



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 390 OF 2012

BERNARD NYARIKI KEBWAGE.....CLAIMANT

VERSUS

TOWN COUNCIL OF KANGUNDO.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant's claim brought by memorandum of Claim dated 9th March 2012 and amended on 3rd May 2013 seeks relief for unlawful termination and payment of terminal dues.
2. The Respondent's reply is contained in a Memorandum of Defence dated 18th July 2012 and amended on 16th April 2013. By consent of the parties, the matter proceeded by documentary evidence and written submissions.

The Claimant's Case

3. The Claimant states that he was first employed by the Respondent as an Assistant Accountant/Cashier. He was deployed as Accounts Clerk on 20th March 2008 and later worked at the Receipts Cash Office from 13th November 2008.
4. The Claimant's employment was terminated on 1st July 2010. He claims that there was no reason for the termination and that he was not given an opportunity to be heard. The Claimant further states that in the course of his employment he was underpaid contrary to the obtaining Regulation of Wages (General) Orders.

5. The Claimant's claim is as follows:

- a. Underpayment (March-April 2006).....Kshs. 5,410.00
- b. House allowance (March-April 2006).....2,761.50
- c. Underpayment (May 2006-April 2009).....163,116.00
- d. House allowance (May 2006-April 2009).....59,567.40
- e. Leave allowance (May 2006-April 2009).....33,093.00

f. Underpayment (May 2009-April 2010).....	78,204.00
g. House allowance (May 2009-April 2010).....	23,430.60
h. Leave allowance (May 2009-April 2010).....	13,017.00
i. Underpayment (May 2010-June 2010).....	15,638.00
j. House allowance (May 2010-June 2010).....	4,295.70
k. Pay in lieu (July-September 2010).....	42,957.00
l. House allowance (July-September 2010).....	6,443.55
m. Severance pay @ 30 days' per year.....	52,276.00
n. Damages for wrongful and unfair termination.....	171,828.00
o. General and punitive damages	
p. Certificate of service	
q. Costs	

The Respondent's Case

6. In its amended Memorandum of Defence filed in Court on 15th April 2013, the Respondent states that the Claimant was employed intermittently on diverse dates as a casual employee paid on daily rate effective April 2006 until 20th January 2009 when he was issued with a three (3) months' term contract. The contract was renewed severally until 1st January 2010 when the last contract lapsed.

7. The Respondent denies having employed the Claimant on permanent and pensionable terms by letter dated 23rd February 2006 as pleaded by the Claimant. The Respondent states that the said letter is a forgery. The Respondent further denies that the termination of the Claimant's employment was wrongful and/or unfair.

8. It is the Respondent's case that the Claimant's term contract came to an end on 1st July 2010. Since the Claimant was not employed on permanent and pensionable terms, he was not covered by the Collective Bargaining Agreement between the Association of Local Government Employers and the Local Government Workers Union.

9. The Respondent also denies the claim for underpayment, stating that the Claimant was paid a consolidated daily wage payable at the end of the month. The claims for leave pay and leave traveling allowance are denied.

Findings and Determination

10. There are three issues for determination in this case:

- a. The nature and status of the Claimant's employment;
- b. Whether the termination of the Claimant's employment was lawful and fair;
- c. Whether the Claimant is entitled to the remedies sought.

The Nature and Status of Employment

11. The Respondent states that the Claimant was employed as a casual employee in April 2006 and was subsequently issued with successive three

(3) months' contracts from January 2009. The last such contract lapsed in January 2010. On his part, the Claimant states that he was employed on permanent and pensionable terms of service.

12. Section 2 of the Employment Act, 2007 defines a casual employee as:

“a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time.”

13. From the engagement letters as well as payroll summaries produced before the Court, the Claimant was neither engaged nor paid on a daily basis. There is now firm jurisprudence from this Court that under Section 37 of the Employment Act, an employee who works continuously for at least one (1) month is deemed to be on term contract by operation of law (see ***Wilfred Bukachi Opwaka v Ready Consultancy Company Limited [2012 eKLR]*** and ***Fred Medembei Shilagava v Emco Billets and Steel Limited [2015] eKLR***)

14. Consequently, the inescapable finding under this head is that the Claimant was a regular employee under term contract.

The Termination

15. The Respondent's defence to the Claimant's claim for unlawful and unfair termination is that the employment contract lapsed. The Claimant's employment was terminated by letter dated 25th June 2010 stating as follows:

“RE: TERMINATION OF CASUAL APPOINTMENT *The above subject refers.*

The office has decided to terminate your services with effect from 1st July 2010. You are therefore required to handover to your immediate supervisors, any possessions of the council under your custody.

The council will get in touch with you in case your services are required in the near future.

I take this opportunity to thank you for the services rendered to the council and at the same time wish you well in your endeavor. (Signed)

S.N. Musembi

TOWN CLERK.”

16. This letter specifically states that the Claimant's employment was terminated and no evidence of lapse of contract was adduced before the Court. It is also evident that no reason was advanced for the termination as required under Section 43 of the Employment Act, 2007. Moreover, the procedural fairness requirements set out under Section 41 of the Act were not adhered to.

17. It seems to me therefore that the termination of the Claimant's employment was unjustifiable and unfair and he is entitled to compensation.

Remedies

18. Pursuant to the finding that the termination of the Claimant's employment was unfair both substantively and procedurally, I award him six (6) months' salary in compensation. In making this

award, I have taken into account the Claimant's length of service and the Respondent's conduct in the termination transaction. I also award the Claimant one (1) month's salary in lieu of notice.

19. The claims for underpayment, house allowance, leave allowance, severance pay, general and punitive damages were not proved and are dismissed.

20. Ultimately, I enter judgment in favour of the Claimant as follows:

- a. 6 months' salary in compensation.....Kshs. 39,000
- b. 1 month's salary in lieu of notice.....6,500
- Total.....45,500**

21. The Judgment amount will attract interest at Court rates from the date of Judgment until payment in full.

22. I direct the Respondent to issue the Claimant with a certificate of service and to pay the costs of this case.

23. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 4TH DAY OF NOVEMBER 2016

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JUDGE

Appearance:

Mr. Nyasimi for the Claimant

Mr. Molenje for the Respondent