



**Transparency International - Kenya v Omondi (Civil Appeal
81 of 2018) [2023] KECA 174 (KLR) (17 February 2023) (Judgment)**

Neutral citation: [2023] KECA 174 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 81 OF 2018
F SICHALE, LA ACHODE & PM GACHOKA, JJA
FEBRUARY 17, 2023**

BETWEEN

TRANSPARENCY INTERNATIONAL - KENYA APPELLANT

AND

TERESA CARLO OMONDI RESPONDENT

(Being an appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nairobi (James Rika, J.) delivered on 17th March 2017 in Employment and Labour Relations Court Case No. 2489 of 2012)

JUDGMENT

1. To contextualize this dispute, it is important to give a brief background to this appeal. The dispute arose from an employee/employer relationship. The appellant employed the respondent on October 1, 2010 as a deputy executive director and head of programmes on a contractual basis. The relevant term of employment provided as follows:

“TI-Kenya is pleased to offer you employment as the deputy executive director/ head of programmes for a period of two years. This employment is effective October 1, 2010 and ends September 30, 2012. Further extension of this contract shall be subject to satisfactory performance and on – going requirement of your services by TI-Kenya.”
2. Upon expiry of the term, the appellant declined to extend the contract of employment and this dispute is primarily on the interpretation of the said clause.
3. Upon non-renewal of her contract of employment, the respondent sued the appellant in suit No 2489 of 2012 seeking the following prayers;
 - a. 3 months’ salary *in lieu* of notice at Kshs 900,000



- b. Equivalent of 2 years' salary for non-renewal of the contract which amounted to dismissal, at Kshs 7,200,000;
 - c. The equivalent of 12 months' salary being damages for wrongful dismissal at Kshs 3,600,000;
Total... Kshs 11,700,000
 - d. General damages.
 - e. Costs of the claim.
 - f. Interest from the date of judgment.
 - g. Certificate of service.
4. In the trial court, the respondent's case can be summarized as follows: that she was employed by the appellant as the deputy executive director and head of programmes; that she performed her duties diligently, and mobilized resources and sustained partnerships with several donor agencies and brought on board new partners such as the World Bank, who brought in new programmes, funded to the tune of Kshs 30 million; that on July 31, 2012, the respondent unexpectedly, and without assigning any reason, wrongfully, unfairly, and maliciously terminated her contract, and dismissed her by informing her, that her contract would not be renewed; and that she wrote to the respondent asking for reasons for the decision but none were given.
 5. In sum total, the respondent averred that based on her good performance and competence, which resulted in the growth of the appellant, the respondent reasonably expected, that the appellant would not only renew her contract but do so, on improved terms.
 6. The respondent averred that her position was not rendered redundant and that there was a possibility of renewal. She further informed the court that she had to take up jobs at Kakuma and Daadab refugee camps. She eventually returned to FIDA where she had served previously. It was her case that, these new employers put her to task, wanting to know why she left the appellant but she did not have any reasons.
 7. From the record before us, the appellant's position in the trial court was that: the respondent was employed for a period of 2 years, commencing October 1, 2010 to September 30, 2012, unless renewed; that the appellant did not terminate her contract, or dismiss her as alleged, but that the contract expired, and a decision was made not to renew, which was lawful and justified; that she was notified on July 31, 2012 that her contract would not be renewed, that she acted as part of a team, and wrongly sought to take credit for the achievements of the team; that she received a warning on June 29, 2012 for breach of protocol; that the appellant needed time to consider World Bank institute's request to have the respondent retained as an independent consultant; that her allegation about being shocked and devastated on being told her contract was at an end, and would not be renewed, was false and contrived; and that the claim lacked legal basis.
 8. After considering the evidence tendered, the learned judge (James Rika J) held as follows:

“97. The claimant's contract provided that “further extension of this contract shall be subject to satisfactory performance and ongoing requirement of your services by TI-Kenya.” There was a promise for renewal, so long as 2 conditions were satisfied. One, the claimant's performance was satisfactory, and two, the respondent still required her services. She argues this clause was a promise. She fulfilled the condition for satisfactory performance. Her services were still required.



98. On satisfactory performance, the court has not been able to find evidence contradicting the claimant's position. She mobilized resources, brought in new donors, and started new programmes. Kimeu coyly admitted she played her part, in growth of the respondent.
99. The exit interviews by employees cannot in the view of the court be taken as a measure of the claimant's performance.
101. The correct measure of the claimant's performance, would in the absence of an objective appraisal, be taken from her achievements with the donors and partners. She may have been a forceful individual, unlikeable to some employees, and feared by others, but her achievements and satisfactory performance, going by the material on record stood out...
102. Even as her fixed term contract was approaching its end, the claimant was still engaging with key partners such as the World Bank institute.
103. The pursuit of the claimant by the World Bank institute, even after termination, would suggest to the court first, that her performance with the respondent was satisfactory.
105. The court is satisfied the claimant had legitimate expectation her contract would be renewed. It was not merely a wish, a hope or a desire for continuity; it was legitimate expectation, rooted in the contract of employment.
113. The Court agrees with the claimant that her outgoing contract was terminated by the respondent prematurely and unfairly.
121. Redress for non-renewal must therefore be at the discretion of court, guided by the cap of 12 months' salary compensation, prescribed under section 49 of the *Employment Act*.

In sum, it is ordered:

- a. It is declared non-renewal of the claimant's contract amounted to unfair termination of employment.
 - b. The outgoing contract was terminated unfairly.
 - c. The claimant is granted the equivalent of 12 months' salary for unfair termination at Kshs 3,600,000 and 1 month salary *in lieu* of notice at Kshs 300,000- total Kshs 3,900,000.
 - d. Costs to the claimant."
 - e. Interest allowed at 14% per annum, from the date of judgment, till payment in full."
9. Aggrieved by the judgment, the appellant filed a notice of appeal on April 10, 2017 and a memorandum of appeal dated March 14, 2018.
 10. The appellant has listed 12 grounds in its memorandum of appeal, which can be summarized as follows: that the learned judge erred by failing to consider that the respondent's contract was a fixed term contract that expired by effluxion of time; by tying the non – renewal of the contract to performance; by holding that the appellant had an obligation to appraise the respondent and give reasons for its decision; by failing to acknowledge that the respondent was throughout aware of the complaints against her management style; by failing to consider the previous warning



and performance concerns, when apportioning liability and failing to consider the respondent's employment immediately after the expiry of her employment when assessing damages.

11. The appellant has filed written submissions dated September 20, 2018. It has collapsed the grounds into three heads:
 - a. The terms of the employment contract;
 - b. The respondent's alleged legitimate expectation;
 - c. The monetary reliefs granted.
12. The appellant submits that this was not a dismissal case, but rather that the respondent's employment contract terminated upon the expiry of the contractual period; that the consideration of performance and the contractual requirements of the job was to be by the appellant and that they were under no obligation to inform the respondent of its findings upon consideration of the same; that the respondent had not proved that her contract would be renewed and that the decision to award the respondent damages equivalent to 12 months' salary was unlawfully excessive and unwarranted.
13. The respondent has filed written submissions dated October 23, 2018. According to her, the issues for determination are: whether the contract was a typical fixed term contract or did the respondent possess a legitimate expectation of renewal; whether she was entitled to reasons for the non-renewal of the contract; whether the manner in which the contract was terminated was justified and whether the court's findings and award were justified.
14. The respondent submits that she had a legitimate expectation for renewal or extension of her contract; that she was entitled to reasons for non-renewal without which she was entitled to damages for unlawful termination; that the respondent was dismissed in a crude and callous manner with the simple rider that the appellant could pay her off. She further submits that the award as granted was justified.
15. This appeal was listed for hearing on November 29, 2022 via the go to meeting virtual platform. When this matter was called out, counsel for the appellant, Mrs Wetende submitted that; in the impugned judgment the learned judge focused only on the two contractual conditions of renewal or extension of the respondent's contract but disregarded the appellant's evidence that was presented before him, regarding concerns on how the respondent was carrying out her duties; that the respondent started to work on the October 1, 2010, and her relationship with other members of staff was very tumultuous; that there was a high exit of staff as a result of her leadership style; that the staff working under her were unhappy leading to a bad working environment; and that the respondent had acknowledged her weakness in dealing with other members of staff.
16. The appellant further submitted that there was no legitimate expectation of renewal of the contract because the contract had a specific expiry date. In addition, the appellant submitted that the contract of employment was clear that the renewal of employment was not automatic but subject to appraisal. Therefore, such a clause could not create a legitimate expectation as alleged by the respondent. The appellant further submitted that taking into account the emails that had been sent to the respondent, especially on her relationship with other staff members, the respondent should have known that the renewal of the contract was not automatic.
17. On his part, Mr Namada, advocate for the respondent submitted that: the contract of employment provided for extension, based on satisfactory performance and the requirements for the services; that it was incumbent upon the employer, if they found that there was any reason not to extend the contract, to provide the employee with reasons why they were not going to renew that contract; that the appellant through their witness, who was the chief executive officer, confirmed that he did



not have any record of any appraisal carried out to confirm that the respondent had not performed satisfactorily in her duties; that the chief executive officer confirmed that he did not issue out any letter to the respondent showing that she was a poor performer; that on the contrary, the respondent was a performer but that her appraisals forms were conveniently not produced before the court; and that only one email from an employee complaining against her was availed to the court.

18. We note that the appellant has raised 12 grounds, which we need not recite in full but in our view, they can be summarized as follows; whether the respondent had a legitimate expectation to have the contract renewed, once its' duration had lapsed; whether the appellant was obligated to give the respondent, reasons for non – renewal of the contract; and whether the respondent was entitled to the award of the reliefs sought in the trial court on the basis of the non-renewal of the contract of employment.
19. This being a first appeal, we are required to analyze the evidence afresh and reach our own conclusions but also warning ourselves that we did not have the advantage of seeing the witnesses. It is thus the duty of the court to analyze and re-assess the evidence on record and reach our own conclusions. In *Selle v Associated Motor Boat Co* [1968] EA 123, it was expressed as follows:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270.

20. There is no dispute that the respondent was employed by the appellant on a two- year fixed term contract from October 1, 2010 to September 30, 2012. It is trite law that a fixed-term contract of employment is a lawful mode of employment with a start and end date.
21. The pertinent question in this appeal is whether, once the fixed term contract comes to an end, can it be termed as dismissal or unfair termination? In other words, could the non-renewal of the contract of employment create a legitimate expectation that is capable of enforcement through an award of damages?
22. We note in a case whose central issue for determination was whether an employer in case of fixed term contract had an obligation to justify the termination, Justice J Rika expressed himself in cause 368 [N] of 2009 *Anne theuri v Kadet Limited* [2013] eKLR as follows:

“There was nothing in the evidence of the claimant that required the respondent to renew her contract.... there would be no justification in seeking notice pay, while the claimant was all the time aware that she was on a 3 year contract, with specific starting and ending dates.

10. The reasons given by the respondent for its decision not to renew the claimant’s contract, have no relevance to this dispute. Once a fixed term contract is at an end, the employer has no obligation to justify termination on other grounds beyond the lapse of the fixed period.... It was the prudent thing for the claimant not to plead damages for unfair termination, because in the circumstances of this case, termination was mutual and in conformity to the terms of the expiring contract..... It would be advisable for the claimant



to contact the respondent, clear out, discuss and agree on any other dues that may be payable under the expired contract. She was invited to do this before coming to court, but did not avail herself, opting instead to pursue her claim without sufficient legal or factual grounds.”

23. In another case in which the main issue for determination was whether the respondent legitimately expected the contract to be renewed after the lapse of the contract period, Justice Rika, in *Margaret A Ochieng v National Water Conservation & Pipeline Corporation* [2014] eKLR held that:

“Automatic renewal would undermine the very purpose of the fixed-term contract, and revert to indeterminate contracts of employment..... courts have upheld the principle that fixed-term contracts carry no expectancy of renewal, in a catena of judicial authorities..... the court is persuaded that the claim has no merit. The fixed term contract had its own in-built termination notice, in that the date of termination was advised to the claimant on execution of the three-year contract in December 2008. She knew termination would be upon the lapse of the three years in 2011...”

24. We quote the above findings of the learned judge with approval and hold that there are no reasons that we can discern, that would make one depart from those findings. Indeed, the doctrine of legitimate expectation does not arise in the renewal of a fixed-term contract and its non-renewal cannot constitute unfair termination or dismissal. Having noted that the respondent was in employment under a fixed-term contract and that the contract came to an end at the appointed time, we are of the view that any relief sought by the respondent on basis of her assertion that her employment was unfairly terminated was automatically not available to her. The Court of Appeal decision in *Registered Trustees of the Presbyterian Church of East Africa & another v Ruth Gattho* [2017] eKLR lends credence to our holding, where the court pronounced itself, thus:

“29. Bearing the foregoing in mind, we note that fixed term contract carries no rights, obligations, or expectations beyond the date of expiry. Accordingly, any claim based after the expiry of the respondent’s contract ought not to have been maintained. This is in relation to the salary of the months 5th of April up to May, 2010. Similarly, since the respondent’s contract came to an end by effluxion of time any claim for wrongful termination could not be maintained.”

25. This issue was also addressed in the case of *Francis Chire Chachi v Amatsi Water Services Company Limited*, [2012] eKLR in which the court stated that;

“This court has recently stated that employers are not under any obligation to give employees reasons for non-renewal of fixed term contracts, unless there is such an obligation created in the expiring contract.”

26. The same sentiments were also echoed in the Court of Appeal case of *Registered Trustees De La Salle Christian Brothers T/A St. Mary’s Boys’ Secondary School v Julius D M Bani* [2017] eKLR as follows:

“In the view of the court, 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. To require an employer to give reasons why the contract should not be renewed, is the same thing as demanding from an employer to give reasons why, a potential employee should not be



employed. The only reason that should be given is that the term has come to an end, and no more.

... Reasons, beyond effluxion of time, are not necessary in termination of fixed-term contracts, unless there is a clause in the contract, calling for additional justification for the termination.

This position has also been restated in *Francis Chire Chachi v Amatsi Water Services Company Limited*, [2012] eKLR as follows:

“This court has recently stated that employers are not under any obligation to give employees reasons for non-renewal of fixed term contracts, unless there is such an obligation created in the expiring contract.” Section 35 (2) of the Act provides for termination of employment by notice and where the notice is greater than one month then the same should be applicable. In *Ruth Gathoni Ngotho-Kariuki v Presbyterian Church of East Africa and Presbyterian Foundation* [2012] eKLR which was cited by the respondent, failure to give the notice led to the judge inferring automatic renewal of the fixed term contract. Accordingly, the necessary timelines for the communication of the decision not to renew the contract need to be upheld. The trial judge did not inquire as to whether there was any obligation in the contract or the timelines adhered to but nevertheless made a finding to the effect that the claimant was entitled to two months’ pay in lieu of notice as per the contract of service. We agree with the trial judge in this respect.”

27. The court is in agreement with these sentiments. We dare say that an automatically renewable fixed-term contract is a contradiction in terms, as it would subject the parties to an indeterminate employment contract. The respondent was under a fixed-term contract with a definite commencement date and termination date. There was no ambiguity created to create an expectation of contract renewal by the appellant’s issuance of a fixed-term contract. The contract terminated automatically when the termination date arrived. Whether a contract with a renewal clause will be extended or not, is an issue that is at the discretion of the employer and it cannot create a legal right under the doctrine of legitimate expectation.
28. On the reliance of the doctrine of legitimate expectation, in the Supreme Court Case, petition No 14 of 2014 *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR, the court held:

“Legitimate expectation” is a doctrine well recognized within the realm of administrative law, as is clear from the English case, *In re Westminster City Council*, [1986] A.C 668 at 692 (Lord Bridge):

“...the courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation”.

An illuminating consideration of the concept of “legitimate expectation” is found in the South African case, *South African Veterinary Council v Szymanski* 2003(4) S.A 42 (SCA) at [paragraph 28]: the court held as follows:

“The law does not protect every expectation but only those which are ‘legitimate’.
The requirements for legitimacy of the expectation include the following:



- i. The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification': *De Smith, Woolf and Jowell* (op cit [*Judicial Review of Administrative Action 5th ed*] at 425 para 8-055). The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril.
- ii. The expectation must be reasonable: *Administrator, Transvaal v Traub* (supra [1989 (4) SA 731 (A)] at 756I - 757B); *De Smith, Woolf and Jowell* (supra at 417 para 8-037).
- iii. The representation must have been induced by the decision-maker: *De Smith, Woolf and Jowell* (op cit at 422 para 8-050); *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346 (PC) at 350h - j.
- iv. The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate: *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (C) at 59E - G.”

This was also referred to with approval in *Walele v City of Cape Town and Others*; 2008 (6) S.A 129 (C.C.) paragraph 41.

The emerging principles may be succinctly set out as follows:

- a. there must be an express, clear and unambiguous promise given by a public authority;
- b. the expectation itself must be reasonable;
- c. the representation must be one which it was competent and lawful for the decision-maker to make; and
- d. there cannot be a legitimate expectation against clear provisions of the law or the *Constitution*.

De Smith, Woolf & Jowell, in “*Judicial Review of Administrative Action* cited in *Republic v Kenya Revenue Authority Ex Parte M- Kopa Kenya Limited* thus:

“A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government’s dealings with the public.”



- 29. In the instant appeal, a cursory look at clause 13 of the contract of employment, allows either the appellant or the respondent, to terminate the agreement, by giving three (3) months' notice in writing or by paying three (3) months' pay in lieu of such notice. The appellant simply exercised its right as captured in the letter and as such, could not be deemed to have unfairly terminated the contract. It is old hat, that parties are bound by the terms of the contracts they enter into.
- 30. Concomitantly, the scenario would have been different if there was an indication, by act or omission from the appellant, to indicate renewal was forthcoming to whet the respondent's appetite, that her contract would be renewed and hence rely on the doctrine of legitimate expectation. In the instant case, there was no promise of any sort that was given to the respondent to justify a claim based on legitimate expectation.
- 31. We think we have said enough to demonstrate that the learned judge misdirected himself on issues of fact and law and that the judgment in favour of the respondent cannot stand, accordingly, we hold that this appeal has merit and it succeeds. Consequently, we make the following orders;
 - a. This appeal succeeds
 - b. The judgment of the trial court dated March 17, 2017 is hereby set aside in its entirety.
 - c. The appellant is awarded costs of this appeal and in the High Court.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2023.

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

L. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

