



REPUBLIC OF KENYA



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**Osoti v Trees for the Future INC (Cause E002 of 2023)  
[2024] KEELRC 962 (KLR) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 962 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E002 OF 2023**

**CN BAARI, J**

**MAY 2, 2024**

**BETWEEN**

**GEDION O. OSOTI ..... CLAIMANT**

**AND**

**TREES FOR THE FUTURE INC ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. Vide a Memorandum of Claim dated 13<sup>th</sup> January, 2023, the Claimant sued the Respondent seeking the following remedies: -
  - i. A declaration that he was constructively dismissed.
  - ii. A declaration that his termination was unfair and unlawful.
  - iii. Kshs 22,916,666.50/= comprising of 12 month's compensation for unlawful termination, one months' pay in lieu of notice and unpaid salary for the remainder of the contract period.
  - iv. Costs of the suit and interests.
  - v. A certificate of service.
2. The Respondent entered appearance on 9<sup>th</sup> February, 2023, and filed a Statement of Response dated 1<sup>st</sup> February, 2023, wherein, it refuted the Claimant's assertions and further averred that his employment contract ended by effluxion of time.
3. The matter proceeded for hearing on 4<sup>th</sup> October, 2023, with the Claimant testifying on his own behalf and 4 witnesses testifying on behalf of the Respondent.
4. Both parties closed their respective cases on the first hearing, paving way to filing of submissions.



5. Both parties filed submissions in the matter.

### **The Claimant's Case**

6. The Claimant's case is that he was employed by the Respondent on 1<sup>st</sup> January, 2019 as Lead Technician, and through sheer hard work and skill, rose to the position of Country director.
7. It is his case that his contract as Country Director was renewed on 1<sup>st</sup> January, 2022 for a period of 4 years at a consolidated monthly salary of Kshs 353,752.52/= . He states further that his salary was raised to Kshs 458,333.33/= on 1<sup>st</sup> September, 2022 due to increased workload.
8. It is his contention that he was sent on unlawful indefinite administrative leave on 4<sup>th</sup> October, 2022 contrary to fair labour practices.
9. He asserts that the unfair administrative leave was engineered so as to terminate him constructively on the false pretext that his contract had ended by effluxion of time.
10. It is his assertion that soon after being sent on administrative leave, he was terminated on 12<sup>th</sup> December, 2022. He states that there was no apparent reason for the termination and the procedure for dismissal in Section 41 of the Employment Act was not adhered to.
11. It is his case that the termination of his contract was based on an audit report whose findings were not shared with him. He states that he was not given reasons for the termination of his contract.
12. He stated that his December, 2022 salary was withheld upon termination of his contract. It is his position that he was informed of the non-renewal of his contract, even when the said contract was still valid for another three years.
13. On cross-examination, the Claimant confirmed that his previous contracts were for one year each, and that only the 2022 was valid for four years. He avers further that a meeting was held to review the contract terms and which also affected other employees of the Respondent such as Ben Oucho and Elijah Ojija, whose contracts term was reviewed to two years.
14. The Claimant's further evidence on cross-exam, is that he received his 2022 contract via email, but confirms that he had not produced the forwarding email in evidence.
15. The Claimant further confirms that the administrative leave was not a termination and that it was meant to enhance service delivery. He further testified that he was required to cooperate with the auditors.
16. It is his testimony that he cleared with the Respondent, but did not sign a clearance form. He confirmed that handing over took place on 10<sup>th</sup> October, 2022
17. It is the Claimant's further evidence that he received salary in the period he was on administrative leave except December, 2022. It is his prayer that the court finds his termination unfair.

### **The Respondent's Case.**

18. It is the Respondent's case that the Claimant was issued with a one-year contract and that upon the lapse of the contract, it was its exclusive prerogative to either renew it or not.
19. It asserts that the Claimant's contract lapsed by effluxion of time and that the 4-year contract he produced was a forgery.



20. The Respondent affirms that the decision to send the Claimant on administrative leave was arrived at after realization of governance challenges bordering on loss of company funds, and that the decision was made in order to pave way for an internal audit.
21. It is their further contention that during the audit, the Claimant took a rude and uncooperative stance by refusing to account for his disbursements. It states that the Claimant's contract lapsed while the audit was ongoing, and after conclusion of the audit, a decision was made not to renew his contract.
22. It is the Respondent's case that constructive dismissal does not arise as the Claimant did not resign. It also avows that the Claimant is not entitled to any damages as the contract lapsed by effluxion of time.
23. In his oral testimony, RW1, Pius Juma Odawo, stated that as the Respondent's Human Resource specialist, he was the one responsible for preparation of contracts and had custody of employee records.
24. It is RW1's evidence that he prepared the Claimant's contract and forwarded it for approval on 20<sup>th</sup> January, 2022, and that there was no way the contract could have been executed on 10<sup>th</sup> January, 2022 as evinced by the contract produced by the Claimant.
25. It is RW1's further testimony that the Claimant's contract was only valid for one year, and that it lapsed in December, 2022. He confirmed that the Claimant did not report to him.
26. It is his evidence that the Claimant's contract produced by the Respondent was neither signed, dated nor sealed. He states that the Claimant was the custodian of the company seal and that he had no access to it.
27. He additionally states that the Claimant has refused to clear with the Respondent to enable payment of his final dues.
28. On his part, RW2 Daniel Muchungu the document examiner, testified that the contract produced by the Claimant was printed from a different source from the Respondent's normal contracts, raising doubts of its authenticity.
29. RW3 Brandy Lellou the Respondent's program coordinator, testified that she did not sign the contract produced by the Claimant and that the Respondent has never issued contracts to employees that were beyond one year, hence the Claimant's contract is not authentic.
30. RW3 denies signing the contract produced in evidence by the Claimant, and asserts that her signature could easily have been copied to the document. It is her evidence that the Claimant's contract was sent to her by RW1 and copied to the Claimant.
31. She avers that she did not receive a signed contract from the Claimant, but does not remember making a follow-up on the same on a signed copy. She further confirmed having a meeting with the Claimant which she avers concerned the Respondent's projects and not term of the contract.
32. It is RW3's evidence that the results of the audit made it difficult for the Respondent to continue working with the Claimant, especially due to his failure to cooperate with the auditors who were conducting the audit.
33. It is RW3's evidence that the audit was meant to review the Respondent's financial situation, hence the report was thus not for the consumption of the employees.
34. She asserts that the audit was for the purposes of checking the company's financial situation and not for termination of the Claimant.
35. RW4 Vincent Mainga testified that the Claimant was aware that his contract was to lapse in December, 2022, but did not avail himself to clear.



### **The Claimant's Submissions**

36. The Claimant submits that in the absence of the one-year contract alleged by the Respondent, his 4-year contract should hold sway.
37. It is his submission that the Respondent's unilateral decision to terminate his 4-year contract via the letter dated 23<sup>rd</sup> November 2022 was prima facie evidence of unfair termination. He submits further that the Respondent should have followed the law on termination of contracts as stipulated in Sections 41, 43, 44, 45 and 47 of the *Employment Act*.
38. He affirms that the Respondent never provided him with details of the accusations levelled against him, and neither did it give him the opportunity to respond to the charges, hence the termination was unlawful.
39. It is his submission that it is not the court's business to rewrite contracts between parties unless coercion, fraud or undue influence is proved. He cites the Court of Appeal case of *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* [2017] eKLR.
40. The Claimant further submits that in the absence of the 1-year contract alleged by the Respondent issues of forgery do not arise.
41. On whether he is entitled to the remedies sought, the Claimant submits that he is entitled to damages on the basis of his contract being unilaterally terminated.
42. It is the Claimant's further submission that the court should award him costs on the strength of the general rule that costs follow the event.

### **The Respondent's Submissions.**

43. The Respondent on its part, submits that it is a Non-profit NGO reliant on donor funding and that its budget is reviewed on a yearly basis based on availability of funds, hence it only issues one-year fixed term contracts.
44. It is the Respondent's further submission that the Claimant was employed on 1<sup>st</sup> January, 2019 and his contract was renewed yearly up to December, 2022, when it ran out by effluxion of time. It asserts that it is unconscionable how the Claimant would be offered a 4-year contract yet other employees were being offered annual contracts.
45. The Respondent equally submits that the Claimant had not resigned, hence cannot claim constructive dismissal. It relies on the Court of Appeal case of *Coca Cola East Africa LTD v Maria Kagai Ligaga* (2015) eKLR and *Milton M Isanya v Aga Khan Hospital Kisumu* (2017) eKLR, where resignation was cited as a vital ingredient for constructive dismissal. The Respondent further stresses that a party cannot plead both constructive dismissal and unlawful dismissal at the same time.
46. Regarding the length of the Claimant's contract, the Respondent urges this court to be guided by RW1's testimony on the procedure for renewal of contracts. In emphasising that the contract produced by the Claimant was forged, the Respondent relies on the case of *Kenya Engineering Workers Union v Narcol Aluminium Rolling Mills Limited* 2015 eKLR where the court dismissed a claim based on forged documents.
47. In further support of the Claimant's contract ending after 1 year by effluxion of time, the Respondent wonders why the Claimant did not write back to them affirming the existence of the four-year contract. The Respondent affirms that fixed term contracts do not carry any expectation of renewal, and the



employer is not obligated to explain the reasons for non-renewal based on the case of *Nguru v Buds and Blooms Limited* [2022] KEELRC 4007 (KLR).

48. In respect of the Claimant's entitlement to the reliefs sought, the Respondent submits to the contrary. It asserts that it owes the Claimant's salary for December, 2022 subject to him clearing.
49. On the claim for one-month salary in lieu of notice, the Respondent states that the issue does not arise as the contract rightfully lapsed. It also submits against an award of twelve months salary as compensation, as there was no unlawful dismissal.

### **Analysis and Determination**

50. I have carefully considered the pleadings, the witnesses' oral testimonies and the rival submissions. The issues that present for my determination are:
  - i. Whether the Claimant was constructively dismissed.
  - ii. Whether the Claimant's contract lapsed by effluxion of time.
  - iii. Whether the Claimant's suspension and subsequent non-renewal of contract was justified.
  - iv. Whether the Claimant is entitled to the remedies sought

### **Whether the Claimant was constructively dismissed**

51. The Claimant claims to have been constructively dismissed on the premise that the administrative leave issued to him, was engineered so as to terminate his contract on the false pretext that his contract had ended by effluxion of time. The *Black's Law Dictionary* (Tenth Edition) defines constructive dismissal as:

“An employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer's course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”

52. Lord Denning in *Western Excavating ECC Ltd v Sharp* (1978) 2 WLR 344, had occasion to describe constructive dismissal in the following words: -

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”

53. The Claimant was sent on what the Respondent referred to as administrative leave. Parties were in agreement that during the period of administrative leave, the Claimant was still deemed to be an



employee of the Respondent, on full salary and entitled to all his benefits. Both the Claimant and the Respondent confirmed this to have been the position in their oral evidence.

54. The Respondent's assertion is that the Claimant declined to co-operate with the auditors brought in to conduct the audit of the Respondent's operations, which action informed the non-renewal of his contract when it lapsed in December, 2022. The Respondent thus insists that it did not dismiss the Claimant, but rather his contract ended by effluxion of time.
55. From the foregone definition of constructive dismissal, a salient feature is that an employee must leave the service of the employer through resignation, either with or without notice.
56. The Claimant did not at all allege to have resigned from the service of the Respondent. his position is that he was issued notice of non-renewal of contract dated 23<sup>rd</sup> November, 2022 which informed him that his contract was not going to be renewed when it expires in December, 2022.
57. In *Milton M Isanya Versus Aga Khan Hospital Kisumu* (2017) eKLR, Maureen Onyango J, expressed herself as follows:

“In constructive dismissal, the desire to resign is from the employee as a result of a hostile working environment or treatment by the employer. A constructive dismissal occurs where the employer does not express the threat or desire to terminate employment but frustrates the employee to the extent that the employee tender's resignation.”

58. The circumstances under which the Claimant left the service of the Respondent, does not bear a single ingredient of a constructive dismissal. I thus hold that the Claimant has not proved a case of constructive dismissal.

#### **Whether the Claimant's contract lapsed by effluxion of time.**

59. The issue of the duration of the Claimant's contract is mired in confusion. On the one hand the Claimant claims that he was on a 4-year contract, while on the other hand the Respondent asserts that the Claimant was on a 1-year contract.
60. The Claimant's assertion is that his 2022 contract of service was for a term of four years, yet the Respondent terminated the same when he had served only one year of the four year term.
61. The Respondent on its part, denies ever issuing the Claimant or any other employee for that matter, a contract of more than one year. It termed a contract carrying a four-year term produced by the Claimant in evidence, a forgery and non-authentic.
62. The contract produced in evidence by the Respondent and said to have been issued to the Claimant, was neither signed, stamped nor sealed, while that produced by the Claimant was stamped and sealed on all pages. The question is which among the documents is authentic.
63. In her testimony, Brandy Lellou the Respondent's Programs Director did not provide sufficient reason why the contract was not signed. Apart from stating that she did not sign the Contract produced by the Claimant, she did not refute that the signature was hers, but merely avers that the signature was forged. It is however significant that this was evidence made on oath.
64. The Respondent produced contracts of service for a number of her employees issued between the year 2019 and 2022. None except the Claimant's carried a four year term.
65. Further, the Claimant told court that he was sent a contract by the Respondent via email, but did not produce the email forwarding his 2022 contract so as to ascertain the term of the said contract, and



the exchanges between the Claimant and the Respondent on the discussion to change the contract to a four year term, instead of one as alleged.

66. It is also not in dispute that the Claimant's previous contracts carried a one year renewable term.
67. In my view, there was no plausible explanation as to why only the Claimant was issued a four year contract, when all other employees were employed on one year renewable contracts. It is thus not convincing and especially where claims of forgeries have been made, and those claims not having been rebutted.
68. The court was told that the Claimant being the Respondent's Country Director, was the custodian of the company seal which further creates doubts in the mind of the court on whether he prepared, signed and sealed his own contracts. The allegation that he did not surrender the company seal when he left, further compounds the situation.
69. The court notes further that the evidence of the forensic document examiner on the authenticity of the contract produced in evidence by the Claimant was not controverted, which then casts doubt on the authenticity of the Claimant's contract which the forensic examiner termed a work of forgery.
70. In the premise the Court finds and holds that the Claimant has not sufficiently proved that his contract was for a four-year term.
71. The Respondent's case is that the Claimant's contract ended by effluxion of time being that the same was not renewed when it lapsed in December, 2022. The Claimant was issued a letter dated 23<sup>rd</sup> November, 2022, which he admitted receipt of, informing him of the Respondent's decision not to renew his contract.
72. The general rule is that a fixed term contract carries no expectation for renewal. It is however settled that a fixed term contracts with a renewal clause may create expectancy of renewal on the part of the employee based on previous contract renewals.
73. Where an employer creates a legitimate expectation and fails to renew the contract, the law deems the employee to have been unfairly terminated. (See *Samuel Chacha Mwita v. Kenya Medical Research Institute* (2014) eKLR).
74. From the Claimant's previous contracts with the Respondent, renewal was only subject to performance, availability of funding and the existence of the position. The letter of non-renewal did not cite any of these as the reason for the decision not to renew the Claimant's contract.
75. Having rolled over the Claimant's contracts annually since 2019 to 2022, it is my view that the Respondent created legitimate expectation that the Claimant's contract will be renewed after the natural expiry of the last contract.
76. By dint of having created a legitimate expectation, the Respondent owed the Claimant sufficient notice and valid reasons for the no-renewal of contract; the absence of which rendered the termination unfair.

#### **Whether the Claimant is entitled to the remedies sought Compensation for unfair termination**

77. The Claimant's termination has been found to be unfair premised on the Respondent having created legitimate expectation for renewal of contract and failure to inform him within reasonable time that his contract would not be renewed.
78. Considering that the Claimant was deemed to be an employee of the Respondent entitled to full salary and benefits while on administrative leave, and for reason that his contract was to lapse within a month of the notice, I deem an award of one month salary sufficient compensation for the unfair termination.



### **One months' pay in lieu of notice**

79. The Claimant was issued notice of non-renewal of contract dated 23<sup>rd</sup> November, 2022, and his contract was to lapse on 31<sup>st</sup> December, 2022. Although his salary for December, 2022 was not paid premised on his failure to clear with the Respondent, the Respondent has admitted that the Claimant is entitled to his December, 2022 salary subject only to him clearing.
80. This goes to confirm that the Claimant was issued notice and was deemed an employee of the Respondent throughout the notice period, and is therefore not entitled to pay in lieu of notice.
81. The claim thus fails and is dismissed.

### **Unpaid salary for the remainder of the contract period.**

82. The Claimant did not prove that his contract was valid for four years. Even so, Section 49 of the [Employment Act](#) does not envisage such a relief premised on the fact that there is no guarantee that the employee will serve their full contract term however long or short. This claim is declined.

### **A certificate of service**

83. A certificate of service is a statutory guarantee under Section 51 of the [Employment Act](#). The claim is allowed and the Respondent ordered to issue the Claimant with a certificate of service within 14 days of this judgment.
84. In whole, I make the following orders: -
- i. A declaration that the Claimant was unfairly terminated.
  - ii. Unconditional release of the Claimant's Salary for December, 2022 at Kshs. Kshs. 533,333.33/-
  - iii. One months' salary as compensation for the unfair termination at Kshs. 533,333.33/-
  - iv. The Respondent shall bear the costs of the suit.
85. Judgment of the court.

**DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 2<sup>ND</sup> DAY OF MAY, 2024.**

**CHRISTINE N. BAARI**

**JUDGE**

Appearance:

Mr. Otieno present for the Claimant

Ms. Kasioka present for the Respondent

Erwin Ongor - C/A

