



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A)**

**CIVIL APPEAL NO. 145 OF 2018**

**BETWEEN**

**KENYA MEDICAL RESEARCH INSTITUTE.....APPELLANT**

**AND**

**MARIA MUKHWANA.....RESPONDENT**

***(Being an appeal from the Judgment and Decree of the Employment & Labour Relations Court at Mombasa (Rika, J.) dated 13<sup>th</sup> October 2017***

***in***

***E&LRCC No. 182 of 2016)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

1. This appeal arises from the judgement of the Employment and Labour Relations Court (**Rika, J.**) delivered on 30<sup>th</sup> October 2017 declaring that the non-renewal of the respondent's contract of employment amounted to unfair termination and for awarding her 12 months' salary as compensation for unfair termination and two months' salary *in lieu* of notice in addition to awards for annual leave allowance and gratuity that were conceded.

2. The background, in brief, is as follows. Based on a letter of offer of employment dated 5th November 2013, the respondent, Maria Kibone Mukhwana, in search of greener pastures and career progression no doubt, resigned her permanent and pensionable position as contracting supervisor with Kenya Petroleum Refineries Ltd in Mombasa on 6th November 2013 in order to take up employment, in the position of Procurement Manager, with the appellant, Kenya Medical Research Institute, within its Wellcome Trust Research Programme on a fixed term contract of two years.

3. The appellant's letter of offer to the respondent stipulated that: the contract "*is offered for a period of 2 years in the first instance and it is renewable*"; probation period was three months and upon confirmation, the respondent's contract would "*be subject to 3 months notice*"; and that comprehensive terms and conditions of service would be made available to her when she took up the appointment.

4. Without much ado, the respondent accepted the offer by her letter dated 6<sup>th</sup> November 2013, which she indicated was her

*"formal acceptance of [the] offer and all its inclusive terms"* and that, "*as agreed*" she would start work with the appellant on 9<sup>th</sup> December 2013.

5. The comprehensive terms and conditions of employment were set out in two documents both dated 9<sup>th</sup> December 2013. The first document was a fixed term contract which stipulated, "*you are offered a two (2) years contract as a Procurement Manager with effect from 9<sup>th</sup> December 2013 to 8<sup>th</sup> December 2015.*" Under clause (h) thereof, the respondent was at liberty to cease employment by giving 3 months written notice or by paying three months' salary *in lieu*.

6. The second document was an agreement dated 9<sup>th</sup> December 2013 and titled, "*terms and conditions of service for employment on contract*" which was expressed to be "*subject to the conditions set forth in the schedule*" annexed to it. Under condition 1 of the schedule it

was reiterated that the contract “is for a period of two (2) years continuous service beginning from 9<sup>th</sup> December 2013 and ending on 8<sup>th</sup> December 2015” and that “renewal of the contract shall be based on job performance evaluation of the person engaged”. Condition 7(i) thereof provided that:

**“The program, through the Institute, may at any time terminate the employment of the person engaged by giving him three (3) months’ notice in writing, or pay him three (3) month’s salary in lieu of notice.”**

7. Under Condition 7(ii) of that agreement, it was provided that the respondent may at any time cease employment by giving the appellant ninety (90) calendar days’ notice in writing or by paying three-months’ salary *in lieu* of notice.

8. All appears to have been well, but as the two-year contract term drew to a close, and as 8<sup>th</sup> December 2015 beckoned, the respondent became anxious as there was no indication coming from the appellant, despite her enquiries, regarding the renewal of her contract. To allay her anxiety, on 25<sup>th</sup> November 2015, a few days before the expiry of the two-year contract term, the respondent wrote a letter to the head of human resources of the appellant stating in relevant part:

**“As my work contract is due to expire on 8<sup>th</sup> December 2015, I wish to apply for renewal of the contract in terms of the letter of offer dated 5<sup>th</sup> November 2013 which was our basis of engagement. My application has been necessitated by the fact that despite several verbal enquiries I have not received any communication regarding the renewal of my contract which expires on 8<sup>th</sup> December 2015...**

**...I hope that you understand that I would need to know your response of the renewal before my contract expiry date. Your silence has caused me a lot of anxiety.”**

9. The appellant did not respond directly to that letter. However, on 4<sup>th</sup> December 2015, without any reference to the respondent’s said letter, the appellant’s head of human resources wrote a letter to the respondent informing her that

**“your contract has been extended for a period of three months with effect from 9 December 2015 to 8 March 2016”, and that, “during this period your notice period will be one (1) month”, and further that “all other terms and conditions of service shall remain.”**

10. Subsequently, by her letter dated 1<sup>st</sup> February 2016, the respondent protested the extension of the contract “for a paltry three months” and expressed concern that it was contrary to the letter of offer of 5<sup>th</sup> November 2013. She asserted that under the letter of offer, the contract was renewable for another term and that she legitimately expected, given her performance and job appraisals, that her contract would be renewed automatically for another term of two years. She again sought confirmation that the contract would be renewed for another term of two years upon expiry of the three months extension.

11. The appellant’s reaction was a letter dated 8<sup>th</sup> February 2016 under the subject reference, “End of Contract Notice”, which the respondent says she received on 16<sup>th</sup> February 2016. In that letter, the appellant asserted that the contract was scheduled to end on 8<sup>th</sup> December 2015; that it was renewed for three months to end on 8<sup>th</sup> March 2016; and that it would “not be available for further renewal upon its expiry.” The appellant went on to say in that letter that, “we hereby give you one (1) months’ notice in accordance with the contractual terms with the Programme. This notice takes effect from the date of this letter.”

The respondent was informed that she would be paid a salary up to and including 8<sup>th</sup> March 2016 and that her final dues would be paid upon clearance of any liabilities to the appellant.

12. On 8<sup>th</sup> March 2016, the respondent filed suit before the Employment and Labour Relations Court (ELRC). In her memorandum of claim that she subsequently amended, she sought: an injunction restraining the appellant from terminating her employment pending the hearing of the suit; a declaration that the failure to renew her 2 year contract in December 2015 was in breach of her contract of employment and amounted to loss of legitimate expectation; a declaration that the letter dated 8<sup>th</sup> February 2016 giving her one months’ notice to terminate her contract is unlawful and in breach of contract of employment; a declaration that a proper notice ought to have been issued before termination; a declaration that the appellant engaged in unlawful and unfair labour practices from December 2015 to February 2016; damages in the amount of Kshs.14,294,748.42 made up of: loss of salary for two years (Kshs.7,888,416.00); 3 months’ salary *in lieu* of notice (Kshs.986,052); gratuity (Kshs.788,841.60); damages for unfair termination (Kshs.3,944,208.00); exemplary damages (Kshs.50,000.00); relocation allowance (Kshs.120,000.00) and accrued leave allowance (Kshs.67,230.82).

13. In defence, the appellant filed a memorandum of response in which it pleaded that it offered the respondent a fixed term contract for two years from 9<sup>th</sup> December 2013 to 8<sup>th</sup> December 2015; that the term was extended to 8<sup>th</sup> March 2016; that the letter of appointment did not state that the contract was renewable for the same term and it was left to the discretion of the appellant whether to renew; that given the terms of the contract, the respondent cannot claim to have had legitimate expectation that the same would be renewed for a further two years.

14. With regard to the claim for damages, the appellant averred that the claim for loss of salary was not payable; that as the contract lapsed automatically by effluxion of time, salary in lieu of notice was not payable; that it was ready to pay gratuity in accordance with the contract; that the claims for damages for unfair termination and exemplary damages did not arise; that the payment of relocation allowance was dependent upon the respondent submitting quotations upon her exit; and that it was willing to pay the accrued leave allowance.

15. At the trial, the respondent testified on her own behalf. Hilary Nasora Ondatto, the appellant’s head of Human Resource, testified for the

appellant. After considering the evidence and submissions, the learned Judge delivered the impugned judgment in which he found that the appellant led the respondent to reasonably expect that the contract would be renewed in that it participated in the respondent's loan transaction by directing her to apply for the loan and by having its Human Resource Manager and other staff sign as guarantors to her; by allowing the loan repayment to be made over a 4 year period, a period beyond the contract period, through salary check-off; by not advising the respondent there would be no renewal when she first asked the appellant about renewal, and by extending the contract for 3 months.

16. The court was satisfied that non-renewal of the contract amounted to unfair termination of employment and granted a declaration to that effect. In addition, the court awarded the respondent 12 months' salary in compensation for unfair termination and 2 months' salary *in lieu* of notice in addition to the conceded claims of accrued leave allowance of Kshs.67,230.00 and gratuity of Kshs.98,605.00 resulting in a total award of Kshs.4,767,411.00. Interest on that amount was to accrue at the rate of 14% per annum from the date of judgment until payment in full.

17. Dissatisfied, the appellant lodged this appeal on grounds that the Judge erred in: finding the non-renewal of the contract amounted to unfair termination; concluding that the appellant's actions created a reasonable expectation of renewal of the contract; disregarding the respondent's admission that she was late or absent from work at times; interfering with the appellant's prerogative not to renew the contract; awarding maximum compensation of 12 months' salary without due regard to the statutory guidelines and in awarding 2 months' salary.

18. Urging the appeal before us, **Ms. Bonyo**, learned counsel for the appellant, relied on written submissions which she highlighted. She urged that the Judge misdirected himself in concluding that in the circumstances obtaining the respondent had a reasonable expectation of renewal of her contract; that the decision to renew a contract of employment, as the Judge acknowledged, is a prerogative of the employer; that the initial 2-year contract did not contain a renewal clause; that in any event, under the terms and conditions of service, renewal of the contract would be based on job performance evaluation.

19. It was submitted that the appellant was under no obligation to give reasons for not renewing the contract. In that regard, counsel referred to the case of **The Registered Trustees De La Salled Christian Brothers t/a St. Mary's Boys Secondary School vs. Julius D. M. Baini [2017] eKLR** and **Trocaire vs. Catherine Wambui Karuno [2018] eKLR**. Counsel urged that it was not open to the court to rewrite the contract between the parties; that the contract prescribed the term and the respondent ought to have known there was a possibility of non-renewal on expiry. In any event, the respondent acknowledged, it was urged, that she was occasionally late for work, a performance issue warranting non-renewal of her contract.

20. Counsel submitted that the Judge considered irrelevant factors in concluding that the appellant's actions created a reasonable expectation of renewal of contract; that contrary to the finding by the Judge, the appellant did not participate in the respondent's loan transaction, which was a personal decision by the respondent to take a personal loan guaranteed by staff in their personal capacity and not on behalf of the appellant. It was submitted that the finding that the termination was unfair was therefore not well founded.

21. On the award of 12 months' salary, it was submitted that the same manifested a wrong exercise of discretion; that the judge did not follow the statutory guidelines under Section 49 of the Employment Act; the Judge did not consider that the respondent contributed to the termination due to habitual lateness; he did not consider the appellant had already paid her gratuity; and the respondent did not mitigate her loss. Reference was made to the decision of the Court in **Regent Management Limited vs. Wilberforce Ojiambo Oundo [2018] eKLR**.

22. As regards the award of 2 months' salary in lieu of notice, it was submitted that extension of the contract by 3 months altered the notice period from 3 months. In awarding the 2 months' salary, the Judge in effect re-wrote the contract, it was submitted.

23. On the interest rate of 14% per annum awarded by the Judge, it was submitted that the same should be substituted with 12% per annum being the rate set by the Chief Justice in accordance with Section 26 of the Civil Procedure Act. The case of **B.O.G Tambach Teachers Training College vs. Mary Kipchumba [2018] eKLR** was cited in support of that submission.

24. Opposing the appeal, the respondent, who appeared in person, relied on her written submissions which she also highlighted. She submitted that the Judge properly evaluated the evidence and arrived at the right conclusion well supported by the evidence; that the Judge found, and rightly so, that there was no renewal of the contract but an extension for 3 months without the appellant giving reasons for such extension; that she reasonably expected the appellant to renew her contract for a similar term otherwise she would never have taken up the job offer; that failure on the part of the appellant to renew the contract was in the circumstances unfair termination; that based on the contractual terms, the appellant was bound to renew the contract automatically or to conduct job performance evaluation and inform the respondent if it was considering not renewing the contract.

25. The respondent submitted that it would not have been reasonable for her to have left her permanent and pensionable position at Kenya Petroleum Refineries Limited to take up a job offer for a 2 year contract without the provision for renewal; that it was on the basis of the letter of offer dated 5<sup>th</sup> November 2013 that she tendered her resignation with the former employer on 6<sup>th</sup> November 2013; that the purported unilateral extension of the contract by 3 months with no reference to her was oppressive and unlawful; that the attempt by the appellant to justify the non-renewal of the contract on grounds of alleged habitual lateness to work was belated, unfounded and not supported by any evidence; that even if claims of lateness had been true, due process in terminating her employment in accordance with Section 41 of the Employment Act was not followed. In that regard, the respondent referred to the case of **Kenfreight (EA) Limited vs. Benson K. Nguhi [2016] eKLR**.

26. The respondent argued further that based on the conduct of the appellant, the Judge was right in finding that the failure to renew the contract amounted to unfair termination. She referred to the decisions in **Isaiah Okode Nyamundhe vs. Kenya Institute of Education [2016] eKLR** and **International Planned Parenthood Federation vs. Pamela Ebot Arrey Effiom [2016] eKLR** where non-renewal of a contract was held to be unlawful and an award of 12 months' salary for unlawful termination granted. In the same vein, the respondent submitted that the award granted by the Judge is within the law and in accordance with Sections 49 and 50 of the Employment Act; and that the Judge considered relevant factors and arrived at the correct decision.

27. We have considered the appeal and submissions. As a first appellate court, we have the mandate in addressing the pertinent issues, to reconsider and evaluate the evidence on record in order to draw our own conclusions, bearing in mind, as the respondent warned, that the trial Judge had the advantage we do not have of seeing and hearing the witnesses and was better placed in that regard than we are to make conclusive findings of fact. See ***Selle vs. Associated Motor Boat Co Ltd [1968] EA 123***.

28. Bearing that in mind, there are two issues for determination in this appeal. First, is whether the finding by the Judge that non-renewal of the respondent's contract amounted to unfair termination of employment. Second, is whether the Judge properly exercised his discretion in awarding the respondent compensation based on 12 months' salary and 2 months' salary respectively. There is also the question of the rate of interest awarded.

29. We begin with the question whether the non-renewal of the respondent's contract amounted to unfair termination of employment. There is authority for the proposition that 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 and that 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. See for instance the judgment of ***Rika, J.*** in ***Bernard Wanjohi Muriuki vs. Kirinyaga Water and Sanitation Company Limited & another [2012] eKLR*** cited with approval by this Court in ***Oshwal Academy (Nairobi) & another vs. Indu Vishwanath [2015] eKLR*** and in the case of ***The Registered Trustees De La Salled Christian Brothers t/a St. Mary's Boys Secondary School vs. Julius D. M. Baini*** (above).

30. In ***Trocaire vs. Catherine Wambui Karuno [2018] eKLR***, this Court re-affirmed the holding in ***Registered Trustees of the Presbyterian Church of East Africa & another vs. Ruth Gathoni Ngotho-Kariuki [2017] eKLR*** that "fixed term contracts carry no rights, obligations or expectations beyond the date of expiry." In that case, which involved a fixed term contract of four months, the Court took the view that the fact that there were earlier expressions by the appellant to extend the contract for a further period of at least two years did not give rise to a legitimate expectation that the contract would be extended for such duration as suggested by the respondent. The Court did not, however, stop there. It went on to say:

***"In any event even if we were to find that the earlier expressions raised the respondent's expectation that her contract would be extended for a period of two years, it is not in dispute that prior to the expiry of the second contract and after the aforementioned expressions were made, the appellant unequivocally indicated that firstly, it would only extend the contract for a period of four months and secondly it had no desire to extend the same upon expiry. The respondent confirmed as much in her evidence. Perhaps this is why she requested the appellant to reconsider the terms which request was turned down. This should clearly have informed the respondent that her earlier expectations would not materialize."***

31. In the present case there is no doubt that the respondent took up employment with the appellant based on the appellant's letter of offer dated 5<sup>th</sup> November 2013. That is clear from the fact that the respondent resigned from her former employer immediately thereafter on 6<sup>th</sup> November 2013. As already indicated, clause 4 of that letter of offer provided that "the contract is offered for a period of 2 years in the first instance and it is renewable." The terms of engagement in the schedule to the agreement dated 9<sup>th</sup> December 2013 provided that "renewal of the contract shall be based on job performance evaluation of the person engaged." In short, there was express provision for the renewal of the contract.

32. The Judge based his finding that the non-renewal of the contract amounted to unfair termination based on the conduct of the appellant. In that regard, the Judge expressed.

***"On the whole, the actions of the respondent can be concluded to have led the claimant into reasonably expecting there would be renewal. The respondent participated in the claimant's loan transaction, directing her to apply for the loan and having its Human Resource Manager and other staff signed as guarantors to the claimant; by allowing the loan repayment to be made over a four-year period, a period beyond the contract period, through salary check-off; by not advising the claimant there would be no renewal when she first asked the respondent about renewal; by not responding to her assertion that appraisal had shown her performance was satisfactory; and by extending claimant's contract for 3 months."***

33. As is evident from that excerpt, there are two aspects of the appellant's conduct with which the Judge took issue. The first being that the appellant took part in the respondent's loan transaction. Is that finding supported by the evidence?

34. At paragraph 7 of the amended memorandum of claim, the respondent pleaded that she approached the appellant for a loan; that the appellant declined "having such arrangements" and referred her to Imarika Sacco "and caused her to bind herself to a 4-year loan facility which they executed as guarantors and is being recovered from her salary by check off system with the respondent's consent." In its memorandum of response, the appellant averred that the loan taken by the respondent "was for her personal benefit and was never guaranteed by the respondent" as she claimed.

35. In her testimony, the respondent stated that she had loan facilities with her former employer who sent auctioneers to recover, whereupon the respondent approached the appellant for assistance. The appellant in turn referred her to Imarika Sacco. One of the guarantors to the loan was the appellant's Human Resource Manager. Imarika Sacco then wrote to the appellant to effect the check off system. That evidence does not in our view support the plea by the respondent that the appellant "caused her" to bind herself. Neither does it support the conclusion reached by the trial Judge that by so referring the respondent to the Sacco and effecting the check off system, it thereby warranted to the respondent that she would remain in employment for the life of the loan.

36. With respect, it is far-fetched to conclude that because an employer agrees to make loan deductions from an employee's salary and remit the same to a lender, the employer thereby binds itself to retain an employee on the payroll for the life of the loan. If that were the case, we doubt that any employer would agree to implementing a check off system for loans repayments.

37. There is a second aspect of the appellant's conduct with which the Judge took issue, and with which we agree. Given that the letter of

offer expressly provided in unqualified terms that the contract “is renewable” and given further that one of the terms of engagement in the schedule to the agreement dated 9<sup>th</sup> December 2013 provided that “renewal of the contract shall be based on job performance evaluation”, it was incumbent upon the appellant, if it was not minded to renew the contract, to inform respondent that it was not going to do so. To that extent, the circumstances in this case are distinguishable with those in the case of The Registered Trustees De La Salled Christian Brothers t/a St. Mary’s Boys Secondary School vs. Julius D. M. Baini (above) to which counsel for the appellant referred where the fixed term contract did not have provision for renewal.

38. There is evidence that despite the respondent having made enquiries from the appellant whether the contract would be renewed, the appellant kept mum leaving the respondent in suspense. The respondent was ultimately constrained to formally write to the appellant on 25<sup>th</sup> November 2015, the eve of the expiry of the contract, as it were, seeking renewal of the contract and complaining that the “application has been necessitated by the fact that despite several verbal enquiries I have not received any communication regarding the renewal of my contract which expires 8<sup>th</sup> December 2015.” Without even acknowledging or referring to that letter, and without consulting the respondent, the appellant unilaterally purported to extend the initial contract term by 3 months, and also unilaterally, prescribed that during the extended period “your notice period will be one (1) month.” To that extent, we find, as the trial Judge did, that the respondent was treated unfairly.

39. We turn to the question whether the Judge properly exercised his discretion in awarding the respondent compensation based on 12 months’ salary and 2 months’ salary respectively. In making the award, the Judge was alive to Section 49(4)(f) of the Employment Act and the factors enumerated for consideration thereunder. He considered that: the respondent had worked for 2 years; expected renewal for 2 years and “was 21 months off the mark in her expectation”; that she was granted a loan

“with the endorsement” of the appellant; that she left a secure employment with her former employer “lured by the false promises of a fruitful career” with the appellant.

40. As already stated, there was no evidence that the appellant “caused” the respondent to take the loan or represented to her that she would remain in employment for the life of the loan. That was a misdirection. Furthermore, the Judge did not consider that the fixed term contract had provision for termination, and was terminable by either party giving the other 3 months’ notice or payment of salary in lieu. Had the Judge taken this into account, we think he would not have awarded the equivalent of 12 months’ salary in compensation. We must therefore interfere with the exercise of his discretion. In our view, compensation based on the equivalent of 3 months’ salary is adequate compensation.

41. We accordingly set aside the award of 12 months’ salary and substitute therefore an award of 3 months’ salary in compensation for unfair termination. In effect, the award of Kshs. 3,944,208.00 is hereby set aside and substituted with an award of Kshs. 986,052.00.

42. The appellant having acknowledged the respondent’s entitlement to pay *in lieu* of notice, albeit based on the wrong premise that is, one months’ notice, as opposed to three months’ notice was applicable, we shall not interfere with the award of 2 months’ salary *in lieu* of notice as awarded.

43. In summary, the total award given in favour of the respondent by the ELRC for Kshs. 4,767,411.00 is hereby set aside and substituted with a total award of Kshs.1,643,420.00, made up of Kshs. 986,052.00 being compensation for unfair termination, and Kshs. 657, 368.00 being the balance of 2 months’ salary in lieu of notice.

44. The award of interest, and the rate on principal sum adjudged, under Section 26 of the Civil Procedure Act is at the discretion of the court. It has not been demonstrated that the Judge did not properly exercise his discretion in awarding interest at the rate of 14% per annum. Interest on the said sum of Kshs.1,643,420.00 will accrue at 14% per annum from the date of the judgment by the ELRC until payment in full.

45. As the appellant has only partially succeeded in the appeal, we order that each party shall bear their own costs of the appeal. The appellant shall however bear the costs of the suit in the ELRC.

**Dated and delivered at Malindi this 14<sup>th</sup> day of November, 2019.**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, (FCI Arb)**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**