



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: WAKI, NAMBUYE & SICHALE, JJA)**

**CIVIL APPEAL NO. 7 OF 2016**

**BETWEEN**

**THE REGISTERED TRUSTEES**

**DE LA SALLE CHRISTIAN BROTHERS**

**T/A ST. MARY'S BOYS' SECONDARY SCHOOL ..... APPELLANT**

**AND**

**JULIUS D. M. BAINI ..... RESPONDENT**

*(An appeal from the Judgment and Orders of the Employment and Labour*

*Relations Court at Nyeri (Byram Ongaya, J) dated 13<sup>th</sup> November, 2015*

*in*

***ELRC No. 16 of 2015***

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**JUDGMENT OF THE COURT**

1. This is yet another employment matter where the termination of employment under a fixed term contract is called to question. Does the employment come to an end when the contract says it will, subject to any express term of extension, or the term can be extended by conduct? Take this case.

2. The respondent before us, a professional teacher, honorably retired from public service after a long and illustrious career after attaining the mandatory age of 60. In the year 2011, he applied for and was offered contractual services to teach English/Literature at St. Mary's Secondary School in Nyeri County, which is sponsored by the appellant. The contract was to run from January to 31<sup>st</sup> December at a monthly salary of Sh. 31,650. By 31<sup>st</sup> December, 2014 he had completed four different yearly contracts. One week after the expiry of the contract ending 31<sup>st</sup> December, 2014, the respondent says he received three letters from the school Principal dated 7<sup>th</sup> January 2015: one informing him that he "has retired with effect from 31<sup>st</sup> December, 2014", another informing him that he "has retired with effect from 7<sup>th</sup> January 2015", and the last one a "service and recommendation" letter stating how good he was in the discharge of his services. He was not given any duties thereafter and was asked to hand over the staff residence and school

property. He signed a clearance form after payment of his dues. But he refused to comply with the Principal's demand and instead filed a claim before the **Employment and Labour Relations Court** (ELRC) on 10<sup>th</sup> February, 2015 contending that the purported 'retirement' did not terminate his contract. Alternatively, he claimed that there was unfair termination of employment which should attract terminal benefits of three month's salary in lieu of notice, severance pay at half a month's pay for each year worked and damages of 12 months' salary for unfair termination. He sought a declaratory order that he was still in employment and an injunction to stop his eviction from the staff house.

3. The appellant resisted the claim on the basis that the services were contractual on yearly basis and they lapsed at the end of each year; that a letter dated 15<sup>th</sup> September, 2014 was served on the respondent informing him that the contract would not be renewed for the year 2015; that a further letter dated 20<sup>th</sup> November, 2014 responding to the respondent's request for renewal of the contract confirmed the non renewal; that the non renewal was based on the age of the respondent, his diminished management skills and poor performance; and that there was no unlawful or unfair termination.

4. The matter was orally heard before **Byram Ongaya, J.** when the respondent testified on his own behalf as **(CW)** and the Principal testified for the appellant as **(RW)**. After considering the evidence, the trial court framed two issues which it answered as follows:

***“(1) The 1<sup>st</sup> issue for determination is whether the claimant served beyond 31.12.2014 when his contract of service lapsed. The termination letter is clear. The claimant served the respondent as an English and Literature teacher and retired with effect from 07.01.2015. The court finds that the claimant served after lapsing of his one year contract on 31.12.2014. The court therefore infers that the claimant’s contract of service was renewed beyond 31.12.2014 and the termination was therefore not on account of lapsing of the contractual tenure of one year.”***

***(2) The 2<sup>nd</sup> issue is whether the termination of the claimant’s employment was unfair. The respondent’s evidence is clear that the claimant had to separate (sic) and his services had to be terminated in view of the allegations of unsatisfactory performance that were leveled against the claimant. Section 41 of the Employment Act, 2007, is clear that in event of removal on account of poor performance, the respondent was required to subject the claimant to a disciplinary process entailing a notice and a hearing. There was no evidence that the claimant was accorded such process. Instead, the evidence shows that the respondent invented a process of making allegations, failing to require the claimant to reply or be heard and then retiring the claimant. The court finds that the procedure as invoked was in contravention of section 41 of the Act and the reason for the termination was not genuine as envisaged in section 43 of the Act as retirement as invoked was also outside the agreement between the parties.***

***The court returns that the termination was unfair for want of due process under section 41 and want of a genuine reason as envisaged in section 43 of the Employment Act, 2007 and as per the contract between the parties.”***

5. With that finding, the court awarded the respondent one year's gross salary of Sh. 379,800 as damages for unfair termination of employment and Sh. 31,650 as one month's payment *in lieu* of notice---total **Sh. 411,450** to be paid within one month and in default to earn interest.Reinstatement was declined and an order was made for the respondent to vacate the staff house.

6. The appellant was aggrieved by those orders and is now before us urging six grounds of appeal which were argued as two by its learned counsel **Mr. Wahome Gikonyo**. The first ground (covering grounds 1 & 2 in the memorandum of appeal) is that the trial court based its decision on an unpleaded issue that was not canvassed in evidence or submissions of counsel. The issue as framed by the court was whether the respondent had worked beyond the expiry of his contract of service and therefore had his contract extended by such conduct. According to counsel, however, that was not the respondent's claim as pleaded. The pleading was that the contract of service which was expiring on 31<sup>st</sup> December, 2014 was not terminated and he was still in employment, hence his demand for reinstatement. On the evidence, he

submitted, the respondent went to the school on 7<sup>th</sup> January, 2015 to sign clearance forms and collect his letter of completion of service and recommendation. There was no question of working beyond the expiry date of the contract. Counsel relied on three authorities in support of this submission: **Captain Harry Gandy vs Caspar Air Charters Limited, [1956] EA 139**; **Nairobi City Council vs Thabiti Enterprises Ltd. (1995 – 98) EA 231** and **Judicial Service Commission vs Gladys Boss Shollei & Another (2014) eKLR**.

7. The second broad ground (covering grounds 3, 4, 5 & 6) attacks the finding that there was unfair termination. In the first place, he contended, the contract expired by effluxion of time. In the second place, it was in evidence that the respondent requested for extension of the contract but the request was declined in writing. There was thus no basis for the finding that there was termination and that it was unfair. He cited the case of **Isaiah Makokha v. Basco Products (K) Ltd [2014] eKLR** where **Radido Stephen, J.** opined thus:

***"In my humble view, under the current statutory framework obtaining in Kenya, the non renewal of a fixed term contract with no clause on (automatic) renewal cannot and does not fall under or amount to unfair termination/wrongful dismissal."***

8. In response, learned counsel for the respondent **Mr. C. M. King'ori** referred us to the statement of claim as well as the witness statement filed with it and observed that the respondent had made it clear that he was retired on 7<sup>th</sup> January, 2015 and must therefore be deemed to have worked beyond the expiry date of his contract. He was thus entitled to notice or payment of one month's salary *in lieu* thereof if the services were to be terminated. The trial court was, therefore, not wrong to frame the first issue. On the issue of unfair termination, counsel referred us to the letter dated 15<sup>th</sup> September, 2014 confirming non renewal of the contract which cited the reasons as misconduct and incompetence but there was no proof of any due process to establish those allegations as required under **Sections 41, 43 and 45** of the **Employment Act**. Counsel further contended that the respondent was never served with any letter of termination of his employment and the ones alluded to by the appellant and produced in evidence were never received by the respondent.

9. We have reviewed and reconsidered the entire record of evidence as we must on a first appeal in order to arrive at our own conclusions. We are aware that we did not see or hear the two witnesses who testified and therefore the trial court was better placed to assess their credibility. We are also aware that this Court will ordinarily not interfere with the findings of fact made by the trial court unless those findings are not based on any evidence on record or the court is shown demonstrably to have acted on wrong principles to arrive at those findings. See **Jabane -vs- Olenja [1986] KLR 661**.

10. In our view, the overarching issue that begs determination is the one posed at the opening paragraph of this judgment-- did the contract of service signed between the appellant and the respondent expire or was it by conduct extended indefinitely? The other issues hang on the coat tails of that main one and will stand or fall depending on our finding thereon.

11. The contract was exhibited on record and it confirms that it was executed between the parties on 24<sup>th</sup> January, 2014 for a period of one year expiring on 31<sup>st</sup> December, 2014. In his oral evidence, the respondent confirmed thus:

***"The staff contract period was 1<sup>st</sup> January to December 31, 2014. It does not provide for extension of contract. It was a yearly contract"***.

There was a termination clause subject to giving one month's notice or paying one month's salary but it is common ground that neither party sought to terminate the contract before the date of expiry.

12. There is, however, evidence of a letter written to the respondent by the appellant on 15<sup>th</sup> September, 2014, stating as follows:-

***“This letter is to confirm our discussion about the nonrenewal of your contract ending 31<sup>st</sup> of December, 2014. You are being nonrenewed because of age, you will be 65 years next year, As you are aware the 4 years you have been with us you faced daunting classroom management, enormous academic hurdles. Our stakeholders, mainly parents have raised similar concerns. Among the issues raised and brought to your attention includes: awarding students marks they did not deserve, quality of exams among others.***

***Your appointment will terminate on 31<sup>st</sup> December, 2014. This letter provides you with proper notice of nonrenewal in accordance with the contract you assigned for this academic year. You are also requested to vacate from the staff house on or before the 31<sup>st</sup> of December 2014.***

***We appreciate your professional contributions and wish you well in your future endeavors”.***

12. The respondent denied receiving that letter and the trial court agreed with him as there was no proof of delivery of the letter to him. We take the view that the finding was of no consequence considering that the contract was still alive and there was no clause requiring the giving of such notice. Furthermore, the appellant appears to have placed no premium on the alleged professional shortcomings on the part of the respondent, otherwise the contract would have been terminated before 31<sup>st</sup> December, 2014 if the appellant was serious about the allegations. But it was not terminated.

13. The appellant produced in evidence a letter dated 18<sup>th</sup> November, 2014 addressed to the Principal in which the respondent stated as follows:-

***“Dear Brother***

***RE: EXTENSION OF CONTRACT***

***As it were, I am affected by the restructuring process which must be in place before next year, 2015.***

***In view of that, I request that you accord me one more year so that I can clear the few debts I owe people; and at the same (sic) save the dignity of my family. The following are the debts I sincerely must pay if I must leave St. Mary’s in a lean (sic) way without denting my integrity:***

***1. ST. MARY’S = 20,368/=***

***2. ST. MARY’S WORKERS’ SAVINGS = 60,000/= (approximately)***

***3. NATIONAL BANK’S FORMER MANAGER = 25,000/=***

***4. LAND SUCCESSION CASE = 12,000/=***

***There are other liabilities such as paying the medical balance for my ailing sister and my son's fees (university education) but these are issues I can deal with as time goes by and according to the will of the Almighty.***

***Thank you for according my (sic) the four years I’ve so far cleared in this institution.***

***I remain hoping that God will guide you with a view to meeting my very honest prayer.***

***Yours obediently,***

***Julius D. M. Baini”.***

14. The respondent admitted in oral evidence that he wrote the letter. But the letter was not evaluated by

the trial court. In our view, it establishes that the respondent was aware, whether from oral discussions with the Principal or otherwise, that the contract was ending on 31<sup>st</sup> December, 2014 and that he was making a request, which he referred to as 'honest prayer', to work for one more year in order to meet pressing financial needs. The appellant responded to that letter on 20<sup>th</sup> November, 2014 stating thus:

**“Dear Mbaini,(sic)**

***I am in receipt of your letter dated November 18, pleading for an extension of your current contract by another year. I regret to inform you that your contract will not be renewed for the coming academic year 2015 based on the same reasons shared with you. Please refer to my earlier communications with you. I also want to inform you that your position has already been advertised and therefore your contract will not be renewed for the year 2015. You are expected to clear with the school by 31 of December 2014. Also ensure that you have moved out of the staff house on or before the 31 of December 2014.***

***Thank you for your services and my best wishes on your future endeavors.***

***Sincerely,***

***Brother Peter Kombe, FSC***

***Headmaster”.***

15. Once again the trial court does not appear to have evaluated that letter, finding as it did, that the letter was not delivered to the respondent. That, however, defies logic, in our view. Why would the respondent make a passionate plea for extension of contract 45 days before its expiry and simply sit back without following up on the response? The School Principal testified as follows:-

***“I see letter of 18.11.2014 by claimant asking for extension of contract. He requested for extension. He knew his contract was ending 31.12.2014. I responded to his letter by my letter of 20.11.2014. I told him that we would not renew his contract. He received my letters from my office. He replied so I say he received the letter”.***

16. According to the Principal, the school term ended on 14<sup>th</sup> November, 2014 and that is when the respondent stopped working. The respondent went to the school when it reopened to collect his service letter and to sign clearance forms which he did on 7<sup>th</sup> January, 2015. He was not at the school between 2<sup>nd</sup> and 7<sup>th</sup>. The appellant's testimony on the other hand was that he was on duty from 1<sup>st</sup> to 7<sup>th</sup> January because he had not been informed that his contract had lapsed and would not be renewed. According to him, he was retired forcefully on 7<sup>th</sup> January, 2015 after commencing a new contract. There was no other support for that evidence. It was his word against the Principal's. Considering that the onus was on the respondent to prove his claim, and considering further that he was already aware of the sunset date of his employment, the letter informing him about non renewal notwithstanding, and that he had on three previous occasions commenced new yearly contracts after signing them, it would overstretch the imagination to accept that the respondent had reported back to work in the new year on the basis of any purported new or extended contract. As the predecessor of this Court stated in ***Selle v. Associated Motor Boat Company [1968] E. A. 123*** at p.126:

***“...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 demeanour of a witness is inconsistent with the evidence in the case generally.”***

In all probability, and we so find, there was no re-engagement of the appellant in employment after his yearly contract expired on 31<sup>st</sup> December, 2014.

17. The trial court appears to have latched on the phraseology used by the appellant in two of the letters issued to the respondent on 7<sup>th</sup> January, 2015 stating that the respondent "has retired" on that day, to impute the existence of a contract of service. We may reproduce them:

*"Jan 7, 2015*

*To Whom It May Concern*

*Re: Mr. Julius D. M. Baini*

*The above named person has been my teacher of English/Literature and has retired with effect from 7/1/2015.*

*Any assistance accorded him will be very sincerely appreciated.*

*Very truly yours*

*Bro Peter Kombe –FSC*

*Headmaster".*

and

*"Jan 7, 2015*

*To Whom It May Concern*

*Re: Mr. Julius D. M. Baini*

*The above named person has been my teacher of*

*English/Literature and has retired with effect from 31/12/2014.*

*Any assistance accorded him will be very sincerely appreciated.*

*Very truly yours*

*Bro Peter Kombe –FSC*

*Headmaster".*

18. With respect, there was no basis for the contrived interpretation of those letters. There is no definition of 'retirement' in the **Employment Act**, but it entails the voluntary withdrawal from work due to age. **Black's Law Dictionary** defines it as: "**Termination of one's own employment or career upon reaching a certain age or for health reasons. It may be voluntary or involuntary.**" The letters seem to show that the respondent voluntarily chose to retire on two different dates, none of which makes sense. They say he 'has retired' not that he 'was retired'. But he had already retired after attaining the mandatory age of 60; why would he be retiring again? The letters are not even addressed to the respondent but "**To whom it may concern**". How could they have been terminating his services? All that, in our view, can only make sense once we consider the evidence of the Principal who testified that it was at the express request of the respondent that the letters be so addressed in order to assist him to seek employment elsewhere. He was being compassionate, he stated. In hindsight, the intention of the respondent may well have been to get a basis for filing his claim as he did one month later in February. Once again, we find no firm basis for choosing the evidence of the respondent over that of the Principal.

19. In the case of *Oshwal Academy (Nairobi) & Another -vs- Indu Vishwanath [2015] eKLR* , this

Court, differently constituted, cited with approval persuasive decisions of the Industrial Court and agreed with the following principles: ***“Termination of fixed term contracts has received judicial consideration by the Industrial Court. In Bernard Wanjohi 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 -vs- 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.”***

20. It is our finding that the respondent's contract ended on 31<sup>st</sup> December, 2014. There was no obligation on the appellant to give notice of expiry or information that it would not be renewed. We find no firm evidence that there was either an extension of the expired contract or a commencement of a new one. Nor is there firm evidence that the respondent worked for one week in January 2015. There was therefore no question of unfair termination of employment. The claim had no basis and ought to have been rejected.

21. This appeal is meritorious and we allow it. We set aside the orders of the lower court and substitute therefor an order dismissing the claim filed on 10<sup>th</sup> February, 2015. We make no orders as to costs here and in the court below, the appellant being a retiree who was acknowledged by the appellant as having generally rendered good services to the school.

Orders accordingly.

**Dated and delivered at Nyeri this 7<sup>TH</sup> day of June, 2017.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**