IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, G.B.M KARIUKI, J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 92 OF 2013

BETWEEN

THE REGISTERED TRUSTEES OF THE PRESBYTERIAN

CHURCH OF EAST AFRICA.....1ST APPELLANT

THE PRESBYTERIAN FOUNDATION....2ND APPELLANT

AND

RUTH GATHONI NGOTHO- KARIUKI.....RESPONDENT

(An appeal from the judgment of the Industrial Court of Kenya at Nairobi (Ongaya, J.) dated 11th December, 2012

in

Industrial Cause No. 509 of 2010)

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JUDGMENT OF THE COURT

1. The respondent was employed on 29th March, 2004 as a Nursing Officer in charge of the P.C.E.A Kikuyu hospital which is owned and managed by the appellants. She was employed on a 3-year contract which was renewable. In point of fact, her contract was renewed effective from 1st April, 2007 and was scheduled to expire on 31st March, 2010.

2. During the course of her employment, the appellants agreed to sponsor the respondent to undertake a Masters degree in Health care services management at the Kenya Methodist University. The sponsorship was subject to the respondent executing a bonding agreement which she did on 13th January, 2009. The salient terms of the bonding agreement were that the respondent agreed to be bound to work for the hospital for a period of five years after the completion of her studies. She was scheduled to complete her training in June, 2010.

3. As per the hospital's human resource policy manual, the respondent on 19th April, 2010 not only informed the appellants that her contract was due to expire but also intimated her interest for the renewal

of the same. There was no response from the appellants despite several reminders from the respondent. Eventually, on 31st March, 2010, the hospital's Chief Executive Officer, wrote a letter to the respondent indicating that her contract expires on the said date and that further communication would come from the Head Office.

4. Be that as it may, the respondent continued working on the strength of the bonding agreement which she believed was an express intention by the appellants to renew her contract. However, on 5th May, 2010 she received a letter from the appellants informing her that the hospital had decided not to renew her contract which expired on 31st March, 2010.

5. The respondent was aggrieved by this turn of events and was convinced that the appellants had breached the terms of her contract. According to her, the letter in question was a termination of her services which she deemed as unlawful. As such, she filed suit in the Industrial Court (now known as the Employment and Labour Relations Court (ELRC)) seeking ,*inter alia,*

- ***Special damages of Kshs. 9,940,101.64/=***
- ***General damages***
- ***Legal costs***
- ***Interest on the above until payment in full.***
- ***An order that the claimant be issued with a certificate of service.***

6. In response, the appellants maintained that the respondent's contract had expired and they did not wish to renew the same. They admitted that the respondent was entitled to gratuity, payment of leave not taken for the period between January, 2010 to March, 2010 and certificate of service. Towards that end, they were always ready and willing to release the same to the respondent but she refused to clear with the hospital.

7. Upon considering the evidence, the trial Judge (Ongaya, J.) in a judgment dated 11th December, 2012 found for the respondent and granted her damages in the tune of Kshs.5,141,148.34/= with interest at court rates. In doing so, he found that the appellants were required to inform the respondent of whether they wished to renew her contract 3 months prior to the expiry of the said contract. Failure to do so meant that the respondent's contract was constructively renewed. The letter dated 5th May, 2010 was a termination letter which was in breach of the contract. Neither was the requisite notice nor payment in lieu of the said notice nor reasons for the termination given to the respondent. As a result, the respondent's termination was unlawful.

8. It is that decision that has provoked the appeal before us which is predicated on the grounds that the learned Judge erred in law by-

- ***Failing to correctly interpret the law in relation to fixed term contracts.***
- ***Misinterpreting the terms of the respondent's contract.***
- ***Holding that the respondent was unfairly terminated.***
- ***Finding that the bonding agreement amounted to a contract of service.***
- ***Awarding damages which were not proved and were otherwise manifestly excessive.***

9. Mr. Amuga appeared for the appellants while Mr. Njoroge appeared for the respondent. Learned counsel relied on the written submissions filed on behalf of the respective parties.

10. It was submitted on behalf of the appellants that the learned Judge misapprehended the terms of the contract. It was argued that there was no provision in the said contract that its renewal was automatic. Furthermore, that the failure by the appellants to indicate their intention within the stipulated time frame did not operate as an automatic renewal of the expired contract. It was clear that the appellants' conduct did not in any way imply constructive extension of the contract. This was evidenced by the fact that the respondent was removed from the payroll once her contract expired. In addition, the appellants' informed her in writing that her contract had expired and never directed her to continue

working. In those circumstances the issue of unlawful termination could not arise.

11. The learned Judge was faulted for finding that the bonding agreement amounted to a service contract. According to the appellants, the bonding agreement was subject to the contract of service being in force and did not in any way alter the fixed term therein. It also did not take away the appellants' right to elect whether to renew the contract. In any event, the terms of the bonding agreement were clear that the respondent bound herself to work for the hospital for 5 years after completing her studies and not before. Since the appellants opted not to renew her contract, the respondent was released from the said bond.

12. The appellants asserted that upon the expiry of the respondent's contract, she had no basis for claiming payment of salary relating to the period after the expired fixed term. Therefore, the award by the learned Judge of Kshs. 3, 764,844/= being salary for the alleged renewed period was erroneous. Moreover, the law limits an award for unlawful termination to a maximum of 12 months gross salary. To buttress this line of argument, the ELRC decision in ***Alphonce Maghanga Mwachanga vs. Operation 680 Limited [2003] eKLR*** was cited.

13. The appellants also took issue with the manner in which the learned Judge assessed damages. To them, the learned Judge issued damages without the same being proved. It was asserted that the respondent had not proved she was entitled to: payment for leave allegedly not taken in the year 2009, extra duties and pay for off days worked. As far as the balance for tuition was concerned, the appellants contend that following the expiry of the contract and it's non-renewal the respondent was not entitled to further bursary. Consequently, the learned Judge erred in compelling the appellants to pay the same.

14. The respondent on her part supported the findings of the learned Judge. It was maintained that the appellants were bound by the terms of the contract. The respondent was entitled to deem that her contract had been renewed in light of the appellants' failure to inform her of their intention within the requisite time frame. Besides, the appellants did not object to her working even after expiry of the fixed term. In that regard, the respondent relied on ***Kenya Airways Ltd. vs. Satwant Singh Flora [2013] eKLR*** wherein this Court expressed:

> ***"On the question whether there was a valid contract of employment between the parties after 14th January, 1997 and whether one can be implied, it is not in dispute that the respondent's contract was terminated on 14th January, 1997. However, the respondent continued working up to the end of June, 1997, despite there being no written contract. Halsbury's Laws of England (4th Edition), Volume 16(1A) page 11, paragraph 15 states that: "In general a contract of employment need not be in any particular from. A contract of employment may thus be inferred from the conduct which shows that such a contract was intended although never expressed as where there has in fact been service of the kind usually performed by employees."***

It followed that the letter dated 5th May, 2010 was in breach of the renewed contract and amounted to unlawful termination.

15. Last but not least, it was submitted that the learned Judge properly exercised his discretion in awarding the damages he did.

16. We have considered the record of appeal, the respective written submissions, the authorities annexed thereto and the law. It is now settled that the duty of the first appellate court in an appeal is to re-evaluate the evidence and come up with its own findings and conclusions. In this regard, see ***Jabane vs. Olenja [1986] KLR 661***. In our considered view the appeal turns on the construction of the contract of service between the parties.

17. ***Section 2*** of the ***Employment Act*** defines a contract of service in the following manner:-

> ***"contract of service" means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of***

apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies;.."

18. The rights and obligations of an employer and employee generally flow from the contract of service. Therefore, the construction of such a contract is to determine the terms and the legal effect of the same. The general rule is that the intention of the parties to an agreement should be ascertained from the document as it is deemed that what the parties intended is what is stated in the agreement. As succinctly put by this Court in ***Savings and Loan Kenya Limited vs. Mayfair Holdings Limited [2012] eKLR***:

"…the object of construction of terms of a written agreement is to establish there from the intention of the parties to the Agreement which must be approached objectively. The question in this appeal is not what the appellant or the respondent meant or understood by the words used but the meaning which the particular clause would convey to a reasonable person having all the background information that was available to the parties at the time of the contract."

19. It is not in dispute that the respondent was hired on a contractual basis for a period of 3 years. Upon the expiry of her initial contract, the appellants renewed the same for a further period of 3 years commencing from 1st April, 2010 to 31st March, 2010. Of relevance were clauses 2 and 6 of the terms of the renewed contract. Clause 2 read as follows: -

"TERMS OF APPOINTMENT

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

Clause 6 provided: -

"RENEWAL OF THIS ARRAGEMENT

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."

20. It is on the strength of the above clauses that the respondent claimed, and the trial Judge agreed, that the appellants were under an obligation to bring their intention not to renew the contract to the respondent's attention 3 months prior to the expiry of the contract. Failure to do so, the contract was constructively renewed for a further period of 3 years.

21. In our interpretation of the contract as a whole, we find that the respondent was hired for fixed period which was renewable upon expiry. We are guided by the decision in ***Ford vs. Beech [1848]*** wherein the court stated:

"The common and universal principle ought to be applied; namely, that [an agreement] ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement and that greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent."

22. We concur with the trial Judge to the extent that as per the contract of service the appellants' were required to inform the respondent of their intention of whether they would renew her contract 3 months prior to the expiry of the same. However, we respectfully disagree that the failure to do so amounted to an automatic renewal. Why do we say so? It is clear from the wording of the above clauses as well the hospital's human resource manual that the renewal was subject to the mutual consent of the respondent as the employee and the appellants' as the employer. To hold otherwise would be tantamount to holding at servitude a party who wishes to exercise his/her right of termination in terms of the contract as observed by this Court in ***Minnie Mbue vs. Jamii Bora Bank Limited [2017] eKLR***. Further, this Court in its own

words in ***Kenneth Karisa Kasemo vs. Kenya Bureau of Standards [2013] eKLR*** held:

> ***"We have carefully considered the law and the facts surrounding this case, suffice to say that the law on employment does not normally envisage a situation where an employee is "forced" upon an employer (and vice versa) and case law is rife on this subject and indeed this Court has time without number honoured the contract existing between the parties."***

23. There is no doubt that the respondent did express her intention for the renewal of the contract. We do not think that failure by the appellants to express their position implied that the contract was renewed as postulated by the trial Judge. In ***Att-Gen of Belize vs. Belize Telecom Ltd. [2009] 1 W.L.R. 1988*** Lord Hoffmann observed:

> ***"In every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such provision would spell out in express words what the instrument read against the relevant background, would reasonably be understood to mean."***

24. We also do not think that the appellants' conduct implied that the said contract was renewed. Firstly, it is clear that the respondent was informed by a letter dated 31st March, 2010 that her contract had expired and further communication in respect of the same would come from the Head Office. Secondly, the respondent in her own evidence testified that she had been removed from the payroll once her contract expired. This was a clear indication of the appellants' position. Moreover, the decision to continue working in the hospital after the expiry of the contract was entirely on the respondent's own motion. She did not tender any evidence to the effect that she had been directed to continue working by the hospital's administration. 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 would be reasonable to do so. See ***Liverpool City Council vs. Irwin [1977] A.C 239.*** Having expressed ourselves as herein above we find that the respondent's contract which expired on 31st March, 2010 was not renewed.

25. The bonding agreement provided in part as follows: -

> *"**CONDITIONS OF TRAINING***
>
> ***1. The hospital sponsorship is given on condition that on completion of the training the participant will work for P.C.E.A. Kikuyu Hospital for a period of 5 (five) years before being released from the bond."***

26. Did it create a contract of service between the parties? The sponsorship which was subject of the bonding agreement was extended to the respondent by virtue of her employment status to the hospital. Thus, the bonding agreement was based on her contract of service. It could not exist in isolation or create a contract of service. In as much as it bound the respondent to work for the hospital for five years upon the completion of her studies, the parties would still have been required to execute a contract of service which would regulate their employer/employee relationship.

27. In the result, we find that the letter dated 5th May, 2010 was not a termination letter but a letter communicating the appellants' intention not to renew the expired contract.

28. In ***Peter M. Kariuki vs. Attorney General [2014] eKLR*** it was stated by this Court that:

> ***"It is trite that this Court will be disinclined to disturb the findings of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a large sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."***

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

30. With regard to the claim for payment of leave not taken for the year 2009, it is clear from the respondent's evidence on record that she took one week off every month to attend classes. This was contrary to the allegation that she had never taken her annual leave. Hence, the trial Judge erred in awarding the same. We cannot also help but note that it is not clear on what basis the trial Judge awarded the sum of Kshs. 233,333.34/= as payment of extra duties performed by the respondent. There was no evidence to support that claim. In ***Douglas Odhiambo Apel & another vs. Telkom Kenya Limited Civil Appeal No. 115 of 2006 (ur)*** this Court held, ***"The need for proof is not lessened by the fact that the claim is for special damage. Unless a consent is entered into for a specific sum, then it behooves the claiming party to produce evidence to prove the special damages claimed. It is not enough to merely point to the plaint or to repeat the claim in submissions. The law on special damages is that they must be specifically pleaded and strictly proved."***

31. The upshot of the foregoing is that we find the appeal has merit and is hereby allowed with costs. Accordingly, we set aside the judgment dated 11th December, 2012 and the damages awarded thereunder save for the sum of Kshs. 583,139.14/= which is admitted by the appellants as being due to the respondent. The appellants are also directed to issue the respondent with a certificate of service. The appellants shall also have costs of the suit in the ELRC.

Dated and delivered at Nairobi this 6th day of October, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR