



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 74 OF 2012

HAMOUD MWINYI MGUZA.....CLAIMANT

v

MOMBASA WATER SUPPLY & SANITATION CO. LTD.....RESPONDENT

JUDGMENT

1. Hamoud Mwinyi Mguza (Claimant) filed a Memorandum of Claim against Mombasa Water Supply and Sanitation Co. Ltd (Respondent) on 3 December 2012 and he stated the issue in dispute *as non-payment of salary and unlawful suspension of the Claimant by the Respondent*.
2. The Claimant had through a letter dated 23 April 2008 been offered employment as Administration Manager MMWS4 by the Ministry of Water and Irrigation (NWCPC) (contract 1).
3. The contract was for a fixed term of 3 years commencing on 1 May 2008. The Claimant accepted the offer. The contract was therefore to expire on or around 30 April 2011.
4. On 15 December 2008, the Claimant wrote to the Respondent's Managing Director seeking that his job group be adjusted from group 4 to 3 and that he be paid arrears from 1 May 2008. His reason was that all Managers were in job group 3.
5. The Respondent replied through a letter dated 17 December 2008 noting his request but affirming what he had been offered and stating that any new negotiations should wait the expiry of the contract.
6. On or around 25 March 2011 (towards the expiry of the contract), the Claimant was appraised and he was give a score of 63.3%. A report dated 21 April 2011 and signed between 9 May 2011 and 11 May 2011 was prepared.
7. The report recommended that the Claimant's contract be renewed for 3 years.
8. On 15 June 2011 the Respondent wrote to the Permanent Secretary, Ministry of Water and Irrigation informing him that the Claimant's contract had expired and that the Claimant had been appraised for purposes of contract renewal.
9. The letter also informed the Permanent Secretary that the Respondent's Corporate Management Team had rejected the Appraisal Committee's recommendation for renewal of the Claimant's contract for 3 years but instead recommended that the contract be extended for only 6 months with effect from 1 May 2011 because of his poor performance, and that a review be carried out after three months.
10. In the meantime, the Claimant wrote to the Respondent on 9 May 2011 requesting to be paid his gratuity for the contract that had expired. Through a letter dated 10 May 2011 the Respondent

- confirmed that the Claimant would be paid gratuity of Kshs 855,115/63 with the May 2011 pay.
11. On 19 September 2011 (5 months after expiry of contract 1), the Respondent wrote to the Claimant offering him a new one year contract (contract 2) effective 1 May 2011 as Administration Manager Grade 4(12) at a basic pay of Kshs 85,517/-, house allowance of Kshs 30,000/- and commuter allowance of Kshs 2,200/-.
 12. On 27 October 2011 the Respondent wrote to the Claimant informing him that the Board of Directors had agreed to renew/give him a one year contract, subject to review (this letter should have preceded contract 2).
 13. The same day the Claimant wrote to the Respondent's Managing Director raising certain concerns including that the Appraisal Committee had recommended that the contract renewal be for 3 years and seeking the Corporate Management Team minutes which rejected renewal for 3 years.
 14. The Claimant also raised issues about his grading at job group 4. Pending resolution of the issues raised, the Claimant did not sign contract 2 in acceptance.
 15. On 22 November 2011, the Respondent's Human Resource & Administration Committee met to discuss among other agenda complaints from the Claimant on appraisal. The meeting resolved that the Claimant should sign the offer (contract 2) within one week.
 16. As a consequence, the Respondent wrote to the Claimant on 23 November 2011 and advised him that the Board of Directors (Human Resource Committee) had considered his letter of 27 October 2011 and decided to uphold the renewal of the contract for one year and asking him to return a copy thereof signifying his acceptance within 7 days or the offer would be withdrawn.
 17. Arising from the letter, the Claimant appended his signature to the contract dated 19 September 2011 on 29 November 2011 (contract 2 - this contract was backdated and therefore was to expire on 30 April 2012). In essence, the Claimant was accepting contract 2 six months into its 1 year term.
 18. Contract 2 had a clause on renewal and the Claimant was expected to request for renewal at least 3 months before the expiry of the term.
 19. On 1 February 2012 the Claimant wrote to the Respondent requesting for a renewal of contract 2.
 20. On 30 April 2012, the Respondent wrote to the Claimant advising him that contract 2 had been renewed for one month (contract 3 - [1 May 2012 to 31 May 2012]).
 21. When contract 3 expired the Respondent again wrote to the Claimant on 5 June 2012 advising that his contract had been extended for 3 months (contract 4 - [1 June 2012 to 31 August 2012]). The terms and conditions were to remain the same.
 22. On 27 September 2012 the Respondent wrote to the Claimant advising him that his services were being terminated with effect from 30 September 2012 and that he had not succeeded in the interviews for the position of Administration Manager.
 23. The letter informed the Claimant of his final dues. The dues as calculated by the Respondent amounted to Kshs 186,852/- and comprised gratuity for 5 months (May 2012 to September 2012) and pending leave days.
 24. On 10 October 2012 the Claimant wrote to the Respondent stating that he should have been paid 3 months' salary in lieu of notice amounting to Kshs 345,256/32 pursuant to clause 19 of the employment contract, because he was not on a fixed term contract.
 25. With the above narration, the Court can now set out the respective parties contentions.

Claimant's case

26. The Claimant contends that the decision communicated on 23 November 2011 to renew contract 1 for one year was not justifiable because other employees had their contracts renewed for 3 years and that his request for a 3 year renewal was unreasonably refused.
27. In testimony, the Claimant stated that the Head of Commercial Services Mr. Barrack Otieno with whom they were appraised got 74% (same rating range) and was given a 3 year renewal and that this showed he was discriminated against.
28. The Claimant also contended that he was under graded and thus underpaid salary and house allowance.
29. In testimony, he stated that his job group was indicated as job group 3 in the Staff Performance Appraisal Form and the starting salary for this job group was Kshs 75,000/- and house allowance of Kshs 40,000/- and not Kshs 70,000/- and Kshs 30,000/- respectively, based on Guva Consultancies International Ltd Final report.

30. The Claimant also stated that even under contract 2 he was still being underpaid, as he was getting Kshs 85,517/- and Kshs 30,000/- instead of Kshs 128,275/- .
31. Lastly, the Claimant contends that his termination was in contravention of the Employment Act, 2007 and the Labour Institutions Act because he was not given notice and he is therefore entitled to damages, and salaries he would have earned had his contract been renewed for 3 years amounting to Kshs 3,468,972/- (upto 30 April 2014).
32. In cross-examination, the Claimant confirmed that the Respondent was incorporated on 18 March 2011 though his claim against it dates to 2008 and that his letter of appointment was issued by the Ministry of Water and that the job group stated was job group 4.
33. He also confirmed that he signed the contract to acknowledge he agreed with the terms, but under duress. On the consultant's report he confirmed the report was not signed but had been implemented after being adopted by the Respondent's Board.
34. He also agreed that renewal was not automatic and that he made a request for renewal on 1 February 2012.
35. The Claimant also confirmed he was paid Kshs 186,852/- at end of contract 4 as final dues and that he was not dismissed or penalized on disciplinary grounds.

Respondent's case

36. The Respondent in its Response asserted that contract 1 between it and the Claimant expired on 1 May 2011 and that it offered to renew the same for 1 more year, an offer accepted by the Claimant on 29 November 2011 (contract 2).
37. The second contract, according to the Respondent was to run until 1 May 2012 and it was renewed twice upto 31 August 2012 (contracts 3 and 4).
38. The Respondent further asserts that it advertised the position of Administration Manager and that the Claimant was not successful in the venture to be recruited thus leading to the termination. After the termination, the Claimant was paid all his dues.
39. The Respondent called its Assistant Manager, Human Resources, Amos Galole. The witness referred to the various letters renewing and extending the Claimant's contracts and stated that contract 4 expired on 31 August 2012 but that the Claimant worked until end of September 2012. According to the witness the contract expired and the Claimant was not terminated.
40. The Court notes that the Respondent annexed to its Response several show cause letters given to the Claimant but the same were not referred to at all in testimony.

Issues for determination

41. The case presented is at core, one of unfair termination and the attendant entitlements of an employee under the employment relationship on separation. Some incidental issues may arise. The Court has therefore deemed it fit to discuss the issues under sub themes as hereunder.

Liability of Respondent prior to incorporation in 2011

42. The Respondent advanced a defence that it was incorporated in 2011 and filed a copy of its certificate of incorporation in its Further List of Documents. While this defence which was not pursued to its logical conclusion, the Court presumes that the Respondent was alleging that it could not be responsible for any liabilities arising before the date of incorporation.
43. But the evidence placed before Court does not lead to the path suggested by the Respondent. Contract 1 dated 23 April 2008 was signed by Anthony M. Chitavi as Managing Director of an entity called NWCPC under the Ministry of Water. The letter though done on a letterhead embossed with the name of Ministry of Water and Irrigation (NWCPC) clearly had also the name Mombasa Municipality Water Supply. The postal address given in the letter was P.O. Box 1100-80100 Mombasa.
44. Contract 2 dated 19 September 2011 was signed by Moses Kinya, Respondent's Acting Managing Director. The letter had similar details.
45. The letter informing the Claimant of his gratuity at expiry of contract 1 was signed by the said Mr. Kinya and it had the Respondent's details. If the Respondent's defence had merit then the

- Respondent had no business paying the Claimant gratuity at the expiry of contract 1.
46. The Respondent did not explain under what circumstances it assumed liability for the gratuity or disclose who was paying the Claimant's remuneration prior to 2011.
47. Further, it is public knowledge that the water sector underwent a lot of reforms at the material time and various juristic bodies were created to perform duties/provide services which had initially been under the direct responsibility of the Ministry of Water.
48. The Respondent cannot escape legal liability in regard to the Claimant's contractual entitlements on the ground that it was incorporated in 2011.

Was it termination or expiry of contract?

49. The Claimant pleaded and testified that he was terminated without justifiable cause or reason and in contravention of the applicable statutes.
50. The Respondent on its part contends that contract 4 lapsed (expired by effluxion of time).
51. Contract 1 was express that it would last for a duration of 3 years and that it could be terminated before the due date by giving of 3 months notice. The contract would have ended on 30 April 2011.
52. Contract 1 did not have any provision on renewal.
53. When contract 1 was about to expire, the Claimant was appraised but it was not until 19 September 2011 that the Respondent wrote to him to inform him that the contract had been renewed for 1 more year (contract 2). Contract 2 was backdated to 1 May 2011.
54. The Claimant raised several issues on the 1 year renewal but the Respondent did not accede to his demands and gave him an ultimatum to sign or leave. He opted to sign.
55. Contract 2 therefore was expected to last until 30 April 2012. Contract 2, unlike contract 1 had a provision for renewal. The renewal provision required the Claimant to make a written request at least 3 months before the expiry date.
56. In this regard, the Claimant should have signified his request latest by end of January 2012. The Claimant made a renewal request through a letter dated 1 February 2012.
57. A minute in the letter of request indicate that the Respondent decided to constitute a Committee to evaluate the Claimant. The Court was not informed whether an Evaluation Committee was constituted and what its recommendations were. On 30 April 2012, the Respondent advised the Claimant that he had been offered a 1 month extension up to 31 May 2012 (contract 3). The other terms and conditions were to remain the same.
58. On 5 June 2012 the Respondent informed the Claimant that his employment was being extended for 3 months-upto 31 August 2012 (contract 4). The letter advised that the terms and conditions would remain the same.
59. On 27 September 2012, the Respondent wrote to the Claimant informing him that his services were being terminated with effect from 30 September 2012 and that he had not been successful in the interviews for the position he held.
60. The Respondent did not inform the Court under what circumstances the Claimant served after 31 August 2012 (contract 5) when the 3 month extension expired on 31 August 2012, i.e. whether it was in writing or verbal. No extension letter was produced.
61. What the Court can conclude is that after 31 August 2012, the Claimant was allowed by the Respondent to hold over after the expiry of the contract. The Respondent decided to roll over contract 4 into contract 5.
62. During the short life of contract 5, a factual presumption arises that the Claimant was serving on same terms and conditions as contracts 2, 3 and 4 or at will (a discredited and controversial doctrine in modern times), for an unknown term, which could be determined by appropriate notice within the statutory protections in the Employment Act, 2007.
63. The Respondent had allowed the Claimant who had been serving on a fixed term contract to continue working beyond the expiry date.
64. This was a new contract which commenced on 1 September 2012 (contract 5). And in the view of the Court, it is contract 5 which the Respondent terminated through its letter dated 27 September 2012.
65. The letter of 27 September 2012 is also clear and unambiguous in its language that the Respondent's Board had made a decision to terminate the services of the Claimant with effect

from 30 September 2012 due to the fact that the contract had expired on 31 August 2012.

66. Under these circumstances the Court finds that the Claimant's contract 4 expired on the agreed and ascertained date but the Respondent opted to hold it over/roll it over and thus a new contract (contract 5) was created and it is this new contract 5 whose terms and conditions retained the terms and conditions of contracts 2, 3 and 4 that was terminated. It did not lapse by effluxion of time.

Whether termination unfair

Procedural fairness

67. The Employment Act, 2007 has now made it part of the Kenyan law that a fair procedure must be followed before terminating the services of an employee. In a sense, sections 41, 43, 45 and 47 of the Employment Act, 2007 has afforded ordinary employees security of tenure. The Court has already concluded the Claimant was serving at will under contract 5. But he was still entitled to be terminated in accordance with a fair procedure.
68. Section 41 of the Employment Act, 2007 has provided for the procedure to be followed when terminating the services of an employee on the grounds of *misconduct, poor performance or physical incapacity*. The Claimant was not terminated on these grounds and so on a literal interpretation, section 41 of the Act would not be applicable.
69. But that literal application does not give the correct legal position. Section 45(2) (c) of the Employment Act, 2007 subjects all terminations to the test of a fair procedure without the apparent limitations of section 41 of the Act.
70. The Statute has not explained what the fair procedure under section 45(2) (c) of the Employment Act, 2007 entails. But in my view, there is no need to reinvent the wheel. What section 41 of the Act requires is application of natural justice or what is referred to as procedural fairness in employment law. Similarly, section 45(2) (c) of the Act requires observance of some form of procedural fairness and by implication, the *audi alteram partem* (hear the other side if a decision will affect them) rule would fill in the void. The *audi* rule has always been a fundamental part of justice. It's been made part of the employment relationship in Kenya.
71. It is common cause that the Claimant applied and did not succeed in the interviews. But in so far as he was serving on a contract of an indefinite duration (contract 5) which commenced on 1 September 2012, he was entitled to be heard before termination. It was not suggested that the Respondent or the 12th full Board meeting gave him an opportunity to be heard.
72. The termination was not carried out in accordance with a fair procedure and therefore was procedurally unfair.

Substantive fairness

73. The Respondent did not address the question of the substantive fairness of the termination. It took the view that the contract lapsed.
74. But the reason given in the letter of termination was that the Claimant was *not successful during the selection process*.
75. Because of the conclusion reached by the Court on procedural fairness, it is not necessary for the Court to evaluate the reasons for termination.
76. Before discussing relief, the Court notes that the Respondent's human resource function was not the best. At best, as it was applied to the case of the Claimant, it exhibited symptoms of systemic weaknesses and failings. It was dysfunctional, as contracts would be renewed many months after expiry.
77. The Court cannot understand why an organisation such as the Respondent was renewing the Claimant's contracts several months after its supposed expiry and backdating the same.
78. It is also not clear why the Corporate Management Team rejected the recommendations of the Appraisal Committee to renew the Claimant's contract 1 for 3 years.

Claimant's job group

79. The Claimant also contended that he was under graded and thus underpaid. Contract 1 informed the Claimant that his grade was MMWS 4. He signed the contract. In testimony, he stated that he established that other managers were on job group 3 and not 4 he had been put in.
80. The Claimant raised the grading issue through a letter dated 15 December 2008. The Respondent replied on 17 December 2008 and stated the grading was part of what had been offered and accepted.
81. To buttress his position, the Claimant made reference to the Staff Performance Appraisal Report which indicated his job group as 3 under the personal particulars and also cited *Consultancy Services on Human Resource Evaluation for Mombasa Water and Sewerage Company* by Guva Consultancies International Ltd dated Mombasa December 2009.
82. The Minutes of the Full Board meeting no. 4 held on 1 December 2011 suggest that the Respondent accepted the recommendations of the Guva Consultants (Minute 4.1.1). But no material was placed before Court to show how and whether the recommendations were to be backdated and in the case of the Claimant whether the recommendations would be applied from 1 May 2008 when his contract commenced.
83. On the discrepancy between the job group in the Staff Performance Appraisal report and the letter of contract, the letter of contract being a primary document enshrining what parties have agreed to would prevail.
84. In the view of the Court, what the Claimant seeks in terms of grading would amount to the Court rewriting or amending what the parties through their party autonomy agreed.

Whether failure to renew contract for 3 years was discriminatory/unlawful

85. The Claimant contended that the failure to renew his contract for 3 years was discriminatory. During the appraisal, the Claimant scored 63.3%. First, he contended that the Appraisal Committee recommended that the renewal be for 3 years but the Corporate Management Team rejected the recommendation. Secondly, he contended that the Head of Commercial Juma Barrack Otieno who scored 74% in the appraisal had his contract renewed for 3 years. According to the Claimant, the score awarded to the Head of Commercial Services was in the same range with his score of 63.3%.
86. The Claimant sought the minutes of the Corporate Management Team meeting which rejected the Appraisal Committee recommendations but were never furnished with copies.
87. The Claimant asserts this was discriminatory and illegal.
88. Section 5 of the Employment Act, 2007 obliges the Court to promote equality of opportunity in employment. The section also requires employers to promote equal opportunity in employment and to strive to eliminate discrimination in the workplace.
89. Section 5(3)(b) of the Act outrightly outlaw discrimination in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.
90. The appraisal of Barrack Otieno was carried out in 2009 and it does not assist the Claimant's case much.
91. In the Respondent's letter to the Permanent Secretary, Ministry of Water dated 15 June 2011, a reason was given why the Claimant's renewal was for a lesser term. The reason was that his overall staff performance was low and that another evaluation would be done after 3 months.
92. Further, the Claimant achieved a score of 63.3%. The officer he cited received 74%. It is correct that the scores were within the same range but nevertheless there is a difference between 63% and 74%.
93. The Court is unable to concede to the invitation by the Claimant that he was discriminated against on the basis of the material placed before Court.

Appropriate relief

Three months house allowance

94. The Claimant sought Kshs 105,000/- under this head. This head of relief was founded on under grading as pleaded in paragraph 8 of the Memorandum of Claim. The Claimant has not succeeded

in the under grading issue and therefore this head of relief is declined.

Three month salary in lieu of notice

95. The Claimant has succeeded in his claim that the termination was unlawful. The terms of his employment after 31 August 2012 were not reduced into writing. The last complete contract the parties had was contract 2. The contract provided for termination by the giving of 3 months prior notice or pay in lieu of notice.
96. The letter dated 30 April 2012 which created contract 3 was explicit that the terms and conditions of contract 2 would remain the same. The letter of 5 June 2012 which created contract 4 retained the terms and conditions.
97. By implication and based on the retention of the terms and conditions of the previous contracts, the Court would invoke the provisions of clause 19 of contract 2 as saved by contracts 3 and 4 and hold that 3 months' pay in lieu of notice would be reasonable and award the Claimant the equivalent of 3 months' salary in lieu of notice assessed in the sum of Kshs 353,151/-.

Commuter allowance

98. For reasons similar to those under house allowance claim, this head of claim is declined.

Twelve months salary pursuant to section 15 of Labour Institutions Act

99. The Claimant sought the maximum twelve months compensation for unfair termination (Kshs 1,601,064/-). He made reference to section 15 of the Labour Institutions Act. The section was repealed in 2011. The applicable statute is section 49 of the Employment Act, 2007.
100. The Court has reached a conclusion the termination was unfair. The remedy under the section is discretionary. Section 49(4) of the Act has set out some factors the Court ought to consider.
101. The formal contract between the parties had expired on 31 August 2012. The Claimant has secured alternative employment with the County Government of Kwale. He was paid gratuity at end of the respective contracts.
102. Considering the mentioned factors, the Court would award him the equivalent of 3 months gross wages assessed at Kshs 353,151/-.

Underpayments

103. The Claimant sought under this head Kshs 973,953/- for the period April 2008 to September 2012. For reasons similar to those discussed under the paragraph on house allowance, this head of claim is declined.

Damages for unexpired period of contract from October 2011 to April 2014

104. The Claimant sought Kshs 3,468,972/- under this head. In view of the conclusions on the nature of the relationship between the parties after 31 August 2012 and that the Claimant failed to demonstrate either a contractual or statutory basis for this head of claim, this relief fails.

Conclusion and Orders

105. From the foregoing evaluation, the Court finds and holds that the Claimant was an employee on terms similar to those of contracts 2,3 and 4 or at will and was unfairly terminated and is awarded and the Respondent is ordered to pay him

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|---|----------------|
| a. Three months salary in lieu of Notice | Kshs 353,151/- |
| b. Three months gross wages as compensation | Kshs 353,151/- |

TOTAL Kshs 706,302/-

106.The claims for house allowance, commuter allowance, underpayments and damages for unexpired period of contract are dismissed.

107.The Claimant is awarded costs.

Delivered, dated and signed in open Court in Mombasa on this 11th day of July 2014.

Radido Stephen

Judge

Appearances

For Claimant Mr. Obara instructed by Obara & Obara Advocates

For Respondent Mr. Otieno instructed by Otieno Okeyo & Co. Advocates