



REPUBLIC OF KENYA



**KENYA LAW**  
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**Machungo v Stanbic Bank Kenya Limited (Cause E304 of 2021)  
[2025] KEELRC 2145 (KLR) (18 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2145 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E304 OF 2021**

**JW KELI, J  
JULY 18, 2025**

**BETWEEN**

**LEVI MACHUNGO ..... CLAIMANT**

**AND**

**STANBIC BANK KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant's employment was terminated on the 30<sup>th</sup> of April 2019 and vide a statement of claim dated 13<sup>th</sup> April 2021 against the respondent, the claimant sought for the following Orders:-
  - a. A declaration that the decision not to renew was based improper motives and extraneous reasons.
  - b. A declaration that the Claimant acquired the expectancy of renewal based on the length of service with the Respondent coupled with subsequent previous contract renewals.
  - c. A declaration that the contracts the claimant was subjected to be deemed to have been converted to term/permanent employment in compliance with the law in force for the time being.
  - d. A declaration that the Respondent engaged the Claimant in a series of renewals of contracts whose outcome is the deprivation to the Claimant of the benefits and rights attendant to permanent employment.
  - e. A declaration that the contracts that the Respondent had subjected the Claimant to were unlawful, unconstitutional, hence null and void.
  - f. A declaration that the conduct of the Respondent against the Claimant in failing to convert his contract to term/permanent and pensionable employment amounted to a violation of the



Claimant's constitutional rights in particular: Article 27 of the Constitution; and Article 41 (1) of the Constitution.

- g. A declaration that the Claimant's termination of employment was a violation of Article 47 of the Constitution.
- h. A declaration that the Respondent subjected the Claimant to modern slavery and forced labour contrary to Article 30 of the Constitution.
- i. An order that the Claimant be compensated by the Respondent for violation of the Claimant's fundamental rights under the Constitution as follows:
  - i. Breach of Constitutional Right under Article 27 of the Constitution Kshs.5,000,000/=.
  - ii. Breach of Constitutional Right under Article 41 of the Constitution Kshs.5,000,000/=.
  - iii. Breach of Constitutional Right Under Article 47 of the Constitution Kshs.5,000,000/=.
  - iv. Breach of Constitutional Right under Article 30 of the Constitution Kshs.5,000,000/=.Total Kshs.20,000,000/=.
- j. General damages for breach of the Constitution.
- k. A declaration that the unfair termination by the Respondent surmounted to redundancy in the guise of non-renewal of contract.
- l. A declaration that the Claimant's termination of employment was contrary to Sections 41, 43 and 45 of the Employment Act and therefore unfair.
- m. A declaration that failure to release the Claimant's terminal benefits amounts to subjecting the Claimant to servitude and hence unconstitutional.
- n. An order that the Claimant be compensated for breach of Sections 41, 43 and 45 of the Employment Act as follows:-
  - i. Twelve months' salary in compensation for wrongful and unlawful termination at Kshs.480,000/=.
  - ii. Compensation for loss of income in commensurate to twelve months salary at Kshs. 480,000/=.
  - iii. One Months' Salary in lieu of proper notice at Kshs.40, 000/=.
  - iv. Payment in lieu of 168 leave days at Kshs. 258,384/=.
  - v. Leave allowance for 21 days taken in May 2017 at Kshs.32,298/=
  - vi. Overtime of 8000hours at Kshs. 2,307,000/=.
  - vii. Variable Commission based pay due at Kshs.342, 993/=
  - viii. Severance Pay Kshs.180,000/=.Total Kshs.4,120,675/=.



- o. The Claimant further claims interest on the above compensation at the rate of 20% per annum from the date of termination of service (that is 30th April 2019 to the date of payment in full.
  - p. An order of issuance of Certificate of Service.
  - q. Costs of the suit.
  - r. Any other or further reliefs the Honourable Court may deem necessary to award.
2. The claimant in support of the claim filed his list of witnesses dated 13<sup>th</sup> April 2021; witness statements dated 13<sup>th</sup> April 2021; and list of documents of even date with the bundle of documents attached.
  3. The Respondent entered appearance through the law firm of Daly & Inamdar Advocates and filed a statement of response dated the 28<sup>th</sup> of June 2022, denying the allegations in the memorandum of claim. In support of the response, the respondent filed its documents; and the witness statement of Simon Mwangi dated 28<sup>th</sup> June 2022 which was later substituted with the witness statement of Winfred Mwendu Kyalo dated 6<sup>th</sup> October 2023.
  4. To counter the Respondent's statement of response, the Claimant filed a Reply to Statement of Response dated the 14<sup>th</sup> of July 2022.

### **Hearing and evidence**

5. The claimant's case was heard on the 8<sup>th</sup> October 2024 where the claimant testified of oath and adopted his witness statement dated 13<sup>th</sup> April 2021 and produced his documents as C-exhibit 1-6 as his evidence in chief. He was cross-examined by counsel for the respondent, Mwaura. The claimant on the 16<sup>th</sup> December 2024 called as CW2 Michael Richie Gatemi who testified on oath as his witness of fact, adopted his witness statement dated 18<sup>th</sup> April 2021 and was cross-examined by counsel for the Respondent, Mwaura.
6. The respondent's case was heard on the 16<sup>th</sup> December 2024. The witness was Wilfred Mwendu Kyalo who was employee relationship manager of the bank. She testified on oath and adopted her witness statement dated 6<sup>th</sup> October 2023 and produced the respondent's bundle of documents. The witness was cross-examined by counsel for the claimant, Okello.
7. The parties filed written submissions.

### **The Claimant's case in summary**

8. The Claimant herein was employed by the Respondent by an Agreement executed in May 2010 as a Vehicle and Asset Finance officer with effect from 1<sup>st</sup> May 2010. He was to serve for a term of one (1) year, unless or until terminated by either party under the termination provisions. Some other terms of the contract were that the Claimant would be entitled to a basic salary of Kshs. 15,000/= and a further retainer of Kshs. 25,000/=, and that no other form of remuneration or benefit would be paid to him; and that he would be entitled to 21 working days annual or payment in lieu of leave days accrued due but untaken as at the date of termination of employment.
9. It is the Claimant's case that his terms and conditions of employment were also regulated by the Respondent's Human Resource Policy which provided, among others, that being a contract staff, the Claimant was not eligible to join the Respondent's Pension Scheme (Clauses 1.2 and 3.3); the Claimant would be entitled to 21 days leave prorated annually with full pay whereas permanent staff were entitled to 26 working days leave per annum (Clause 1.3); the Claimant would be entitled to loan facilities that would attract interest at the normal market rate; and that temporary/contract staff would not be



required to serve more than three months continuously in line with the purpose of their engagement which was to cope with variations in workload and to alleviate personnel difficulties (Clause 7.10). Other relevant terms of the Respondent's Human Resource Manual, according to the Claimant were: Clause 8.3 that obligated the Respondent Bank to issue a termination notice or make payment in lieu of notice should it wish to terminate an employee's services; Clause 9 which provided that an employee issued with final written warnings within 12 successive months would be dismissed; and Clause 13.1 which dealt with offences that would warrant termination without notice.

10. The Claimant stated that he worked for the Respondent for nine (9) continuous years on successive one (1) years contracts, during which period he performed his duties diligently. He was never accused of committing any of the terminable offences listed in the Respondent's Human Resource Manual, and upon evaluation of his work during periodical appraisals, he was rated "Good".
11. The Claimant's grievance against the Respondent emanates from the Respondent's non-renewal of his contract which ended on 30<sup>th</sup> April 2019. It is the Claimant's case that the it was the practice of the Respondent to grant renewal of his contract yearly since it did so for Nine (9) years. All the Claimant's performance appraisals by the Respondent were favourable, and he was given assurances that he would be promoted to a managerial position because of his excellent work performance. The Claimant takes the view that his contract was not renewed owing to concerns raised over his and his colleagues employment terms and conditions of employment being different from the Respondent's permanent and pensionable employees. He also believes that another reason for the friction between him and the Respondent Bank was the variable commission-based pay which was paid to the Claimant and his colleagues on the premise of the actual sales achieved in any given month for an employee achieving monthly targets in excess of Kenya Shillings Five Million (Kshs. 5,000,000/-) in Vehicle and Asset Finance drawdowns. Despite the Claimant and his colleagues rightfully earning the variable commission-based pay remitted to them, and at no point did they receive payments in excess of the actual sales achieved in any particular month, sometime in early 2019 the Respondent commenced a witch hunt on employees in the Asset Finance Department where he worked and maliciously took disciplinary action against them on allegations that they were earning a lot of money as variable commission-based pay. Some of his colleagues were subjected to investigations. The Respondent through its Managing Director harassed and intimidated the Claimant and his colleagues even going as far as constantly intimating that their services were no longer required in the bank and thus they should pack and leave the bank during the months of February-April 2019.
12. The above tensions came to a boil on 30<sup>th</sup> April 2019 when the Claimant and his colleagues reported to work, only to find that the Claimant's computer at his work station was shut down and he and his colleagues were not allowed to access our offices as they were locked out. They were instructed to surrender all the bank documents and badges in their possession. No prior notice of termination, or of non-renewal of contract, was given to the Claimant and his colleagues. The Claimant states that he later learned that his colleagues in the Asset Finance Department in the Respondent Bank's branches in Mombasa, Kisumu, Nakuru and Eldoret were also terminated on the said date without reasonable grounds.
13. The Claimant avers that he had a legitimate expectation that his contract would be renewed based on his length of service with the Respondent coupled with subsequent previous contract renewals. The Respondent created a reasonable expectation of a tacit renewal allowing him to believe that the employment relationship would extend for a further term, on the same or similar terms of contract, through giving assurance. Existing practices and the conduct of the Respondent generated the Claimant's legitimate expectation. The Claimant states that he was unfairly terminated from



employment since his contract was not renewed contrary to the legitimate expectation aforesaid, and he was not given notice of non-renewal.

14. In addition to the above, it is the Claimant's case that his constitutional right to fair labour practices under Article 41 was contravened by the Respondent as he was deliberately kept on contract for Nine (9) years despite there being provision within the Respondent's structure to employ him on permanent and pensionable terms. The Respondent's discretion in continually renewing his contract yearly for nine years as opposed to converting his employment to a permanent and pensionable position displays a degree of unreasonableness and unfairness on the Respondent's part. The Claimant states that the failure by the Respondent to convert his contract to permanent employment was a deliberate move by the Respondent to deny him the benefits enjoyed by the permanent and pensionable employees as contemplated under the Respondent's Human Resources Policy. The Claimant avers that he was held in modern day slavery and servitude which is contrary to Article 30 of the Constitution.
15. Under Section 37 of the Employment Act, provision is made for conversion of casual employment to permanent and pensionable employment after working for an aggregate period of three months. The Claimant felt that it was therefore unfair for the Respondent to term his employment as a fixed term contract which expired by effluxion of time yet the Claimant was in employment with the Respondent for nine years on a yearly renewal. He avers that his contract by dint of Section 37 of the Employment Act was converted to permanent and pensionable employment.
16. The Claimant also states that he was discriminated against by the Respondent contrary to Article 27 of the Constitution and Section 5 of the Employment Act since he was perpetually confined to repeat yearly contracts for Nine (9) years without a reasonable justification. Other employees in the position of Business Development Managers who held similar roles to the Claimant and performed similar duties were granted permanent and pensionable terms. The Respondent was required to promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice, but discriminated against the Claimant in respect of recruitment, training, promotion, and terms and conditions of employment, since the terms and conditions for permanent and pensionable employees were more favourable than the Claimants. To illustrate, the Claimant states that the Respondent's permanent and pensionable employees were taken for team building exercises by the Respondent and allowed to attend without pay, whereas the contract staff were always informed that for them to attend team building they must pay. Further, the Respondent's permanent and pensionable employees received and paid off loans at the staff rate of 7% whereas the contract staff received and paid off loans at the market rate of 14%; contract staff were not eligible to join the Bank's Pension Scheme; the Respondent's permanent and pensionable employees were entitled to 26 leave days whereas the contractual staff were entitled to 21 days; contract staff were not covered by the Respondent's medical cover from 2010-2015, and even when they were added to the medical cover in 2016, they were given inferior terms; and the permanent and pensionable employees were eligible to promotion and salary increments unlike contract staff. The Claimant complains that for the nine years that he worked for the Respondent, he was denied all the benefits entitled to an employee under the Employment Act.
17. Finally, the Claimant avers that he has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, and the Respondent violated this right when it failed to give the Claimant written reasons/explanations for their decision, which was adverse to the Claimant. In the Claimant's view, he was entitled to reasonably work up to the mandatory retirement age of Sixty (60) years but for the Respondent's unlawful contracts and unfair termination. He believes that the Respondent disguised his termination from employment and that of his colleagues in the Asset Finance Department as non-renewal of contract to avoid paying their terminal dues and severance as



pertains to redundancy of employment. The Respondent's exercise of its managerial prerogative was unreasonable and clothed in bad faith, no fair process was undertaken in the process of reorganization by the Respondent, no consultations were made within the Respondent's business to ascertain the need for reorganization, and no notice was given to the Claimant, hence the Respondent failed to comply with Section 40 of the Employment Act on redundancy. The termination of the Claimant's employment was substantively and procedurally unfair in contravention of Sections 43 and 45 of the Employment Act.

### **Respondent's case in brief**

18. The Respondent admitted that it contracted the Claimant on or about October 2011, but stated that it engaged him as an independent contractor to provide sales services in its Vehicle and Asset Finance Department for four (4) years. In 2015, the Respondent offered the Claimant a fixed-term employment contract dated 29<sup>th</sup> April 2024 as a sales consultant within the same department. Some of the terms of the fixed-term contract were that it would subsist for one (1) year commencing on 1<sup>st</sup> May 2015; and the Claimant's remuneration would be comprised of a fixed salary to be paid monthly in arrears after the necessary statutory deductions, and a variable commission also to be paid monthly in arrears based on the Respondent's pay scales on products sold by the Claimant. The commission pay scale document was provided to the Claimant. Also under the said contract, the Claimant was eligible to join was Respondent Bank's medical scheme; was subject to a monthly performance assessment which would be used to determine whether he had fulfilled his obligations under the contract; and was entitled to 21 working days as annual leave.
19. In addition to the terms of his fixed term contract, the Claimant was also subject to the Respondent's Human Resource Policy which indeed contained the provisions particularized by the Claimant in his memorandum of claim in respect to the Respondent's pension scheme, entitlement to annual leave, disciplinary actions, and loan facilities. It also provided for three categories of employees, namely permanent staff who worked on a permanent basis, temporary staff who work for limited periods per month or per year, and contract staff who are contracted on individual fixed-term contracts.
20. The Respondent states that Claimant's fixed term contract was renewed on the same terms for the years 2016-2019, with the last contractual term being 1<sup>st</sup> May 2018 to 30<sup>th</sup> April 2019. Prior to renewal, the Claimant was issued with a notice of renewal of contract before the lapse of the ongoing contract as was customary with the Respondent. In 2019, the Respondent determined that it no longer required the services of the Claimant hence would no longer renew his contract, and indeed issued him with a letter dated 15<sup>th</sup> April 2019 informing him that his contract would lapse on 30<sup>th</sup> April 2019 and would not be renewed. The Respondent Bank sent the Claimant the stated letter informing him of the lapse of his fixed term contract, despite being under no obligation to do so at law or contractually.
21. As far back as 2015, and at the point of entering into each subsequent contract, the Claimant was made aware that his employment was on a fixed-term basis, and not a permanent basis. He was also provided with the Human Resources Policy which contained the different categories of employees.
22. The Respondent therefore denies that the Claimant was discriminated against, and states that offering different terms to employees carrying out different duties does not amount to discrimination. They state that in some ways, the Claimant's employment terms could be viewed as more favourable than those for employees on permanent terms, as contract employees earned huge salaries due to exemplary performance which pushes up commissions. They confirm that the Claimant was paid all his commissions are evidenced by his pay slips which he himself produced.



23. It is the Respondent's case that upon termination of the Claimant's contract of employment by effluxion of time, the protocols and procedures of the Respondent, as outlined in the Human Resources Policy took effect regarding surrender of the Respondent's property by employees no longer in the service of the Respondent. They are insistent that the Claimant was not summarily dismissed from employment.
24. The Claimant's claim that he had a legitimate expectation that his employment contract would be renewed is denied by the Respondent. They state that there cannot reasonably be any expectation of renewal of a fixed-term contract of employment where the contract itself expressly states that it is for a specific period of time. Further, an express notice was issued to the Claimant indicating that the contract would not be renewed two weeks before the expiry thereof, and was not opposed by the Claimant. The Respondent argues that length of service cannot birth a legitimate expectation when the contract in question is a fixed term contract, that even permanent contracts may be terminated hence there cannot be a reasonable claim that they are perpetual, no assurances were ever made to the Claimant that his contract would be renewed beyond 30<sup>th</sup> April 2019, and the Claimant was not employed under a contract of service for 9 years, but rather successive 1-year contracts. Renewal was certainly not automatic, but was as the discretion of either party. It is the Respondent's contention that employment on fixed-term contract basis is lawful in accordance with Section 10 (3) (c) the [Employment Act](#) Cap 226 of the Laws of Kenya.
25. On the alleged violation of the Claimant's right to fair labour practices under Article 41 of the [Constitution](#) of Kenya, the Respondent states that the parties freely entered into a lawful fixed term employment contract, that was not intended to be indefinite but for a term of one year. With each renewal, the Claimant was allowed an opportunity to accept or reject the offer of fixed term employment for another year on similar terms as the preceding fixed term contract, which he freely accepted each time. At no time was the Claimant ever informed that his employment on a fixed term basis was a condition for his subsequent employment on a permanent basis or that his employment on a fixed term basis would morph into employment on a permanent basis. They therefore state that the Claimant's employment on a fixed-term basis was fair and reasonable, particularly as the contracts were entered into without duress.
26. The Respondent the Claimant's claim of subjection to slavery contrary to Article 30 of the [Constitution](#) as misguided and offensive to actual victims of slavery, as the Claimant freely entered into a fixed term employment contract with the Respondent where he enjoyed fair remuneration including commissions on his sales as well as benefits including annual leave, sick leave and medical insurance.
27. The Respondent allegations that the Claimant was engaged as a casual labourer are also categorized as a casual labourer is clearly defined in Section 2 of the [Employment Act](#), and the Claimant was never employed as a casual labourer by the Respondent. As such, it is their view that Section 37 of the [Employment Act](#) is not applicable.
28. On the claim on discrimination against the Claimant contrary to Article 41 of the [Constitution](#) and Section 5 of the [Employment Act](#), the Respondent avers that the categorisation of the Respondent's employees into permanent staff and contract staff has always been known to the Claimant since his engagement with the Respondent as an independent contractor and as a fixed term contract employee thereafter. While he was an independent contract between 2010-2015, the Claimant was not entitled to coverage by the Respondent's medical insurance scheme. They state that the Claimant freely entered into a fixed term contract with the Respondent with full knowledge of the different categories of employees employed by the Respondent, their different duties, their different remuneration packages, and the different benefits and entitlements each category enjoyed. The foregoing was clearly laid out in



the Respondent's Human Resources Policy that was provided to the Claimant before he freely entered into the fixed term contract. The Respondent explains that the terms of employment of a fixed-term contract employee are laid out in their contract of employment, which only entitled the Claimant as principal member to coverage by the medical insurance scheme, not his family.

29. Finally, the Respondent states that it was not obligated at law to provide reasons for not renewing the Claimant's fixed-term contract of employment.; and as the present termination was not by way of redundancy, the redundancy provisions in the *Employment Act* do not apply. It confirms that it issued the Claimant with a Certificate of Service, and paid him his terminal dues, including a total consolidated salary of Kshs. 448,146.57, accrued leave days, and commissions accrued during the Claimant's last month of employment.

## **Determination**

### **Issues for determination**

30. The claimant addressed the following issues in his submissions –
- a) Whether the termination led to loss of legitimate expectation?
  - b) Whether the Respondent discriminated against the Claimant?
  - c) Was the termination on account of redundancy?
  - d) Was the Respondent unfairly terminated?
  - e) Whether the Claimant is entitled to a certificate of service?
31. The respondent's addressed the following issues in submissions –
- a. Whether the Respondent discriminated the Claimant and thereby violated Article 27 of the *Constitution*, 2010 and Section 5 of the *Employment Act*.
  - b. Whether the Claimant violated the rights of the Claimant enshrined under Article 41 of the *Constitution* of Kenya.
  - c. Whether the termination of the Claimant's employment was unfair, unprocedural and unlawful.
  - d. Whether the Respondent violated the legitimate expectation of continued employment on the part of the Claimant.
32. The court having perused the issues identified by the parties and having perused the pleadings and prayers sought finds that the issue for determination in the suit to be-
- A. Whether the termination of the employment of the claimant was fair
  - B. Whether the Respondent discriminated the Claimant and thereby violated Article 27 of the *Constitution*, 2010 and Section 5 of the *Employment Act*.
  - C. Whether the claimant was entitled to relief sought

### **Whether the termination of the employment of the claimant was fair**

33. It was not in dispute that the claimant had served under continuous 1 year fixed term contracts and had worked with the respondent since 10<sup>th</sup> May 2010 to contract expiring on 30<sup>th</sup> April 2019 (page 138 of the respondent's bundle was the claimant's testimonial dated 19<sup>th</sup> August 2019). The court noted



that the claims for unfair labour practice could only be limited to three years under section 89 of the *Employment Act*. It was not in dispute that the last contract of the claimant was ending in April 2019. The claimant submitted that having had his contracts renewed and his performance not in issue he had legitimate expectation of renewal.

### **The claimant's submissions**

34. In *Rajab Barasa & 4 others v Kenya Meat Commission* [2016] eKLR where this Honourable Court held that "...Such a contract (fixed-term) does not carry the expectation for renewal. The exceptions to this general rule are few and limited based on each case and its circumstances where strictly an employer should not act in a manner so as to avoid a legal obligation".
35. Clause 3 on performance of the contract provides as follows:
  - 0.1. A Performance Agreement will be provided by your Line Manager on commencement of duty and your duties will be set out in the Performance Agreement. The Agreement will consist of monthly target.
  - 0.2. Subject to clause 13 below, if the targets for any given month are not achieved you will be notified by the Bank in writing and the period of one (1) month from the date of such notification shall serve as the Bank's notice to terminate this contract unless the targets for the following month are met. If the targets for the following month are duly met then the notice to terminate shall be deemed to have been lifted. Sales targets shall not be cumulative. Accordingly, sales targets and sales achieved shall not be carried over from month to month. The Claimant was on a fixed term for a contract of over 9 years with the Respondent and the Claimant acquired expectancy of renewal based on the length of service with the Respondent coupled with subsequent previous contract renewals.
36. The Respondent created a reasonable expectation of a tacit renewal allowing the Claimant to believe that the employment relationship shall extend for a further term. The Claimant reasonably expected the Respondent to renew the contract of employment on the same or similar terms of since the Respondent has been renewing the contract yearly for the last 9 years.
37. In the course of the employment there existed assurances, existing practices and conduct of the Respondent that generated the Claimant's expectation. Since the Respondent employed the Claimant from 2010-2019, it has promoted the Claimant on two occasions from a contractor into a contractual employee and the Claimant was relying on the Respondent's promise to promote him to permanent and pensionable terms based on his continued exemplary performance. The Claimant's reliance on the Respondent's promise to promote him was legitimate. The Respondent initially promised and employed him, transiting his terms from contract for service to an employment contract. Thus, the Claimant did not only have expectation for renewal of the contract but also promotion into a permanent and pensionable employee.
38. In March of 2019, the Claimant's performance was above board as assessed by the Respondent. During cross examination, the Respondent confirmed that the Claimant was not subject to investigations like other employees as he met his targets. The Claimant met the targets for the month and it followed that he was not eligible to be issued a notice of termination and subsequently, his contract was automatically renewed. The Claimant anticipated a renewal as per the legal obligation emanating from the contractual clause 3.0.2 and by issuing a termination letter dated 15/4/2019, the Claimant's legitimate expectation was violated.



39. In United Nations Appeals Tribunal [Tribunal D' Appel Des Nations Unies] UNAT, Case No. 2010-125 between *Frenchon v The Secretary-General of the United Nations* the UN Tribunal held as follows:

“44... an administrative decision not to renew a fixed-term contract may be challenged in certain circumstances, for example where the actions of the Administration give rise to a legitimate expectation on the part of the staff member that his or her fixed term contract may be renewed or extended. The case law has also established that an exception to the rules governing the expiry of a fixed-term contract will arise if the administrative decision not to renew is based on improper motives or if there are countervailing circumstances”

40. As per Clause 13.2 on termination of the contract provided as follows: Either party may, however, terminate this Contract by giving the other one (1) month's written notice to that effect or by payment of one (1) month's salary in lieu. Despite meeting every requirement for renewal of the contract, the Respondent resorted to improper motives aimed at terminating the contract between the Claimant and itself. It followed that the Respondent commenced a malicious witch hunt in form of disciplinary action against all the contractual employees at the Asset Finance Department without formal written warnings. The disciplinary actions were based on the effect that the Claimant and his colleagues earned a lot of money as variables commissioned-based pay. The Respondent could not prove these allegations but had a foregone conclusion to terminate the Claimant to avoid fulfilling its obligation to him. Hellbent on terminating the Claimant and 11 others, the Respondent resorted and closed the operation of the Asset Finance Department on 30/4/2019 as an alternative and in effect terminated the Claimant and 11 others measures which were calculated to initiate separation on account of countervailing circumstances with an intention to avoid legal obligation. By terminating the contract, the Respondent clearly avoided legal obligations to the Claimant based on the contract and promises to promote him to a permanent and pensionable employee.
41. During the hearing, the Claimant PW1 and Michael Gatemi PW2 confirmed and which confirmation remained uncontroverted that the Respondent's unfair and malicious witch hunt led to nothing and shortly afterwards, they were all terminated.<sup>23</sup> In the month of April 2019, the Respondent did not give the Claimant a notice of termination of the contract as obligated under the employment contract and having performed exemplarily, the Claimant expected a new contract and not termination. The termination letter dated 15/4/2019 breached the Claimant's expectation for a new contract.
42. Further, during cross examination, the Respondent did not controvert that the notice vide letter dated 15/4/2019 to the Claimant was issued on 30/4/2019 on the same date when the Respondent blocked the Claimant from accessing his work station. During the cross examination, the Claimant confirmed that the renewal letters were issued weeks after expiry of the contracts. The period between lapse and renewal, the Claimant continued to work routinely. There was no provision of the contract that the renewals would be done on notice therefore the Claimant needed not to be given a notice of renewal. During cross-examination, the Respondent's witness confirmed that a renewal notice was not necessary.
43. The Claimant testified at the cross examination that the renewals notices including letters dated 26/5/2016 which extended the Claimant's contract until 29/4/2017 was issued 3 weeks after the lapse of the contract in 2016 as follows:
- a) The contract issued on 29/4/2015 lapsed on 29/4/2016.



- b) However, the Claimant continued to work with expectation placed on the Respondent's promise that would be renewed.
  - c) 3 weeks after the lapse of the contracted dated 29/4/2015, the Respondent issued an extension vide a letter dated 26/5/2016. The letter appears on page 36 of the Respondent's Bundle of Documents.
44. Further, the Claimant testified that the Respondent's letter dated 3/5/2018 which extended the contract until 30/4/2019 was issued to the Claimant 1 week after the contract in 2018 had lapsed as follows:
- a) The contract issued on 24/4/2017 lapsed on 24/4/2018.
  - b) The Claimant continued to work after expiry with the expectation of renewal and relied on the Respondent's assurance that the contract would be renewed.
  - c) 1 week after the lapse, the Respondent issued the Claimant a contract extension dated 3/5/2018. The letter appears on page 37 of the Respondent's Bundle of Documents
45. Just like the years before 29/4/2019, the Claimant expected the Respondent to renew his contract basing on assurances of renewal and promotion. However on 30/4/2019, the Respondent terminated the Claimant. The Claimant's legitimate expectation for renewal stemmed from previous renewals spanning 9 years of employment with the Respondent. There was no advanced notice issued by the Respondent to the effect that the termination was due as per the contract of employment thus the Claimant's legitimate expectation was lost.

### **The respondent's submissions**

46. The Respondent humbly submits that it did not essentially terminate the Claimant's employment rather the employment agreement came to an end through effluxion of time. In the case of *Transparency International Kenya v Teresa Carlo Omondi* [2023] eKLR the Court of Appeal relied on the case of *Margaret A Ochieng v National Water Conservation & Pipeline Corporation* [2014] eKLR which stated as follows:

“Automatic renewal would undermine the very purpose of the fixed-term contract and revert to indeterminate contracts of employment..... courts have upheld the principle that fixed-term contracts carry no expectancy of renewal, in a catena of judicial authorities..... the court is persuaded that the claim has no merit. The fixed term contract had its own in-built termination notice, in that the date of termination was advised to the claimant on execution of the three-year contract in December 2008. She knew termination would be upon the lapse of the three years in 2011...”

47. Additionally, the Claimant seeks damages for the alleged failure of the Respondent to issue him with a termination notice. The Respondent, although not required by law or contract to issue the Claimant with a non-renewal notice, out of courtesy did issue the Claimant with a notice to notify him that his fixed term contract would not be renewed. In the case of *The Registered Trustees De La Salle Christian Brothers T/A St. Mary's Boys' Secondary School v Julius D. M. Baini* [2017] eKLR the Court of Appeal held that.- 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.

48. The Claimant alleges that his termination was on account of redundancy and that the procedure required for redundancy was not adhered to. The Respondent humbly submits that the Claimant's employment was not terminated on account of redundancy, in fact it was terminated at all. Rather the Claimant's employment automatically came to an end through the effluxion of time.
49. On Whether the Respondent violated the legitimate expectation of continued employment on the part of the Claimant. The Claimant claims that he acquired the expectancy of renewal of the contract based on the length of service with the Respondent coupled with subsequent previous contract renewals. The initial Independent Direct Sales Agent Agreement clearly stipulated that upon expiry of the term, the agreement may be renewed at the sole discretion of the Bank. (see Document 1 at page 2 of the Defence). The subsequent commission-based Vehicle and Asset Finance Sales Consultant Agreement, which is the subject of this suit, also clearly stipulated that the employment term was for a one (1) year fixed term period applicable from 01/05/2018 to 30/04/2019. That from 01/05/2018 the Claimant was aware that his contract was for a fixed term and the same would lapse on 30/04/2019. Nevertheless, the Respondent, out of courtesy, did notify the Claimant that his contract would not be renewed. There was no requirement, either by contract or law, on the part of the Respondent to issue the said notice of non-renewal. (see Document 6 at page 132 of the Defence). The Court of Appeal in the case of *The Registered Trustees of The Presbyterian Church of East Africa v Ruth Gathoni Ngotho* (*supra*) stated that:

“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” The court noted the rest of the submissions revolved on the above.”

## Decision

50. According to the respondent, the claimant was issued with a non-renewal letter dated 15<sup>th</sup> April 2019 in which he was reminded that his contract was coming to end on 30<sup>th</sup> April 2019 (page 132 of the Respondent's bundle of document notice of non-renewal of contract). The claimant stated he was not issued with the notice of non-renewal prior to termination. At the bottom of the document was the claimant's signature. During cross-examination the claimant admitted he was informed of non-renewal of contract vide letter dated 15<sup>th</sup> April 2019. The Court of Appeal had opportunity to determine a similar issue of legitimate expectation of renewal of fixed term contracts in *Transparency International - Kenya v Omondi* [2023] KECA 174 (KLR) - The Court of Appeal in overturning the trial court decision in favour of renewal observed:- ‘an automatically renewable fixed-term contract is a contradiction in terms, as it would subject the parties to an indeterminate employment contract. The respondent was under a fixed-term contract with a definite commencement date and termination date. There was no ambiguity created to create an expectation of contract renewal by the appellant's issuance of a fixed-term contract. The contract terminated automatically when the termination date arrived. 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.....In the instant appeal, a cursory look at clause 13 of the contract of employment, allows either the appellant or the respondent, to terminate the agreement, by giving three (3) months' notice in writing or by paying three (3) months' pay in lieu of such notice. The appellant simply exercised its right as captured in



the letter and as such, could not be deemed to have unfairly terminated the contract. It is old hat, that parties are bound by the terms of the contracts they enter into” The court further created an exception as follows:- “Concomitantly, the scenario would have been different if there was an indication, by act or omission from the appellant, to indicate renewal was forthcoming to whet the respondent’s appetite, that her contract would be renewed and hence rely on the doctrine of legitimate expectation. In the instant case, there was no promise of any sort that was given to the respondent to justify a claim based on legitimate expectation.” I find the claimant’s case did not fall under the said exception as the employer issued a notice of non-renewal 15 days to the end of the fixed term contract. Indeed there was no requirement of such a notice and there cannot be a guarantee of automatic renewal of fixed term contract as that would defeat the meaning of the term, “fixed”. The court cannot rewrite contract of parties on the mere basis that it is a bad bargain. The court finds that the employer has no obligation beyond the fixed term contract. The claimant accepted the renewals over the years. The court did not find basis of the legitimate expectation of the renewal guided by the decision in Omondi. The termination by effluxion of time was lawful. The issue of redundancy does not arise the contract having expired.

## **Whether there was discrimination**

### **The claimant’s submissions**

51. Discrimination was defined in [Pravin Bowry v Ethics & Anti-Corruption Commission](#) [2013] eKLR this Court cited Industrial Court of Kenya, at Nairobi, Cause No. 1161 of 2020 *Veronica Muthio Kioko v Catholic University of Eastern Africa*

“...Article I of Convention No. 111-Convention Concerning Discrimination in Respect of Employment and Occupation, 1958 which defines discrimination thus;

“For the purpose discrimination includes; this convention the term a. Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;”
52. Section 5(3) of the [Employment Act](#) provides as follows:-No employer shall discriminate directly or indirectly, against employee or prospective employee or harass an employee or prospective employee-
  - (a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status;
  - (b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.”
53. During the subsistence of the Claimant's employment, the Respondent subjected the Claimant to discriminatory practices and policies as follows:
  34. Since 29/4/2015-30/4/2019, the Claimant was compelled to pay from his pocket to attend Respondent's team building activities every year while permanent and pensionable employees were exempted from paying any expense. By creating a divide in participation of its employees in its welfare, clearly the Respondent denied the Claimant the Constitutional protection against discrimination by treating officers in the same station fundamentally differently. See [Pravin Bowry v Ethics & Anti-Corruption Commission](#) [2013] eKLR.
54. The Respondent excluded the Claimant from accessing loans as an employee whereas the permanent and pensionable employees were advanced loans, see page 112 of the Respondent's Bundle of



- Documents. Whenever the Respondent advanced loans to the Claimant, he was required to pay loan at market rates of 14% while the permanent and pensionable employees paid the same amount of loan at 7%.
55. The Respondent barred the Claimant from registering into its pension scheme and declared it reserved for the permanent and pensionable employees only. See page 38 and 41 of the Claimant's Bundle of Documents.
  56. The Claimant was entitled to 21 days leave per year while the permanent and pensionable employees were entitled to 26 leave days, appears at page 38 of the Claimant's Bundle of Documents.
  57. Contrary to the provisions of the Respondent's policy (appears on page 54 of the Respondent's Bundle of Documents), the medical scheme covered the Claimant only and not his family and the medical cover did not include dental, optical and maternity limited at Ksh.4million whereas the permanent and pensionable employees medical scheme covered the employee, spouse and a maximum of four children up to 21 years of age. Their cover included dental,- optical and maternity and was limited at Ksh.8million.
  58. The Respondents actions are discriminatory and contravene Article 27 of the Constitution of Kenya which provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.

#### **The respondent's submissions**

59. The Respondents have in place a human resource policy which clearly categorizes its employees into three (3) categories. These are namely: temporary employees, contract employees and permanent employees.
60. All three categories of employees are hired to undertake and perform different roles and tasks within the Respondent's Bank. The permanent employees tend to perform the mainstream tasks impacting the core-business of the Respondent's business for instance disbursing loans to customers and managing cash deposit portfolios. While the temporary and contract staff tend to perform peripheral tasks which may not be the core business of the Respondent's business for instance vehicle asset sales. The three (3) categories of the employees are hired/employed to undertake separate and distinct tasks within the Respondent's establishment.
61. The Respondent humbly submits that it has applied the principle of differentiation of benefits and privileges between temporary employees, fixed term contract employees and permanent employees. That contrary to what the Claimant alleges, the Respondent has not discriminated against the Claimant but rather has differentiated the roles, duties and privileges of the Claimant, who is under a fixed term contract, from that of a permanent employee.
62. Further, it is imperative for this Honourable Court to note that the differentiation in benefits and privileges was informed by the fact that the permanent employees were parties to a collective bargaining agreement, which was incorporated/factored into the human resource policy, and therefore they had enhanced benefits and privileges. (see Human Resource Manual at page 90 to 94 of the Defence). The Black's Law Dictionary, 10<sup>th</sup> Edition, Byran A. Gurner, 2014 page 551 and 567 defines discrimination and differential as follows: Differential: A difference between things, as between the wages of people doing different types of jobs within the same industry of profession. 'Discrimination: 'A differential treatment; especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured. This said differentiation of benefits and privileges was valid due to the difference in position and tasks undertaken by the employees in the various job



categories. Further, the fact of having in place variable privileges and benefits for the different categories of employees is a generally acceptable market trend. For instance, a middle management employee cannot deem to be discriminated by the fact that his benefits and privileges are not congruent to those of a senior management employee. That the differentiation of benefits did not apply to employees performing the same nature of work or duties. This was the holding in the case of *Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others* [2018] eKLR where the Court of Appeal relying on the Indian Supreme Court case of *State of Kerala & Another v N. M. Thomas & Others* 1976 AIR 490 stated that:

“The question of unequal treatment does not arise between persons governed by different conditions and circumstances. Equality means parity of treatment under parity of conditions. ”The Respondent submits that differentiation or disparate benefits does not automatically amount to discrimination. In the case of *Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others* (*supra*) the Court of Appeal stated that:

“The mere existence of disparate treatment of people of, for example, different races is not discrimination on the ground of race, unless the difference in race is the reason for the disparate treatment. Put differently, it must be shown that the difference in salaries is because of sex, gender, race, and so on.”

63. The Claimant alleges that the Respondent has another set of employees (namely: permanent employees) performing similar roles to that of the Claimant and that these set of employees enjoy more benefits compared to those extended to the Claimant. The Claimant specifies that one such instance is the Business Development Manager, who for the record, falls within the category of permanent employee. The Respondent humbly submits the following:
- i. The role and duties of a Business Development Manager are very different and distinct from the role of the Claimant which was namely: a commission-based Vehicle and Asset Finance Sales Consultant.
  - ii. The title of the two (2) positions is also very different and distinct. The permanent employee's title was a Business Development Manager and the title of the Claimant was a Vehicle and Asset Finance Sales Consultant.
  - iii. That from a mere reading of the two (2) job titles it is clear that the Claimant was tasked with the sale of motor vehicles and other assets and arranging financing of these vehicles and assets for customers on behalf of the Respondent. While on the other hand, the permanent employee was in charge of developing the overall business of the Respondent.
  - iv. In the circumstances, from a mere reading of the above two (2) job titles it is clear that the two (2) roles were separate, distinct and therefore differentiable.
  - V. Further, the Claimant alleges that he performed similar tasks to that of the Business Development Manager however, he has failed to produce evidence to demonstrate that he was performing similar tasks to that of the Business Development Manager or any other employee contracted on a permanent basis.vi. It is a cardinal principle of the civil process that he who alleges must prove. It is the Claimant who came before this honourable Court claiming that he performed similar roles to that of the Business Development Manager, it is therefore incumbent upon the Claimant to prove that assertion.



- vii. In the circumstances, the Respondent humbly submits that the Claimant was not deprived of the alleged benefits and the same benefits extended to other permanent employees performing similar roles and tasks to the Claimant.
  - viii. The Respondent humbly submits that the Claimant has not made out a case of discrimination against him by the Respondent.
64. The Respondent humbly submits that discrimination entails the unjust or prejudicial treatment of different categories of people in the same circumstances as was the holding in the Supreme Court case of *Law Society of Kenya v Attorney General & another* [2019] eKLR. The Claimant has alleged discrimination on specific benefits which the Respondent wishes to submit on specifically as hereunder:
- a) Discrimination on account of failure to renew the fixed term contract
    - i. The Claimant alleges that he was discriminated by the mere fact that his contract was not renewed.
    - ii. The Respondent was not bound to renew the contract of the Claimant and similarly the Claimant was not bound to accept the renewal of the contract by the Respondent.
    - iii. The Respondent's decision not to renew the fixed term contract of the Claimant is void of any element of discrimination. In the case of *The Registered Trustees of The Presbyterian Church of East Africa v Ruth Gathoni Ngotho* [2013] eKLR the Court of Appeal relying on the case of *Minnie Mbue v Jamii Bora Bank Limited* [2017] eKLR stated that: "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. In the circumstances, the Respondent's resolution not to renew the fixed term contract of the Claimant was not tantamount to discrimination.
  - b. Discrimination on account of team building
65. The Respondent's policy does not provide for differentiation of the three categories of employees on account of team building. The Respondent humbly submits that the Claimant was not required to pay for team building as the same was fully catered for by the Respondent. Further, the Respondent notes that the Claimant has not produced any evidence in the form of receipts or otherwise to sustain his claim that he was required to pay for the team building and that he indeed paid for the same.

**c) Discrimination on account of interest on loan.**

66. The core business of the Respondent is the issuance of loans to persons that meet the criteria and/or threshold of accessing a loan.
- x. The Respondent did not issue loans simply on the basis that someone is an employee of the Respondent, an employee needed to be creditworthy to qualify as per the credit policy. Please see page 112 of the Defence.
  - xi. The Claim that permanent employees accessed loans at 7% while contract staff accessed loans at market rate of 14% is misleading and a mere imagination of the Claimant. For the reason



that the Human Resources policy does not prescribe a uniform applicable interest rate for any loans.

The Human Resource policy states that: "...Various loan schemes, as described in the attached copy of the Credit Policy for staff loans, are available to qualifying staff members. These may be offered at concessionary interest rates. However, in lending to Staff Members, the Bank is exposing itself to certain risks and therefore it has to be sure that the staff member is able to both service and repay the debt.

67. Consequently, it is necessary to assess the creditworthiness of staff members on the same basis as other customers. The loans available to eligible staff members must therefore not be viewed as a right. They are facilities for which staff members must qualify based on normal credit criteria. In the circumstances, the Respondent humbly submits that the Claimant was not discriminated on account of disbursement of loans and/or the interest rates applicable on the loan.

#### **d) Discrimination on account of pension benefit**

68. The Respondent submits that Tier I and Tier II pension contributions were contributed and submitted to National Social Security Fund NSSF on behalf of the Claimant. The Respondent run its independently owned pension scheme where both the employees and the Respondent would remit pension contributions.. The permanent employees were eligible to join the pension scheme by virtue of the Collective Bargaining Agreement.. The Claimant together with other contract and temporary staff were not eligible to join the pension scheme as they were not parties to the Collective Bargaining Agreement. In the circumstances, the Respondent humbly submits that the Claimant discriminated. Rather he could not derive the benefit of the Respondent's pension scheme not a party to the collective bargaining agreement.

#### **Discrimination on account of leave days**

69. The Claimant alleges that permanent staff were entitled to 26 leave days per annum while the contract staff were entitled to 21 leave days per annum. The Human Resource Policy provides that the leave days for permanent staff was 26 leave days per annum as provided under the Collective Bargaining Agreement. (see Document 5 at page 53 of the Defence). The Claimant was not a party to the Collective Bargaining Agreement ("the CBA") hence cannot expect to benefit from the said CBA, which he was not a party to. In the circumstances, the Claimant cannot claim to be discriminated as he cannot derive benefits and privileges from a Collective Bargaining Agreement which he is not a party. Further, the Respondent submits that the Claimant annum which is in consonant with what is applicable under Section 28 (1) (a) of the *Employment Act*, CAP 226, Laws of Kenya, entitled to 21 leave days per annum.

#### **Discrimination on account of medical cover**

70. The Claimant contends that the Respondent's medical scheme was applied differently between permanent staff and contract staff. That for permanent staff, the medical scheme was limited to the employee, spouse and maximum of four (4) children. While for contract staff the medical scheme was limited to the employee only. The Human Resource Policy provides that the Respondent has in place a medical scheme which all employees are eligible to join namely: permanent, contract and temporary staff. Again, the issue of the medical scheme was a matter negotiated in the Collective Bargaining Agreement. That the benefit of permanent staff having their spouse and children included in the Respondent's medical scheme was a benefit agreed upon under the Collective Bargaining Agreement.



The Claimant was not a party to the Collective Bargaining Agreement and in the circumstances cannot demand/claim to benefit from the same. In the circumstances, the Claimant was not discriminated.

### **Discrimination on account of salary increment and promotion**

71. The payment of salaries and other benefits was subject to Cost To Company (CTC) and the applicable grading structure of the Respondent. – (see the Human Resource Manual at page 91 of the Defence) Further, the matters of salary increment and promotion for unionisable/permanent employees was guided by the Collective Bargaining Agreement. The Human Resource Manual provided that salary increment for non-unionisable staff, for instance, the Claimant was not automatic and the percentage increase would depend on performance and would be determined by management. Please see the Human Resource Manual at page 92 of the Defence. The matter of salary increment was guided by the Collective Bargaining Agreement, which the Claimant was not a party to. Therefore, the Claimant cannot claim discrimination and demand to receive benefits which he is not a party to. Further, it is important to point out that the Claimant's salary had both a fixed and variable component. The variable component was a commission which he earned based on the vehicle and asset sales made. Therefore, there are instances, based on the high number of sales made, he would earn more than the permanent staff. ( see Document 2 at pages 31 to 32 of the Defence)
72. On Whether the Claimant violated the rights of the Claimant enshrined under Article 41 of the Constitution of Kenya- The Respondent submits that it has not infringed, threatened and/or violated the Claimant's right to fair labour practices. The Claimant avers that the failure by the Respondent to convert the Claimant's contract to permanent terms was deliberate to deny the Claimant the benefits extended to permanent employees. This assertion by the Claimant does not amount to violation of the Claimant's right to fair labour practices rather the Claimant seems to assert that the Respondent violated his legitimate expectation in which he expected his contract to be converted to permanent terms. That the fixed term contract of employment did not provide that the Claimant's employment should be converted to permanent terms and neither did the Respondent promise either orally, written or in conduct that it would convert the status of the Claimant's employment to that of permanent status( Transparency International Kenya v Teresa Carlo Omondi [2023] eKLR).

### **Decision**

73. A similar case had been decided by the court in *Omondi Justice Ranga'anga & 28 others v KCB Bank Kenya Ltd* Nairobi ELRC No. E618 OF 2021(Lady Justice Monica Mbaru). I say similar as the claimants were on fixed term for one year renewed over time, the respondent had a defined pension scheme of which the fixed term contract employees were not eligible to join, the fixed term contract employees had less leave days than the permanent staff etc. A recurring statement of defence of the different terms was –“The Claimant was not a party to the Collective Bargaining Agreement and in the circumstances cannot demand/claim to benefit from the same.” This was the same defence in the *KCB Bank case*. In that case the trial court held that –

“63. Even where the respondent has the prerogative to employ employees on different job cadres or positions within the Bank based on the Bank's needs, vacancies available, amongst other criteria, and as set out in the Bank's Policies and also guided by the applications received by the Bank, terms and conditions of employment for unionisable employees particularly where the respondent had secured and negotiated a CBA with the interested party has a bearing. Terms and conditions of employment once negotiated and secured under a CBA are enforceable and applicable to all unionisable employees



protected under the law and based on Section 59(5) of the Labour Relations Act, 2007 read together with the *Employment Act*, 2007 especially the provisions directing the employer to directly apply the terms and conditions of employment of a CBA when issuing an employment contract without distinction.

64. Section 10(3)(e) of the *Employment Act*, 2007 directs the employer in issuing an employment contract to an employee that;

(3) The statement required under this section shall also contain particulars, as at a specified date not more than seven days before the statement, or the instalment containing them, is given of-

(a) any terms and conditions relating to any of the following-

(e) any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the person by whom they were made; and ...

65. in securing an employment contract, whether for a casual employee, a temporary employee or as the case may require, such contract must give an account to the provisions of any CBA directly affecting the terms and conditions of employment and which must be reasonably be made accessible to the employee. Therefore, the wording, formulation and application of Section 11(3) of the *Employment Act*, 2007 is deliberate and contextualised to apply to all employees at the shop floor who are unionisable that;

(3) A statement under section 10 may refer the employee for particulars of either of the matters specified in section 10(3) (e) to the law or to the provisions of any collective agreement directly affecting the terms and conditions of the employment which is reasonably accessible to the employee.” The Court finds similarity in the facts of this case to the KCB Bank one in treating the fixed term employees different without justification on basic condition of service of annual leave and medical scheme and other terms already negotiated for permanent staff under the CBA. This is contrary to provisions of section 5 of the *Employment Act*. It is unfair for a medical scheme to cover only the principal member and leave out immediate family for the fixed term employees only. What would justify such a crude treatment? Immediate family is the obligation of the claimant. It is an indignity to expose his children and spouse (for fixed term staff only) to indignity for lack of medical cover which affects the claimant. The court did not find basis for excluding the fixed-term contract employee from pension scheme under the CBA and giving them an inferior scheme. This applied to leave too. The statute gives minimum terms. Section 26 of the *Employment*



Act provides for an employee to benefit from the most favourable terms. It states:-‘26 (2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Employment and Labour Relations Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.’” The court found no evidence of the alleged requirement of the cadre of employee to pay to attend a company event while other staff did not pay. CW2 did not produce his terms of service.

74. The court finds evidence that the treatment of the claimant during employment as demonstrated above amounted to discrimination in breach of section 5 of the Employment Act and Article 27 of the Constitution. The differential treatment for the basic terms of service was not justified. The court upheld with approval the decision in *Rang’anga and others v KCB Bank Ltd and another* (ur Nairobi ELRC Cause No.E304 OF 2021 and the claimant similarly is awarded damages for discrimination of Kshs. 2, 000,000/- .

#### **Whether the claimant was entitled to**

75. The claimant sought for the following relief:-

- a. A declaration that the decision not to renew was based improper motives and extraneous reasons.
- b. A declaration that the Claimant acquired the expectancy of renewal based on the length of service with the Respondent coupled with subsequent previous contract renewals.
- c. A declaration that the contracts the claimant was subjected to be deemed to have been converted to term/permanent employment in compliance with the law in force for the time being.
- d. A declaration that the Respondent engaged the Claimant in a series of renewals of contracts whose outcome is the deprivation to the Claimant of the benefits and rights attendant to permanent employment.

The court holds that the yearly renewal of contracts were lawful The contract ended by effluxion of time.

- e. A declaration that the contracts that the Respondent had subjected the Claimant to were unlawful, unconstitutional, hence null and void.
- f. A declaration that the conduct of the Respondent against the Claimant in failing to convert his contract to term/ permanent and pensionable employment amounted to a violation of the Claimant’s constitutional rights in particular: Article 27 of the Constitution; and Article 41 (1) of the Constitution.
- g. A declaration that the Claimant’s termination of employment was a violation of Article 47 of the Constitution.
- h. A declaration that the Respondent subjected the Claimant to modern slavery and forced labour contrary to Article 30 of the Constitution.



- i. An order that the Claimant be compensated by the Respondent for violation of the Claimant's fundamental rights under the Constitution as follows:
- j. Breach of Constitutional Right under Article 27 of the Constitution Kshs.5,000,000/=.
- k. Breach of Constitutional Right under Article 41 of the Constitution Kshs.5,000,000/=.
- l. Breach of Constitutional Right Under Article 47 of the Constitution Kshs.5,000,000/=.
- m. Breach of Constitutional Right under Article 30 of the Constitution Kshs.5,000,000/=.
- n. Total Kshs.20,000,000/=.
- o. General damages for breach of the Constitution.

76. The court found that the differentiation of basic condition of service between the term contract employees and the permanent employees was not justified and specification made this finding with respect to annual leave, medical provision, social security in terms of blocking the claimant from joining an existing pension scheme, which are very basic conditions of service under the Employment Act. General damages compensation for discrimination was awarded at Kshs. 2million. The court was guided by similar case in *Omondi Justus Ranganga and other v Kenya Commercial Bank and BIFU* (ur Nairobi ELRC Cause No. E)618 of 2021) where a similar amount of Kshs. 2million was awarded for unjustified differential treatment of temporary employee cadre and the permanent and pensionable staff.

- p. A declaration that the unfair termination by the Respondent surmounted to the redundancy in the guise of non-renewal of contract.- there was no case of redundancy the contract ended by effluxion of time.
  - q. A declaration that the Claimant's termination of employment was contrary to Sections 41, 43 and 45 of the Employment Act and therefore unfair.- The termination was fair as held above.
  - r. A declaration that failure to release the Claimant's terminal benefits amounts to subjecting the Claimant to servitude and hence unconstitutional.
  - s. An order that the Claimant be compensated for breach of Sections 41, 43 and 45 of the Employment Act as follows:-
  - t. Twelve months' salary in compensation for wrongful and unlawful termination at Kshs.480,000/=.
  - u. Compensation for loss of income in commensurate to twelve months salary at Kshs. 480,000/=.
  - v. One Months' Salary in lieu of proper notice at Kshs.40, 000/=.
- All the above are denied as the termination was vide effluxion of time.
- w. Payment in lieu of 168 leave days at Kshs. 258,384/=.
  - x. Leave allowance for 21 days taken in May 2017 at Kshs.32,298/=(This claim was a statute barred claim as the same ought to have been raised 12 months post termination of the 2017 contract.
  - y. Overtime of 8000hours at Kshs. 2,307,000/=.



- z. Variable Commission based pay due at Kshs.342, 993/=. The court finds that commission of Kshs. 336718 was paid under salary of April and May 2019. The claimant did not justify the claim.
- aa. Severance Pay Kshs.180,000/=. There was no case of redundancy.

### **Conclusion**

77. The claim is allowed. The court holds that the termination was fair. The court enters judgment for the claimant against the respondent as follows:-
- a. A declaration is issued that the respondent discriminated against the claimant contrary to the provisions of Article 27 of the Constitution and Section 5 of the Employment Act.
  - b. General damages for discrimination Kshs. 2,000,000 (Two Million Kenya Shilling) awarded with interest at court rate from date of judgment.
  - c. Costs of the suit.
  - d. Certificate of service to issue according to section 51 of the Employment Act.
78. Stay of 30 days.
79. It is so ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18<sup>TH</sup> DAY OF JULY, 2025.**

**J.W. KELI,**

**JUDGE.**

In The Presence Of:

Court Assistant: Otieno

Claimant: Ms. Opiyo

Respondent: Ms. Mwaura

