 included pay for 21 days leave and the wage paid was over and above the statutory wage and overtime due was paid every month.

17. The termination was not due to any disciplinary issue but the fixed term contracts lapsed. Such were not renewed. The introduction of redundancy does not arise in this case and there is no violation of section 40, 41, 43 or 45 of the Employment Act as alleged.

18. The claim is an abuse of Court process and should be dismissed with costs to the respondent.

19. The Respondent also called their witness Mr Peter Mumo testified that he worked with the Claimants who were rewinders, doing finishing job on printing once the machinists had done their work. The Claimants would rewind and do final touches to the printed matter. The Claimants were on one (10 year contracts which lapsed and were not renewed. there was no redundancy and the issue of hearing did not arise as the contracts lapsed. In the pay slips for February 2013, the Claimants were advised that their contracts had ended and would not be renewed.

20. That the Claimants were paid the legal minimum basic pay; their leave that was due and overtime all in the February pay.

21. In cross-examination, the witness testified that the Claimants joined the Respondent employment while he was there. They were issued with contracts of employment in 2011. There was no application required for contract employment, when an employee worked well, they were taken on contract terms. All the employees of the Respondent have written contracts. All work dues were paid under each contract of employment.

22. Mr Mumo also testified that the work hours were from 8am to 5.30pm. Leave due in 2013 for 21 days was paid for. Since the contract lapsed, the claim for notice pay should not arise. The only notice the Claimants got was that their contracts would not be renewed. The Respondent complied and paid for all NSSF and NHIF dues and service pay is not due.

23. That the Claimants while working as rewinders, their work was good. By the time of their termination the workload had gone down. There were low orders. After work improved, there were two employee taken after 4 months.

Submissions

24. The Claimants submit that they were orally employed by the Respondent on 12th March 2008 as Rewinders. By letter dated 9th December 2008, the Respondent sent the Claimants to the NSSF and NHIF to register as members for remittance of their contributions.

25. On 28th February 2012 the Claimant were issued with employment letters. For the respondents to assert that the Claimant commenced work on 1st March 2012 to 28th February 2013 is misleading and meant to defeat the claims. The time of employment was at all material times 12th March 2008 to 1st March 2013.

26. That the respondents have failed to demonstrate that the Claimants were on one year fixed term contracts. As such the Claimant had permanent employment with the respondent. The introduction of one year contracts with regard to the claimants' employment was to get rid of them and this amounts to an unfair labour practice. The Respondent has since employed new workers without giving the Claimants consideration and this is a demonstration that the Respondent was only keen to get rid of the claimants.

27. The Claimants also submit that they were not procedurally terminated and there lacked a reason for

their termination. By 1st March 2013 there were low volumes of work and the Respondent could not engage the Claimants further. Having known that work volumes were low, the Respondent took the easier option out and terminated the claimants. Such circumstances of low volume of work has been defined as a redundancy that is regulated under section 40 of the Employment Act. Such is a redundancy and severance pay is due and compensation for unfair termination of employment as there was no reason given for the same. It was wrongful for the Respondent to terminate the Claimants under the guise of lapsed contracts whereas in real since they were addressing a redundancy situation.

28. The Claimants are entitled to terminal benefits as claimed. Notice pay is due; leave days owing, house allowance and the underpayments; overtime, service pay and compensation for wrongful and unfair termination of employment. In terms of section 62 of the Employment Act, there are Regulations governing the employment of the Claimants that set the minimum wage that ought to have been paid.

29. The Respondent submit that the Claimants were employed on fixed term contract from 2010 until 2013 when the last contract lapsed on 28th February 2013. At the time the Claimant earned Kshs.9, 130.00 per month and house allowance of kshs.1, 370.00. Upon the lapse of the contract the Claimants were paid 21 leave days – 1st Claimant kshs.23, 019.00; 2nd Claimant kshs.22, 211.36; and 3rd Claimant Kshs.24, 715.11.

30. The Claimants confirmed they had one year fixed term contracts. They were informed of the lapse and non-renewal. All owing dues were paid.

31. The Respondent submit that the Claimants were never declared redundant. Section 10(2) (e) of the Employment Act, employers are required to issue employees with written contracts of employment. Such written contract should have details of its term, the period it is expected to serve, if it is a fixed term contract, date when it is expected to end. The law therefore contemplates a written fixed term contract. In **Isaiah Makhoha versus Basco Products (K) Ltd [2014] eKLR**; the Court held that even the so called permanent contracts have a retirement age and thus have a definite period and therefore are fixed term contracts. The non-renewal of fixed term contract cannot amount to unfair termination. The Court in **Bernard Wanjohi Muriuki versus Kirinyaga Water and Sanitation Co. Ltd & Another [2012] eKLR**; the Court held 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. There is no obligation to give reason for terminating a fixed term contract a held in KUDHEIHA Workers versus Family Health Options Kenya.

32. The Claimants had fixed term contract with a definite end period, the termination cannot therefore be found to be unfair labour practice pursuant to article 41 of the Constitution. The Respondent was entitled to end the fixed term contracts.

33. The Respondent also submit that from the records the Claimants were employed in 2010 as rewinders. This is supported by the NSSF and NHIF records. The Claimant have also applied employment rates for Printing Machine Operators whereas they were not. The Claimant dealt with finished products and not entitled to claim otherwise.

34. There was no underpayment. The Claimants were earning a basic pay of kshs.6, 948.00 and house allowance of Kshs.1, 042.00 according to the minimum wage order applicable in 2011. In March 2010 the Claimants were earning;

Kshs.6,948.00 with house allowance of Kshs.1,042.00 and the Wage order for machine attendants was Kshs.6,948.00 as basic wage and 15% house allowance;

In September 2010 Claimants earned Kshs.7, 643.00 and house allowance Kshs.1, 147.00 while wage Order for Machine attendant was the same;

In 2011 and 2012 the minimum wage orders consolidated wage was kshs.8, 723.90 and Kshs.9, 866.70. The Claimants were paid kshs.9, 500.00 in 2011 and Kshs.10, 500 in 2012 in 2012.

The issue of underpayment does not arise.

35. On the remedies, the Respondent submit that notice pay is not due in this case as the contract in place and a contemplated end date. No leave pay is due as this was settled for each claimant. Overtime was dully paid and nothing is due. Service pay is not applicable as all statutory dues were deducted and remitted as appropriate. This was not a case of unfair termination to claim compensation. The suit lacks merit and should be dismissed with costs.

Determination

The issues that emerge for determination are

What nature of employment existed between the parties?

Whether there are remedies due

36. The Employment Act at section 2 defines a contract to mean;

“contract of service” means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies

37. Under these provisions of the law, parties entering into an employment relationship can enter into a written contract that is permanent, fixed term, periodic or seasonal based on the need, purpose or the interests of both parties and the persons involved. In **Chacha Mwita versus KEMRI, Cause No.1901 of 2013** held that;

... Once there is a written contract, the Court will seek to give meaning to such a written contract based on its terms in determining any issue that may arise especially any dispute. The Court as guided by the provisions of section 10 of the Employment Act will give the ordinary meaning to any written agreement between parties unless there is proof that there is ambiguity on the face of the contract.

38. The Claimants admit that they were on written contract. The last such contract was for one (1) years and it lapsed. The Claimants applied for renewal but this was not approved. The fact of seeking a renewal in itself show knowledge of the terms of the contract ending 28th February 2013. By 1st March 2013 and in their last pay slips, the Respondent had noted that the contracts would not be renewed.

39. Section 10(2) of the Employment Act also requires and employer to state and set out the following;

(2) A written contract of service shall state—

(a) ...

(b)...

(c) the job description of the employment;

(d) the date of commencement of the employment;

(e) the form and duration of the contract;

(f) the place of work;

(g) the hours of work;

(h) the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits;

(i) the intervals at which remuneration is paid; and

(j) The date on which the employee's period of continuous employment began, taking into account any employment with a previous employer which counts towards that period; and

40. The Claimants confirm that the Respondent was in compliance to the above provisions. They had their job as Rewinders; the last contract commenced 1st March 2012 for a period of one (1) year and ending 28th February 2013; and hours of work were 8am to 5.30pm; and the salary was agreed. As held in **Veronica Moraa and 28 Others versus Indu Farm (Epz) [2016] eKLR**; where the reason for termination was that the Claimants therein had fixed term contracts and their letters of termination stated that there was reduced volume of work and thus the Respondent could not renew their contracts;

It was therefore quite legitimate for the Respondent to exercise its discretion not to renew the contracts due to reduction in work volume. The contention that because the contract had a provision for one month's notice of termination hence the Claimants were entitled to one month's notice is not sustainable. The notice provision could only apply in circumstances where the contract was to be terminated prematurely which was not the case here.

41. Therefore, parties are bound by the terms of their contract and where the intention is to have a fixed term contract for one year, such must be upheld as the intention of the parties. Unless there is proof that there was fraud, misrepresentation or any other act of illegality in entering into such a contract, the Court based on the applicable law that recognises and indeed encourages parties to have a written contract will uphold the agreed terms of an employment contract.

42. In this case therefore I find no justifiable grounds for the Court to infer illegality on the part of the Respondent in ending the fixed term contract as parties were in agreement to the terms and the Claimant knew at all material times that the contract would lapse on 28th February 2013. Such is not an unfair labour practices. It is a practice to be encouraged where parties should put the terms and conditions of employment into writing.

43. With the lapse of each employment contract and despite moving into another new contract, the previous employment relationship ended and was renewed under the new contract the last such being the one running and ending on 28th February 2013. See **Chacha Mwita, cited above**;

*fixed term employment contract is, for example, entered into for a period of six months with a contractual stipulation that the contract will automatically terminate on the expiry date, the fixed term employment contract will naturally terminate on such expiry date, and the termination thereof will not (necessarily) constitute a dismissal, as the termination thereof has not been occasioned by an act of the employer. In other words, the proximate cause of the termination of employment is not an act by the employer. There is a definite start and a definite end. Thus, the contract terminates automatically when the termination date arrives; otherwise, it is no longer a fixed term contract. See the case of **SA Rugby (Pty) Ltd v CCMA & Others (2006) 27 ILJ 1041 (LC)** This decision is comparable to the common law position where fixed-term contracts expire automatically upon arrival of the stated date. See **Brassey Employment and Labour Law** vol 3 A8: 9;*

At common law, an employment contract for a fixed-term terminates automatically upon the expiry of the period unless the parties agree, expressly or tacitly, to renew it.

Remedies

44. The Claimants are seeking notice pay on the grounds that they were unlawfully and unfairly terminated. As the contract was not unlawfully and unfairly terminated, the provisions of section 35 of the

Employment Act being clear, the contract having an end date, there is no notice due or payment in lieu thereof.

45. On the claim for leave days due, the Claimants attached their payslips to the Memorandum of Claim at pages 12 to 14;

At page 12, George Kamau the 2nd Claimant was paid Kshs.7, 350.00 for 21 leave days in February 2013;

At page 13, Reuben Kamau Mwangi the 3rd Claimant was paid Kshs.7, 350.00 for 21 leave days in February 2013; and

At page 14, Shadrack Soo the 1st Claimant was paid kshs.7, 350.00 for 21 leave days in February 2013.

46. This being the last known employment relationship between the parties, the same having ended on 28th February 2013, and 21 leave days having been paid for in cash, section 28 of the Employment Act does not apply with regard to the claim over leave pay. Such is not due.

47. Over time is claimed on the basis that the Claimant worked for 9 hours a day each of the 5 days at work. The same pay slips attached by the Claimants to the Memorandum of claim set out that Kshs.5, 169.00 for 64.00 hours; Kshs.4, 361 for 54.00 hours; and Kshs.969.10 for 9.00hours was paid to George Kamau, Reuben Kamau Mwangi and Shadrack Soo respectively for overtime. It is trite and pursuant to the provisions of section 10 (6) and (7) that the employer is the one to keep work records and where a dispute is filed with the court, the employer has the duty to provide such records to disprove any allegation made by the employer. In this case, the Claimants were kind to submit their pay slips which confirm payment of overtime due at the end of their contracts.

(6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.

(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

48. Service pay is claimed on the basis that the Claimants were not registered with the NSSF and NHIF. By their own admission, the Claimant confirmed that they were sent by the Respondent to register with NSSF and NHIF and there were deductions and remittances since. Section 35(5) read together with subsection (6) thereof, the Respondent has complied and service pay is not due.

49. I therefore find no illegality in the conduct of the respondent, the party's employment relationship was regulated by written terms and the same lapsed. This was not an unfair labour practice and no compensation or damages are due.

In conclusion therefore, the claims are dismissed. Each party shall bear own costs.

Orders accordingly.

Delivered in open Court at Nairobi this 14th day of November 2016.

M. MBARU

JUDGE

In the presence of:

Court Assistant:

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