



Kirigo v Othaya Mukurwe-Ini Water Services Limited (Cause E016 of 2024) [2025] KEELRC 451 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 451 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E016 OF 2024
ON MAKAU, J
FEBRUARY 20, 2025**

BETWEEN

DUNCAN NDERI KIRIGO CLAIMANT

AND

OTHAYA MUKURWE-INI WATER SERVICES LIMITED RESPONDENT

JUDGMENT

Introduction

1. By a memorandum of claim dated 11th May 2024, the claimant alleged that the respondent had, contrary to his expectation, failed to renew his fixed term contract without assigning any reason, despite meeting the requirements for renewal. Therefore, he prayed for the following reliefs: -
 - a. An order reinstating the claimant to his position as the Respondent's Technical Manager.
In the alternative:
 - b. A declaration that the claimant had a legitimate expectation that his contract of employment would be renewed by the Respondent.
 - c. A declaration that the Respondent's actions in failing to renew the claimant's contract as Technical Manager for no reasonable cause or at all is unfair, unlawful and that the claimant is entitled to payment of his terminal dues in full.
 - d. A declaration that the claimant is entitled to compensation for unfair and illegal termination.
 - e. An order for the Respondent to pay the claimant his terminal dues amounting to Kshs.1,660,800.00
 - f. An order for the Respondent to issue the claimant with a certificate of service.



- g. Costs of the claim plus interest thereon.
2. The Respondent filed a response to the claim admitting its failure to renew the claimant's fixed contract and averred that there was no reasonable expectation of renewal created by the contract. It further averred that the fixed term contract was to lapse automatically and its renewal was subject to the respondents discretion.

Facts of the case

3. The facts of the case are that the claimant was employed by the respondent as its Technical Manager starting 19th February 2019. The contract was for a fixed term of two years renewable subject to performance based on evaluation and subject to the claimant submitting an application for renewal six (6) months before the expiry date.
4. The contract was renewed for a further three (3) years from 19th February 2021 and it was further renewable subject to the said condition for renewal. By a letter dated 8th September 2023, the claimant applied for renewal of the contract and thereafter he scored 73% in the 2022/2023 performance appraisal. However, by the letter dated 17th January 2024, the respondent informed him that it would not renew his contract but advised that he was at liberty to apply for the position once advertised.
5. The claimant contended that the contract had created a reasonable expectation of renewal based on performance as per the evaluation report, and upon application for renewal six months before the expiry date of the contract period. Consequently, he averred that the failure to renew the contract after meeting the condition for the renewal amounted to unlawful and unfair termination because no reason was assigned for the termination nor was he accorded any hearing before the decision for non-renewal was made.
6. During the hearing, the claimant testified as CW1. He basically adopted the above facts as contained in his written statement dated 11th May 2024 and produced a bundle of seven (7) documents as exhibits.
7. In brief, he confirmed that he worked for five (5) years. He contended that he requested for renewal of the contract six (6) months before the expiry date but the respondent's Board declined the request vide the letter dated 17th January 2024. He confirmed that the Board allowed him to re-apply for the job upon advertisement. He reiterated that the renewal of the contract was based on evaluation of his performance.
8. The respondent called its Managing Director, Mr. Moses Ndwiga Njiru Munyi who testified as RW1. He adopted his written statement dated 14th August 2024 as his evidence in chief and produced four (4) documents as exhibits.
9. In brief, he confirmed that the claimant's initial contract was for two (2) years and it was renewed for three (3) years vide the letter dated 15th February 2021. He further confirmed that clause 6 of the contract provided for renewal based on performance and upon making an application for renewal six (6) months before expiry of the contract.
10. He admitted that the claimant submitted a request for renewal within six months vide the letter dated 8th September 2023 but when the Board met on 24th November 2023 it resolved that the claimant's contract would not be renewed and the position would be advertised. The decision was communicated to him vide the letter dated 17th January 2024 and he was given the liberty to apply.
11. He further admitted that the claimant's performance was done in November 2023 and he scored 73.6% which was above the baseline target (minimum required score) of 70%. He clarified that the



said appraisal was for the year ending in June 2023. He further clarified that there was no promise of renewal based on the performance alone, and that the respondent had no obligation to serve prior notice before lapse of the contract.

Submissions

12. It was submitted for the claimant that, he had a legitimate expectation that his contract would be renewed because his previous contract was renewed, and secondly because he had fulfilled the conditions for the renewal. The said conditions included satisfactory performance of 73.6% in November 2023 as admitted by RW1.
13. For emphasis, reliance was placed on the case of Teresa Carlo Omondi v Transparency International - Kenya (2017) eKLR and Keen Kleeners Limited v Kenya Plantation and Agricultural Workers' Union (Civil Appeal 101 of 2019) (2021) KECA 352 (KLR) (17 December 2021) (Judgment) to urge that the claimant was entitled to renewal of his contract.
14. It was further submitted that the failure to renew the contract after exceeding the performance target in the evaluation done in November 2023 amounted to unfair dismissal from his employment and a remedy is warranted under section 49 of the Employment Act. It was further urged that the claimant was entitled to be given the reason for the non-renewal without which he was entitled to damages for unlawful termination. It was submitted that the non-renewal was based on improper motive which amounts to unfair labour practice as held in Margaret A Ochieng v National Water Conservation & Pipeline Corporation (2014).
15. It was further submitted that his services were still required because he was allowed to apply after the position was advertised. He submitted that the position has not been advertised or filled in any other manner and therefore urged the court to order for his reinstatement to his employment.
16. On the other hand, it was submitted for the respondent that the contract of employment was for a fixed term and it lapsed automatically after effluxion of time and the employer had no obligation to renew it. For emphasis, reliance was placed on several cases including the Court of Appeal decision in the case of Registered Trustees of the Presbyterian Church of East Africa & another v Ruth Gathoni Ngotho (2017) eKLR to urge that a fixed term contract does not create a legitimate expectation of renewal.
17. It was further submitted that the non-renewal of the contract did not amount to unfair termination since there was a valid reason for termination, namely, the fixed contract term had come to an end. For emphasis, reliance was placed on Bernard Wanjohi Muriuki v Kirinyaga Water & Sanitation Company Limited and Another (2012) KEELRC 4 (KLR).
18. Finally, it was submitted that in view of the foregoing matters the claimant is not entitled to the reliefs sought save for the certificate of service which he has not requested for in writing. Consequently, the court was urged to dismiss the suit with costs to the respondent.

Determination

19. Having considered the pleadings, evidence and submissions, I am satisfied that the case revolves around non-renewal of the claimant's 3 years' fixed term contract dated 15th February 2021. The issues falling for determination are:
 - a. Whether the contract created a legitimate expectation for a renewal.
 - b. If so, whether the claimant fulfilled the conditions provided for the renewal.
 - c. If so, whether the failure to renew the contract amounted to unfair dismissal.



- d. Whether the claimant is entitled to the reliefs sought in his pleading.

Legitimate expectation

20. The term legitimate expectation is not defined in our laws. In *Republic v Kenya Revenue Authority, Ex-parte M-Kopa Kenya Limited* (2018) eKLR, Odunga J (as he then was) adopted the definition by De Smith, Woolf & Jowell, in “*Judicial Review of Administrative Action*” 6th Edition Sweet & Maxwell page 609, thus:

“Legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectation ought not to be thwarted. The protection of legitimate expectation is the root of the constitutional principle of the rule of law, which requires predictability and certainty on government’s dealings with the public.”

21. With respect to fixed term contract, the general principle emerging from our courts is that such contracts do not create any legitimate expectations of a renewal. In *Transparency International-Kenya v Omondi* (2023) KECA 174 (KLR), the Court of Appeal went further to state that:

“Whether a contract with a renewal clause will be extended or not, is an issue that is at the discretion of the employer and it cannot create a legal right under the doctrine of legitimate expectation.”

22. Rika J sitting as the trial court in the above matter held that there are expectations to the aforesaid general rule as to expectation of renewal of fixed term contracts. He stated that: -

“The burden of proof, in legitimate expectation claims, is always on the employee. It must be shown that the employer, through regular practice or through an express promise, leads the employee to legitimately expect there would be renewal. The expectation becomes legally protected, and ought not to be ignored by the employer, when managerial prerogative on the subject is exercised. Legitimate expectation is not the same as anticipation, desire or hope. It is a principle based on a right, grounded on the larger principles of reasonableness and fair dealings between employers and employees. The employee must demonstrate some rational and objective reason, for her expectation. The representations underlying the expectation must be clear and unambiguous. The expectation must be induced by the decision maker. The decision maker must have the authority to renew. Repeated renewal extends service beyond the period provided for in the fixed term contract, and promise of renewal are some of the elements that would amount to objective reasons underlying expectation of renewal. The presence of these elements, however, is not to be taken as conclusive proof of legitimate expectation.”

23. I agree with the foregoing view that there are instances when an employee’s legitimate expectation is aroused by the employer’s undertaking in the contract itself, and other factors highlighted in the above decision. In the instant case, the employer made a promise to the employee in the contract itself that



it will be renewable subject to him meeting two main conditions set out in clause 5 of the contract dated 15th February 2021: -

“Terms of employment- You will be employed on a three-year contract term renewable based on performance as per the record in the evaluation report. You will be required to make application for renewal six months before the expiry of the period.”

24. Having considered the said contract, I am satisfied that the contract of employment created a legitimate expectation for renewal if the claimant fulfilled the said conditions.

Fulfillment of the conditions

25. There is no doubt that the claimant performed above expected minimum target of 70% in 2022/2023 by scoring 73.6%. The second condition was to apply for the renewal six months before the expiry date being 18th February 2024. He made the request vide the letter dated 8th September 2023 and delivered it on 13th September 2023.
26. From 8th September 2023 to 18th February 2024 when the contract was lapsing was less than six months. It was about five months and as such I find and hold that the claimant did not meet the timelines for requesting the employer for renewal. Although RW1 stated that the request for renewal was made within the required timelines, I have verified that his testimony was not correct on that issue.
27. In view of the foregoing, I am not satisfied that the claimant met all the conditions set out in the contract upon which the employer could have been held liable to renew the contract. For that reason, I distinguish the facts of this case from the case of John Nduba v Africa Medical & Rescue Foundation (Amref Health Africa) (2021) eKLR where I faulted the employer for not renewing the claimant's contract after fulfilling all the requirements for renewal.

Unfair termination

28. In view of the foregoing conclusion, it is obvious that the contract of employment lapsed automatically by effluxion of time. There was no obligation created by the contract for the employer to serve the claimant with prior notice or accord him a hearing unless he met all the requirements for renewal.
29. Where an employment contract provides for renewal upon meeting certain conditions, the employer owes the employee an explanation of the reason for not keeping the promise to renew. However, in this case, the claimant did not meet all the requirements and therefore issue of unfair termination does not arise.

Reliefs sought

30. Having found that the claimant did not meet the conditions for renewal, I am of considered opinion that the claimant is not entitled in both the primary prayer of reinstatement to his position or alternative of compensatory damages under section 49 of the *Employment Act*.
31. However, he is entitled to any terminal dues earned under the expired contract plus certificate of service under section 51 of the *Employment Act*. Since the said terminal dues have not been quantified, I leave that to the respondent to compute and pay.
32. Finally, I direct each party to bear own costs since the suit did not succeed to a larger extent.

DATED, SIGNED AND DELIVERED AT NYERI THIS 20TH DAY OF FEBRUARY, 2025.

ONESMUS N MAKAU



JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

