



**Nandwa v National Communication Secretariat (Employment and Labour Relations
Petition E235 of 2023) [2024] KEELRC 1889 (KLR) (12 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1889 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E235 OF 2023**

AN MWAURE, J

JULY 12, 2024

BETWEEN

NELLY AWINJA NANDWA PETITIONER

AND

NATIONAL COMMUNICATION SECRETARIAT RESPONDENT

JUDGMENT

1. The Petitioner filed a Petition dated 11th December 2023.

Petitioner's Case

2. The Petitioner avers that the Respondent offered her employment as a Clerical Officer vide an offer letter dated 18/11/2005 which she accepted on 23/11/2005. In the course of her employment she rose to the rank of Accountant, Head of Finance and Accounting.
3. The Petitioner avers that during her employment, she was employed on a three- year contract which was consistently renewed for six times in a row. On 23/11/2020, her contract was renewed again vide a renewal letter dated 19/11/2020; the same was renewable.
4. The Petitioner avers that Clause 2.11 of the Respondent's Terms & Conditions of Service, 2002 required the Petitioner requests for contract renewal through its Communications Secretary, not less than three months before its expiry. Vide a letter dated 31/07/2023, she applied for renewal of her contract noting that her contract was lapsing on 22/11/2023.
5. The Petitioner avers that it was a mandatory requirement that receiving her renewal request, the Communications Secretary ought to have tabled the request to the Respondent's Board or its Committee for consideration and once the Board or Committee gave an approval, the employee would be informed.



6. However, the request was not tabled before the Board and it could not have been tabled before any of the Committees, as none of them sat to deliberate on the her request.
7. The Petitioner avers that vide a letter dated 22/11/2023, the Ag. Communications Secretary, Mr. Vincent Adul purported to refuse renewal of her contract. This decision was unilateral and in breach of clause 2.11 of the Terms & Conditions of Employment. Further, the letter was vague as it did not specify any deliberations tabled or who constituted the “Board” or “Committee” and the reasons why it made the said decision not to renew her contract.
8. The Petitioner avers that she was never supplied with any minutes confirming that there were deliberations resulting to non-renewal of her contract, whereas, the said decision by the board (if at all it there was such a meeting and resolutions) affected her employment, neither was she informed of the reasons of the decision in violation of her right to fair administrative action guaranteed under Article 47 (2) of the *Constitution*.
9. The Petitioner avers that she was unfairly terminated as she was not afforded a chance to be heard and there is no evidence that the termination of her employment was sanctioned by either the Respondent’s Board or Committee.
10. It is the Petitioner’s case that the termination of her employment denied her an opportunity to have her employment contract renewed for a further 3 years as she legitimately expected.
11. The Petitioner avers that she worked for the Respondent for 18 years and was never terminated any employee’s contract by effluxion of time.
12. Further, vide an internal memo dated 06/07/2023, he was appointed as part of the Respondent’s Budget Implementation Committee for the Financial Year 2023/2024. Hence, he legitimately expected that her contract would be automatically renewed as she was given tasks extending beyond 22/11/2023.
13. The Petitioner avers that she had a stifled relationship with the Ag. Communications Secretary as she filed a suit ELRC Petition No. E085 of 2022: *Nelly Awinja Nandwa v National Communication Secretariat* [2023] eKLR, wherein she prayed for a promotion to her rightful cadre of rank, given her experience and capacities, and further, for any underpayments that may have ensured from the Respondent’s actions of placing her in a lower employment cadre.
14. The Petitioner avers that upon hearing of the aforesaid petition, the judge ruled in her favour and granted her underpayments due amounting to KShs. 1,627,672. However, in contempt of the Court order, the Ag. Communications Secretary ignored and/or refused to approve and enforce these payments to the Petitioner until sometime in late October 2023.
15. The Petitioner further avers that subsequent to the above, the Respondent discriminated upon her in various ways, including intentionally leaving her out of social events attended by all Heads of Departments.
16. The Petitioner avers that upon the Judgment/Decretal sums being remitted to her and despite this being done with Mr. Adul’s approval, Mr. Adul in his capacity as Ag. Communications Secretary issued her with a Notice to Show Cause (NTSC) dated 23/10/2023 to demonstrate why disciplinary action should not be taken against her for remitting the sums to herself.
17. He thereafter reached out to the Petitioner’s bank and demanded that the remitted amounts be recalled back to the Respondent’s bank accounts.



18. The Petitioner avers that she subsequently wrote to the Principal Secretary, Mr. Edward Kisiang'ani, vide a letter dated 25/10/2023. The letter raised concerns about Mr. Adul's intents to deny her fruits of the Judgment, and her worries that, despite having applied for a renewal of her contract, she had not received any feedback despite numerous requests addressed to Mr. Adul.
19. The Petitioner avers that upon responding to the NTSC, Mr. Adul wrote her a letter on 14/11/2023 asking that she refunds the sum of KShs. 1,627,672 which had been paid pursuant to a Court Order.
20. The Petitioner avers that the Respondent invited her to a Disciplinary Committee hearing on 20/11/2023; she responded the same day and sought for more time to prepare for the hearing.
21. Subsequently, she was invited for a hearing on 29/11/2023 demonstrating the Respondent had no intentions to renew her contract beyond 22/11/2023. However, pending disciplinary proceeding against her, she received a letter of non-renewal of contract from Mr. Adul on 22/11/2023.

Respondent's Case

22. In opposition to the Petition, the Respondent filed a replying affidavit dated 10/04/2024.
23. The Respondent avers that it received the Applicant's request for renewal of contract within the stipulated timelines of her contract. The renewal was dependent upon her satisfactory performance.
24. The Respondent avers that a performance appraisal was undertaken and revealed discrepancies in her duties including incomplete tasks; lack of pro activeness; lack of teamwork; urgent need of counselling; lack of respect; and use of impolite language against fellow staff.
25. The Respondent avers that on 21/08/2023, it convened a performance management committee meeting to review and moderate the Petitioner's appraisal. The committee members noted the Petitioner's shortcomings and accepted she did not meet the expectations of her post.
26. The Respondent avers that the Committee recommended sanctions that the Petitioner be placed on a performance improvement programme.
27. The Respondent avers that it issued the Petitioner a NTSC dated 23/10/23 on grounds that she failed to conduct herself professionally and not following due process and attempting to make herself irregular payment of Kshs 1,627,672 and Kshs 222,568.
28. The Respondent avers that the Petitioner filed a response and appeared before the disciplinary committee. Upon deliberations, the committee found her culpable for the complaints against her.
29. It is the Respondent's case that the decision not to renew the Petitioner's contract was not unilateral as it was subjected to a performance management committee to moderate the appraisal undertaken by her supervisor.

Petitioner's Submissions

30. The Petitioner submitted that the Respondent failed to justify that she was not performing well; if she was a poor performer, nothing would have been easier for the Respondent than proving that there were verbal/written warnings issued to her, or that she had ever been placed on a performance improvement plan for the 18 years she worked for the Respondent.
31. It is the Petitioner's submission that there was no justifiable or substantive reason to warrant her termination, and none has been proven by the Respondent. The Respondent abruptly realised that her performance was not good, yet she had been promoted over the years due to her stellar performance.



32. The Petitioner submitted that the illegal and unlawful termination and/or non-renewal of her contract was actuated by malice and ill intention by her Supervisor, Mr. Adul. The unfair treatment towards her was not only unprocedural but also discriminatory in breach of Article 27 (1) of the Constitution.
33. The Petitioner submitted that by assuming imaginary authority and power to terminate her services without involving the Respondent's "Board" or "Committee" the Ag. Communications Secretary subjected the Petitioner to unjustified harassment, intimidation and mental torture that fell short of the Petitioner's dignity one, as a person, and as a senior staff of the Respondent in violation of Article 28 of the Constitution.
34. The Petitioner submitted that in breach of her right to access to information guaranteed under Article 35(1) of the Constitution, the Respondent failed to supply her with minutes of the alleged deliberations meeting that resolved not to renew her employment.
35. It is the Petitioner's submission that she was subjected to illegal harassment and mistreatment by the Ag. Communications Secretary; this was in violation of her right to fair labour practices as conferred in Article 41(1) of the Constitution.
36. It is the Petitioner's submission that the law and the her Terms and Conditions of Employment clearly prescribe the grounds and procedure for removal from office by way of termination by effluxion of time. These processes were intentionally avoided by persons with a personal vendetta against the Petitioner amounting to unfair administrative action in contravention of Article 47 of the Constitution.
37. The Petitioner submitted that the Respondent operates independently and has its own Board and distinct letterhead, cannot be said to be immune from employment claims when her employment contract as well as her Terms and Conditions of Employment were all issued by the Respondent.

Respondent's Submissions

38. The Respondent submitted that the reasons it relied upon before dismissing the Petitioner was valid and she ought to have conducted herself in the best way possible during the subsistence of her employment.
39. The Respondents submitted that the Petitioner was taken through due process that was fair and in compliance with Article 41 of the Constitution that requires the employee is notified of intended proceedings.
40. It is the Respondents submission that it is trite law that there can be no general damages awarded in a contractual relationship as was held by the Court of Appeal in case of *Walter Musi Anyange v. Hilton International Limited & Anor.* Civil Appeal No. 269 of 2003.
41. The Respondents submitted that the Petitioner has not adduced any evidence to indicate that she was working during the subject period and payment of such amounts will contravene principles of public Finance as enshrined under Art. 201 (d) of the Constitution of Kenya which stipulates that public money shall be used in a prudent and responsible way.
42. The Respondents submitted that the relief of reinstatement to employment should not issue in the instant as trust and confidence between the Petitioner and the Respondent has irretrievably broken down as was held in *Kenya Revenue Authority v Renwel Waitbaka Gitabi & 2 Others* Civil Appeal No. 66 A of 2017 {2019} eKLR.



Analysis and Determination

- a. The Court finds from the pleadings and submissions on record the issue for determination is whether the petitioner was illegally, unlawfully and maliciously terminated by the respondent in violation of articles 27, 28, 35, 41 47 and 50 of the Constitution.
- (b) Is she entitled to the reliefs sought.
43. The petitioner was employed by the respondent on 3 years contract from 18th November 2005. The contract was consistently renewed six times and the last time on 19th November 2020 her contract was renewed for another three years and was to lapse on 22nd November 2023.
44. The letter read in part as follows... “Your employment will be governed by the prevailing terms and conditions of service.”
45. The petitioner further states that in her terms and conditions of employment there was a provision that at an appropriate time no more than six months and not less than three months before expiry of the contract the employer shall inform the board through communication secretary whether he wishes to be considered for further employment. The secretary shall table the application to the board or its committee with a recommendation as to whether the employee should be offered a further contract. The employee shall there upon be informed whether or to the contract renewal has been approved.
46. The petitioner says it was a mandatory requirement that the communication secretary had to table the request for renewal of the contract to the respondents board or its committee for consideration.
47. The petitioner says this procedure was not followed in breach of petitioner’s terms and conditions of employment.
48. The Court on the other hand is seized of the contract of employment dated 20th November 2020 which was for 3 years. The same was therefore to expire on 20th November 2023. The petitioner wrote to the respondent asking for renewal of her contract. This was by her letter dated 31st July 2023. The respondent took long to respond to the letter until the last day of the expiry of her contract which was 22nd November 2023. That was not kind of the respondent.
49. Having said so the Court would not see any violation of law or the Constitution because the petitioner was on a three years fixed contract which expired on that date. She was not given any promise by the respondent that the same would be renewed. In other words there was no legitimate expectation availed to the petitioner to the effect that her contract would be renewed after the expiry of the term.
50. The referred proviso that the communication by an employee requesting for renewal for her contract would be presented to the respondent’s board is not mandatory that the board must renew the contract once the term expires. This in my view is a mere procedure and is not a legal requirement that would make failure to present the contract and to renew the contract a legal breach.
51. As it is the Court finds there was a pending issue about some excess payments paid to the petitioner which she had apparently failed to return and held it as interest on a decree awarded to her in cause no Petition no 085 of 2022 and ruling was delivered on 1st February 2023.
52. In any event a fixed contract has never been a ground for unfair termination once it has expired by effluxion of time unless there are very compelling reasons to establish that an employee had been given legitimate and unquestionable expectations that his/her contract would be renewed.



53. In numerous authorities Courts have held that where parties have entered into a contract the terms of such a contract can only be enforced by the Court. The Court cannot rewrite the terms of a contract but is only left to enforce the terms of the said contract.
54. Persuaded by among other cases *Apex Steel Limited Dominic Steel v Mulwa Muendo* [2020] eKLR the Court held:
- “The general principal is that fixed term contract has no rights or obligations or expectations beyond the date of the expiry.
55. In *Johnson Luvila v All Pack Industries* [2019] eKLR Court declined to grant a declaration of unfair termination where a fixed term contract had come to an end”
56. In this case as well the petitioner was not terminated but her term expired by effluxion of time.
57. In view of the foregoing the Court finds no grounds whatsoever that the petitioner contract was terminated illegally and unlawfully and maliciously in violation of articles 27, 28, 35, 41, 47 and 50 of the *Constitution* and all the other prayers therein being prayers 2, 3, 4, 5, 6 and 7 of the petition dated 11th December 2023 are declined.
58. The petitioner to be given her certificate of service within 14 days hereof if she had not been given this far.
59. The Court orders each party to meet their respective costs of the petition.
- Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 12TH DAY OF JULY, 2024.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

