



REPUBLIC OF KENYA



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**National Water Conservation & Pipeline Corporation v Mwanza (Civil Appeal 178 of 2014) [2017] KECA 797 (KLR) (26 May 2017) (Judgment)**

Neutral citation: [2017] KECA 797 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 178 OF 2014  
PN WAKI, RN NAMBUYE & HM OKWENGU, JJA  
MAY 26, 2017**

**BETWEEN**

**NATIONAL WATER CONSERVATION & PIPELINE CORPORATION ..... APPELLANT**

**AND**

**JAYNE KANINI MWANZA ..... RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya at Nairobi (Nzioki Wa Makau, J.) dated 23rd January, 2014 in Industrial Court Cause No. 25 of 2012)*

**JUDGMENT**

1. Does a fixed contract of service, which has an option for renewal, expire automatically by effluxion of time or the employee has a legitimate expectation that it would be renewed once the option is exercised? In either case, what are the consequences? Those are the questions we are required to answer in this appeal. The appellant will henceforth be referred to as “the Corporation” which was represented before us by learned counsel Mr N Malonza instructed by M/s Sisule Munyi Kilonzo & Company Advocates, while the respondent (“the employee”) was represented by learned counsel Mr E A Ongicho instructed by M/s Ongicho-Ongicho & Company Advocates.
2. The salient facts are fairly straight forward and largely undisputed.  
The employee was working for the Corporation from the year 2002 as a Human Resources Officer on permanent and pensionable terms. On the advice of consultants in 2008, the corporation made policy changes in respect of a certain cadre of offices which were created, including the office of ‘General Manager, Human Resource and Administration’. It was made a fixed term contractual office. The position was advertised and the employee applied and was successfully interviewed after accepting the change of her status from permanent and pensionable to contractual.



3. By a letter dated December 17, 2008, the employee was appointed as, and she accepted to be, the General Manager, Human Resource & Administration Department of the Corporation on a fixed contract of three years expiring on December 16, 2011. The Corporation reserved the right to terminate the services prematurely depending on the employee's performance but that option was never exercised. There was also a clause for "Renewal of Appointment"

providing as follows:

"7. Should you wish to be reappointed in the same position, you will be required to make a written request at least 6 months before the expiry of this contract".

A further clause for "Termination" by either party giving three months prior notice or paying three months salary in lieu thereof was not invoked by either party before the expiry of three years.

4. Six months prior to the expiry of the contract, the employee exercised the option for renewal by making a request in a letter dated June 7, 2011. She acknowledged in the letter that her contract would end on December 16, 2011. There was no response to that letter by the Corporation. On the last day of the contract, the employee addressed the Corporation as follows:-

"I wrote to you in June 2011 requesting for renewal of my contract that was to expire on December 17, 2011. I wrote six months in advance as required expecting that the renewal request will be processed in good time and informed of the outcome before the contract expired. However, as of today I have not received any formal communication concerning the same. Since the contract expired on December 17, 2011 (*sic*), I have found it necessary in line with good governance not to report on duty awaiting a decision over the contract renewal. Meanwhile I have submitted to your office a leave application form requesting to take my pending leave days as I wait for your response concerning the contract renewal".

5. The letter was written on a Friday with a weekend in between and the Corporation responded on Monday December 19, 2011 referring to the fixed contract and the letter seeking renewal but regretting that the board of directors (BOD) had met on 16<sup>th</sup> December and resolved not to renew the contract. It said the position would be re-advertised and invited the employee to apply if so willing. She would be paid her gratuity and other dues on the expired contract.

6. The employee was aggrieved by that action and therefore went before the Industrial Court on January 10, 2012 and lodged a claim asserting that the renewal of the contract was automatic upon the proper and timely request made by her under clause 7 which was not responded to until after the expiry of the contract. She further pleaded that the purported termination of the renewed contract on December 19, 2011 was unfair termination causing her mental anguish because she had a legitimate expectation that her contract had been renewed. She made the following prayers:-

- i. A declaration that the Letter dated December 19, 2011 is null and void.
- ii. A declaration that the 2<sup>nd</sup> 3 year contractual period is subsisting.
- iii. Reinstate the grievant and treat her in all aspects as if the grievant employment had not been terminated.
- iv. The respondent be ordered to re-employ, and/or revert and/or change the claimant's employment terms to be on permanent and pensionable terms.



7. In the alternative, the employee sought payment of the following terminal dues and benefits:

- “(i) Outstanding salary for 1<sup>st</sup> to 21 December, 2011 (21days x 306,000) = Kshs. 214,200.00 30
- ii. Outstanding gratuity for the first term of contract served (31 x 190,000 x 36 months) = Kshs. 2,120,400.00 100
- ii. 12 Months Notice or payment in lieu thereof (12 months x Kshs.306,000.00) = Kshs. 3,672,000.00
- ii. 36 months salary damages being pay for the unexpired period of her fixed term contract 36 Months x Kshs.306,000.00 = Kshs.11,016,00.00
- ii. Leave days (unutilized) (133 days x 306,000.00) = Kshs. 1,356,600.00 30
- ii. Medical cover insurance benefits:  
Inpatient cover = Kshs. 1,500,000.00  
Out patient cover, inclusive for her 4 No dependants = Kshs. 500,000.00
- ii. Progressive Salary increment arrears:  
1<sup>st</sup> year of contract service 2,500 x 12 = Kshs. 30,000.00 2<sup>nd</sup> year of contract service 13,750 x 12 = Kshs. 165,000.00 3<sup>rd</sup> year of contract service 25,000 x 12 = Kshs. 300,000.00 Total = Kshs. 495,000.00
- ii. Gratuity on salary increment arrears:  
(31 x 495,000) = Kshs. 153,450.00  
100
- ii. Severance/gratuity from 2002 – 2008  
31/190,000 x 12 x 6 = Kshs.4,240,800.00  
100
- ii. Pensionas per the existing scheme of service”.

8. The Corporation denied the claims and in particular that the renewal was automatic pointing out that it was subject to consideration and acceptance by the BOD. It pleaded the Code of Regulations which was part of the contract between the parties and which provided that appointments on contract lasted for a maximum of 3 years and were only renewable at the discretion of the BOD. The contract would otherwise end by effluxion of time and attract no claim for unfair termination. It pleaded further that the employee was aware of the date of expiry of the contract and had acknowledged it in her letters. She was thus stopped from asserting otherwise. At all events, the corporation urged, if such contracts were automatically renewable, it would make nonsense of the fixed term converting the contract into a renewable one ad infinitum. It further contended that there was no time limit for the response by the BOD on the request made under clause 7 and the court cannot therefore impute any. Finally, the Corporation contended that the employee had been paid her salary, gratuity and leave under the contract and nothing more was claimable.

9. The matter fell before Nzioki wa Makau, J. for hearing and determination but the parties agreed to have the decision made on the basis of the documents filed, submissions made and issues framed by them.



In the end, the trial court found that although there was a fixed contract, the employee continued to work past the contract date and it was therefore impliedly renewed. Termination thereafter without notice was unlawful and the employee was entitled to compensation. Judgment was thus entered in favour of the employee for the following:-

- a. Kshs 750,000/= being 3 months notice per the contract
- b. Kshs 918,000/= being 3 months salary as compensation
- c. Pay for 113 leave days
- d. Costs of the suit.

10. In arriving at those conclusions, the trial court reasoned in the following manner:

“The law is clear. In the case of a fixed term employment if an employee continues working past the end of a contract without it being formally renewed, there’s an implied agreement by the employer that the end date of the contract has changed. The employee requires to be given proper notice if the employer wants to dismiss the employee. The claimant was therefore entitled to a notice of the intention to terminate. Simply put, the respondent was under an obligation to communicate refusal to renew the contract the claimant had with the respondent before the expiry date. There is a plethora of case law that where there is legitimate expectation of renewal and there is no renewal such as in this case, the non-renewal of the contract amounts to a dismissal. See *South African Clothing & Textile Workers Union and Another v CEDEMA Industries (Pty) Ltd* [2008] ZALC and *Mediterranean Woollen Mills (Pty) Ltd v SA Clothing & Textile Workers Union* [1988] 2 SA 11 and *Banking Insurance & Finance Union (Kenya) v Kipsigis Teachers Sacco Society Limited* [2013] eKLR for the restatement of the principle. The case of *Spellman & Walker Co. Ltd v University of Nairobi* [2005] eKLR is not relevant as it relates to a conditional acceptance of an offer. The case of *Ruth Gathoni Ngotho-Kariuki v Presbyterian Church of East Africa and Presbyterian Foundation* [2012] eKLR supports the claimant’s position. In the case before me, the renewal was not automatic but had to be communicated to the claimant. Failure to communicate the renewal was tantamount to a constructive renewal.”

11. Those are the findings which aggrieved the corporation and provoked this appeal. In its memorandum of appeal the corporation laid out 13 grounds but learned counsel Mr Malonza focused on the issue stated at the introduction of this judgment, that is, whether the contract was renewable automatically. He referred to clause 7 (*supra*) and submitted that the clause must be read together with clause 2.2.3 of the Code of Regulations which were incorporated into the contract and stated in part:-

- “2. 2.3 Contractual Appointment
  - i. Appointments on contract terms of service shall apply to positions that cannot be filled on pensionable terms or where suitable candidates can only be appointed on contract terms of service.
  - ii. Appointments on contract will normally be awarded for a maximum period of three years and may be renewed at the discretion of the Board acting on the advice of the Managing Director.”

12. In those circumstances, urged counsel, making the request as the employee did, did not precipitate any renewal as the request was subject to consideration by the BOD. According to him, the employee was



aware of the expiry date of the contract and specifically stated so in her letters to the Corporation. The communication by the BOD was made at the first opportunity after its meeting on December 16, 2011 because there was an intervening weekend. By that time, the contract had expired automatically and there was no obligation on the part of the Corporation to respond at any particular time to a request made.

13. In support of that submission, counsel cited the case of *Ruth Gathoni Ngotbo-Kariuki v. Presbyterian Church of East Africa and Presbyterian Foundation* [2012] eKLR where the fixed term clause provided as follows:-

" The hospital's board shall renew your contract and you shall serve the Hospital as Nursing Officer in Charge of the Kikuyu Hospital for 3 years renewable contract commencing April 2, 2007".

The letter, in clause 6 on renewal stated thus:

"Not less than three months before the date of this expiration of this contract the Hospital Board shall inform the officer as to whether or not it wishes to renew the contract".

14. Instead of the hospital informing the employee about the renewal 3 months before its expiry, it did so 2 months after the expiry and the trial court, Byram Ong'aya, J. found that there was an obligation under the contract for the employer to renew the contract. The court held:

"..the renewal was to be mandatory, thus, "The hospital board shall renew your contract....." was such an imperative provision of the contract that entitled the claimant to unwavering legitimate expectation to the renewal of her contract of service. The only intervening contractual provision was that if renewal was to be refused, then the claimant was to be informed the refusal three months before the expiry of the contract. The respondents having failed to comply with the three months conveyance of refusal to renew, the court finds that the three years fixed term contract intended to lapse on March 31, 2010 did not so lapse."

15. That case, in Mr Malonza's submission, was distinguishable since the contract between the employee and the Corporation in this case did not impose any obligation for renewal and there could thus be no legitimate expectation of a renewal. As to what amounts to legitimate expectation, counsel cited the Supreme Court decision in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR.

16. Counsel further relied on the persuasive decision of Rika, J. in the case of *Margaret A Ochieng v National Water Conservation & Pipeline Corporation* [2014] eKLR which was based on identical facts and circumstances but related to the office of 'General Manager, Corporate Services and Legal Affairs'. It was decided on March 18, 2014, two months after the case before us. The court in that case stated the position in law to be that fixed-term contracts carry no expectancy of renewal and held:

" Was renewal automatic? The Court agrees with the submissions of the respondent that it was not the intention of the parties that there would be an automatic renewal. Such an intention would not make sense, and would negate the respondent's policy shift in 2008, from permanent and pensionable terms to fixed-term contracts, with regard to certain positions. The respondent would just have re-designated the position held by the claimant prior to 2008, and asked her to go on serving on permanent and pensionable terms.



Automatic renewal would undermine the very purpose of the fixed-term contract, and revert to indeterminate contracts of employment.

17. The second ground urged by counsel was in respect of the remedies awarded by the trial court. These, according to him, could only have been awarded if the contract was terminated before the three year period which it was not. As there was no termination of any contract by the corporation, there cannot be any remedies granted. He pointed out, and it was evident, that the employee was paid all her dues including payment in lieu of 103 days leave and the entire suit should therefore have failed.
18. In response, Mr Ongicho relied on the Submissions made before the trial court in which he advanced the arguments, inter alia, that the contract was automatically renewable once the employee made a request; that the employee was under no incapacity to work and had performed well in her employment; that the Corporation's decision was an afterthought and in bad faith; that the abrupt termination was in breach of trust and the Corporation was under an obligation to give a hearing to the employee as well as the reasons for termination of the contract; and that the remedy of specific performance was the best in the circumstances of the case.
19. Counsel further submitted that the fixed term contract had a pre-conditional clause for renewal which, once complied with, called upon the corporation to respond. It was a right of the employee to make a request and a duty of the corporation to respond. The corporation failed to respond until after the expiry of the contract and therefore, in counsel's view, the employee had a legitimate expectation that the contract was extended. He cited for support, this Court's decision (differently constituted) in *Oshwal Academy (Nairobi) & Another v Indu Vishwanath* [2015] eKLR where the court cited with approval persuasive decisions of the Industrial Court propounding the legal position 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.” (Emphasis added)
20. In this case, urged counsel, there was an obligation on the part of the Corporation to respond to the request of the employee before expiry of the contract. The trial Judge was therefore right that the contract was deemed to have been extended beyond December 16, 2011 on the same terms and unless there was compliance with the *Employment Act, 2007*, any termination thereafter would be unfair termination attracting the remedies dished out by the trial court. The appeal was for dismissal.
21. We have considered those submissions and the entire record of appeal, as we must on a first appeal, in order to arrive at our own conclusions on matters of law as well as facts. Since the trial court had no added advantage of hearing and seeing any witnesses for assessment of credibility, we stand on equal footing with that court and are at liberty to interfere with the decision if it is based on no evidence or on a misapprehension of the evidence or the court is shown demonstrably to have acted on wrong principles in reaching its findings. See *Mwangi vs Wambugu* [1984] KLR page 453.
22. Was the fixed term contract automatically renewed upon the employee making a request? The sole basis for the finding made by the trial court was the legal proposition that if an employee continues working past the end of a contract without being formally renewed, there is an implied agreement by the employer that the expiry date of the contract had changed and a notice was thereafter necessary to terminate the employment. With respect, we think that principle was too widely stated and erroneously construed. A general principle that a fixed term contract will continue if not terminated would be a contradiction to the very definition of a fixed term. There is a definite start date and an end date. The contract would logically end automatically without more otherwise it would no longer be a fixed term contract. See the case of *SA Rugby (Pty) Ltd v CCMA & others* [2006] 27 ILJ 1041 (LC) at 1044 par 6).



23. The general principle, as we understand it, is that a fixed term contract will terminate on the sun set date unless it is extended in terms stated in the contract. A court cannot rewrite the terms of a contract freely entered into between the parties. Once there is a written contract, the court will seek to give meaning to such contract giving ordinary meaning to its terms in determining any issue that may arise. The principle has been considered by several Judges of the Industrial Court (now the Employment and Labour Relations Court) and they are generally in agreement. Indeed this Court was in agreement in the *Oswal Academy (Nairobi) case* (*supra*) when it decided as follows:-

“Termination of fixed term contracts has received judicial consideration by the Industrial Court. In *Bernard Wanjobi Muriuki vs Kirinyaga Water and Sanitation Company Limited & another* [2012] eKLR, Riika J, held 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 vs 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.”

24. The Ruth Gathoni case (*supra*) which was relied on by the trial court in this case (Nzioki wa Makau, J.) was an exception to the rule as clearly stated by the court itself (Byram Ongaya, J.). The renewal clause of the contract in that case obligated the hospital board to inform the claimant three months before the date of expiry of the contract that the contract would or would not be renewed. It was an obligation created under the contract itself for the employer to comply but the employer did not, hence the liability. Not so in the case before us. The renewal clause was premised, not only on the request of the employee, but also on the discretion of the Corporation, both of which were express terms of the contract. There was no obligation of the Corporation to act. In the circumstances, the trial court was in error in stating that the Ruth Gathoni case supported the employee’s case.

25. The only issue for consideration is whether the terms of the renewal clause fell within the exceptions to the general rule. Some of the exceptions were stated in the case of *Frenchon vs The Secretary-General of*



*the United Nations*, decided by the United Nations Appeals Tribunal [UNAT], Case No. 2010 -125.T as:

- a. where the actions of the employer give rise to legitimate expectation on the part of the Employee, that there would be renewal;
- b. where the decision not to renew is based on improper motives or
- c. where there are countervailing circumstances.

26. Was there legitimate expectation by the employee for renewal? The Supreme Court in the *Communications Commission of Kenya case (supra)* extensively analyzed the principle of legitimate expectation in comparative fashion before summarizing it 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*.

27. The employee here was not a new recruit in the Corporation. She was aware of the policy decision the Corporation took to change from permanent and pensionable to fixed term contract employment terms of the identified cadre of employees and she willingly became part of that process. That is why it was clear in her mind as she wrote the second letter on 16<sup>th</sup> December, 2011 thus:

“Since the contract expired on December 17, 2011(*sic*), I have found it necessary in line with good governance not to report on duty awaiting a decision over the contract renewal.”

28. She did not report to work but instead asked for her untaken leave days to be paid. She knew she would have to await the decision of the BOD as the contract was not automatically renewable and the terms of it said so. She did not work past the end of the contract as erroneously stated by the trial court. How would it then turn out that she expected the contract to be automatically renewed? An expectation to be actionable ought to be legitimate and in our view there was no ‘express, clear and unambiguous’ promise by the corporation in this case that the contract would be automatically renewed once the employee so requested. We also find no legitimate expectation that the employee would be given the reasons for non extension of a fixed term contract as there was no obligation on the part of the corporation to give any.

29. We think we have said enough to satisfy ourselves that this appeal is meritorious. We allow it and set aside the orders of the lower court. There is evidence on record that the employee worked for many years with the corporation and rendered exemplary services. In exercising her right to question the actions of the corporation she was not, in our view, actuated by malice or ill will but seeking a binding construction of the contract between the parties which may well extend to benefit a wider section of the employed public. For those reasons we find no good reason to condemn the employee on the costs of the litigation. We order that each party shall bear its own costs both here and before the Employment and Labour Relations Court.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY, 2017.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**R. N. NAMBUYE**

.....

**JUDGE OF APPEAL**

**H. M. OKWENGU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

