IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 67 OF 2017

BETWEEN

TROCAIRE.....APPELLANT

AND

CATHERINE WAMBUI KARUNO.....RESPONDENT

(An appeal from the Judgment of the Employment and Labour Relations

Court at Nairobi (Wasilwa, J.) dated 6th July, 2016

in

***ELRC Cause No. 1325 of 2015*)**

****

JUDGMENT OF THE COURT

1. At all material times the relationship between **Trocaire** (the appellant) and **Catherine Wambui Karuno** (the respondent) was that of employer/employee. Their respective rights and obligations were regulated by a fixed term contracts which were renewed from time to time. Initially, the respondent was engaged as a Regional Human Resource and Administration Manager for a period of 14 months commencing from 4th January, 2012 up to 28th February, 2013. That contract was extended for a further period of one year running from 4th March, 2013 up to 28th February, 2014.

2. According to the respondent, the appellant had on several occasions indicated that it would extend her contract for a further period of two years. Her confidence for the extension was rooted on a number of verbal and written communications by the appellant which included a letter dated 26th September, 2012 , whose contents were as hereunder:-

> ***"To whom it may concern-Catherine Karuno***
>
> ***Catherine Karuno is employed with Trocaire Horn & East Africa Regional Office as the Regional Human Resource & Administration Manager. Her current contract runs from January, 2012 to February, 2013. We plan to renew this contract in February, 2013 for a period of not less than two years."****Emphasis added.*

An email dated 7th July, 2013 from the then Regional Manager which read:

> ***"Hi Catherine,***
>
> ***The position is located in Maynooth and I think they usually require someone with residency or a work permit for Ireland. With the current unemployment, it is very difficult to get work permits for non-national staff these days. We have agreed with Caoimhe that your position will continue in Nairobi for at least two more years to facilitate the transition and my recommendation is that it continues after that with a greater focus on Somalia, Kenya and South Sudan. Feel free to contact Joe if you are still interested in applying, he can advise you further.***

Best wishes

Rosemary"

A further email from her line manager, one Guy Clerk dated 8th November, 2013 which stated in part that:-

> ***"As discussed in our subsequent meeting, the decision has been made to offer you the position of Regional HR Advisor (RHRA) until February 2015 in line with commitments given to you by the organization before I began in post in April 2013. In the meeting to which you refer I informed you that I was to draft a JD for the role of RHRA a task still to be done and one which I am now committing to re-prioritise. The challenge as I explained continues to be how we make your role fit with the regional needs and the existing HR support in place."*** *Emphasis added.*

3. Be that as it may, just as the second contract was about to end, the appellant informed the respondent of its decision to re-designate her as the Regional Human Resource Advisor under a four months' contract. She was not pleased and made several requests to the appellant to reconsider the same. From the correspondences on record, it seems the appellant was steadfast and gave the respondent an ultimatum to either accept or decline the new terms. Ultimately, the respondent accepted the new terms though according to her she did so with reservation. A new contract to that effect was executed which was to run from 1st March, 2014 up to 30th June, 2014.

4. On 25th June, 2014 the appellant wrote to the then Ministry of labour informing it of its decision not to renew the respondent's contract once it lapsed on 30th June, 2014. The relevant portions read:-

> ***"This letter is to officially inform your office with effect from September, 2013 Trocaire's Board of Directors located in Ireland made the decision to reduce the number of operational countries from 27 to 17 worldwide and to phase out the regional structure that had previously operated globally. This restructuring was caused by reduced funding …***
>
> **…**
>
> ***As a result of the above, the position of Regional Human Resource Adviser no longer forms part of Trocaire's structure. The previous Head of Region Guy Clarke, communicated this to Ms. Karuno and there is correspondence to that effect.***
>
> ***In this regard, as required by Section 40 of the Employment Act this is to notify the Ministry…of our intention not to renew the contract … Catherine Karuno has likewise been informed verbally and served with a written letter to communicate the end of the contract period…"***

After the contract lapsed the appellant tabulated and paid what it referred to as a 'redundancy package' to the respondent.

5. Convinced that she had been wronged, the respondent filed suit in the Employment and Labour Relations Court (ELRC) claiming that not only had she been discriminated against on the basis of her gender and race but also her services were terminated unfairly on grounds of redundancy. The long and short of the appellant's response was that the respondent's contract had lapsed by effluxion of time hence she had no cause of action against it.

6. The learned Judge (Wasilwa, J.) in a judgment dated 6th July, 2016 found for the respondent. In doing so, she held that the respondent had a legitimate expectation that her contract would be extended up to February, 2015 as portrayed by the appellant. The appellant had clearly admitted by the correspondence to the Ministry of labour and payment of a redundancy package that the respondent's termination was on the basis of redundancy.

The appellant had not followed the laid down procedure in declaring the respondent redundant as stipulated under ***Section 40*** of the ***Employment Act*** rendering the resultant termination unfair and unlawful. In the end, she awarded the respondent damages in the following terms:-

> ***(i) 1 months' salary in lieu of notice = 299,747/=.***
>
> ***(ii) 12 months' salary as damages for unlawful redundancy***
>
> ***=299,747 x 12 = 3,596,964/=. Total = 3,896,711/=***
>
> ***Less statutory deductions***
>
> ***(iii) Plus costs and interest.***

7. It is that decision that is the subject of the appeal before us wherein the appellant complains that the learned Judge erred in law and fact by:-

> ***i. Finding that estoppel arose from the discussions between the parties.***
>
> ***ii. Inferring redundancy despite glaring evidence that the respondent's contract of employment had lapsed by effluxion of time.***

iii. Awarding maximum compensation of 12 months' salary to the respondent without justification.

8. At the hearing of the appeal, Mr. Munyu appeared for the appellant, while Mr. Juma appeared for the respondent. Counsel relied on the written submissions filed on behalf of the respective parties and also made oral highlights.

9. Mr. Munyu began by stating that the appeal turned on two issues namely, whether redundancy could be inferred in the circumstances and if so, whether the damages as assessed by the learned Judge were appropriate. He reiterated that the nature of the respondent's employment was by way of fixed term contracts which were extended from time to time. The respondent voluntarily signed the third contract which clearly stipulated that its duration was four months. Once the stipulated time frame lapsed her contract automatically came to an end. It is on that basis that he faulted the learned Judge for finding that she had a legitimate expectation that her contract would be extended for a further period.

10. In his view, there was nothing to support that finding because first, there was no unequivocal extension of the contract after its expiry. The appellant was categorical that it would not extend the same. Secondly, all previous extensions of the contract had been expressed through execution of a new contract. Thirdly, it was wrong for the learned Judge to impute/infer any longer period outside the express agreement set out in the fixed term contract. Making reference to the persuasive decision of the ELRC in ***Kennedy Ouru vs. James Finlays (K) Limited [2016] eKLR*** it was submitted that legitimate expectation cannot arise for renewal/extension of a fixed term contract once it determines.

11. Mr. Munyu contended that the reference to redundancy by the appellant in its correspondence was in error but still the same did not affect the nature of the contract in question. As it stood the appellant did not declare the respondent redundant, instead her contract automatically came to an end by effluxion of time. In support of that line of argument counsel cited the case of ***Banking Insurance & Finance Union (Kenya) vs. Commercial Bank of Africa Ltd [2015] eKLR***.

12. He argued that in the event we are to find that the respondent's termination was unfair we should interfere with the damages as assessed by the learned Judge which were excessive and unwarranted. Based on those grounds Mr. Munyu urged us to allow the appeal.

13. In opposing the appeal, Mr. Juma, relying on the English case of ***Combe vs. Combe [1951] 1 ALL ER***, submitted that the learned Judge correctly found that the appellant was estopped from going back on its promise to renew the respondent's contract for a further period of two years. He also submitted that the appellant's conduct gave rise to a legitimate expectation on the respondent's part that her contract would be extended until the year 2015. In that regard, he quoted the sentiments of Lord Diplock in ***O'reilly vs. Mackman [1983] 2 AC 237*** that-

> ***"Legitimate expectation may arise either from an express promise given or from the existence of a regular practice which the claimant can reasonably expect to continue."***

14. Mr. Juma argued that the appellant's reasons for declining to renew the respondent's contract as earlier indicated was allegedly because her position had been phased out. He added that there was no reason for us to interfere with the award of damages granted.

15. We have considered the record, submissions by respective counsel and the law. Our primary role as the first appellate court was discussed in ***Kenya Ports Authority vs. Kuston (Kenya) Limited (2009) 2EA 212*** as follows:-

> ***"On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"***

16. It is clear from the evidence on record that the respondent's employment was governed by fixed term contracts. As aptly observed by Lord Denning MR in ***British Broadcasting Corporation vs Ioannou [1975] 2 All ER 999*** such a contract binds parties for the term stated in the agreement. In our view, the duration for the third contract was expressly stipulated therein, that is, for a period of four months running from 1st March, 2014 up to 30th June, 2014. To us 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. This is because as this Court expressed in ***Registered Trustees of the Presbyterian Church of East Africa & another vs. Ruth Gathoni Ngotho- Kariuki [2017] eKLR*** fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry.

17. 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.

18. Similarly, it is clear that she executed the third contract voluntarily and being fully aware of the terms thereunder; her allegation that she executed the contract with reservation does not hold any weight, also for the simple reason that the appellant gave her an option of either accepting or declining the new terms and she choose to accept. It is trite that the function of a court is to enforce a contract as agreed by the parties. It should not make additions to such a contract by implying a term merely because it deems it would be reasonable to do so. See ***Liverpool City Council vs. Irwin [1977] A.C 239***. Therefore, we find that the respondent was bound by the contractual terms of the third contract and could not rely on the earlier representations.

19. It follows that the contract in question automatically lapsed on 30th June, 2014 by effluxion of time. That being the case the reason given by the appellant in its letter to the Ministry of labour for its decision not to renew the respondent's contract and the payment of what was termed as a redundancy package in our view, has no relevance to this dispute. We also find that the same could not have been a basis of finding that the respondent had been declared redundant. 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. This much was appreciated by this Court in ***Oshwal Academy (Nairobi) & another vs. Indu Vishwanath [2015] eKLR*** which quoted with approval Rika, J.'s sentiment in ***Bernard Wanjohi Muriuki vs. Kirinyaga Water And Sanitation Company Limited & another [2012] eKLR***:-

> ***"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.***

20. For reasons herein above stated, we find that the appeal has merit and is hereby allowed with costs. We set aside the judgment dated 6th July, 2016 in its entirety and substitute the same with orders dismissing the respondent's suit with costs.

Dated and delivered at Nairobi this 2nd day of February, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR