



**Musau v World Vision Kenya (Cause E049 of 2023)
[2024] KEELRC 79 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 79 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E049 OF 2023
S RADIDO, J
JANUARY 31, 2024**

BETWEEN

CECILIA MUTANU MUSAU CLAIMANT

AND

WORLD VISION KENYA RESPONDENT

JUDGMENT

1. Cecilia Mutanu Musau (the Claimant) sued World Vision Kenya (the Respondent) on 12 July 2023, alleging unfair termination of contract, discrimination and breach of contract.
2. The Respondent filed a Response on 15 August 2023, and the Court gave directions on 3 October 2023 and 16 October 2023.
3. The Cause was heard on 27 November 2023 and the Claimant filed her submissions on 21 December 2023, and the Respondent on 28 January 2024.
4. The Claimant identified the Issues for determination in her submissions as:
 - i. Whether the termination of the Claimant’s employment was unfair, wrongful/unlawful for want of procedural fairness and substantive justification?
 - ii. Whether the Respondent’s conduct towards the Claimant amounts to discrimination on account of pregnancy?
 - iii. Whether the Claimant served the Respondent diligently?
 - iv. Whether the Claimant is entitled to the prayers sought in the Memorandum of Claim?
5. On its part, the Respondent isolated the Issues for adjudication as:



- i. Whether the Respondent's action to declare the Claimant redundant was procedural and lawful.
 - ii. Whether the Respondent by conduct had created a legitimate expectation of renewal of contract on the Claimant.
 - iii. Whether the Claimant was discriminated against on the grounds of pregnancy.
 - iv. Whether the Respondent's actions amount to unlawful termination of the Claimant's employment.
 - v. Whether the Claimant is entitled to the reliefs sought.
6. The Court has considered the pleadings, evidence and submissions.

Background

7. The Claimant was initially employed by the Respondent in 2005 on a 2-year fixed-term contract as a Development Facilitator.
8. The contract was renewed several times during the course of which the Claimant was promoted and also got transferred.
9. The last renewal was signified through a letter dated 27 September 2018. Under the renewed contract, the Claimant was to serve as a Grants Coordinator, Integrated Programs from 1 October 2018 to 30 September 2020.
10. On or around 5 July 2020, the Claimant applied through email for her annual leave to run from 3 August 2020 to 20 August 2020. She also informed the Respondent that she would be due for maternity leave around August 2020, and proposed a colleague to stand in for her. The request was approved the same day.
11. Around 9 July 2020, the Claimant formally applied for maternity leave commencing on 26 August 2020.
12. On 21 July 2020, the Respondent formally notified the Claimant that her contract would terminate on 30 September 2020 and that she should prepare to hand over and clear.
13. Around 28 September 2020, the Claimant was updated about a change process and establishment of a new institutional structure within the Respondent.
14. The Claimant thereafter cleared with the Respondent and later on instituted the instant Cause.

Unfair termination of employment

15. While asserting unfair termination of employment, the Claimant contended that the Respondent disregarded the law and procedures that require both substantive justification and procedural fairness before termination of employment.
16. The Claimant did not disclose the particular laws and procedures flouted by the Respondent.
17. Under section 47(5) of the *Employment Act*, 2007, a Claimant should at the first instance demonstrate that an unfair termination of employment occurred.



18. The Claimant did not demonstrate that the Respondent terminated her contract on the grounds listed in sections 41 and 44 of the *Employment Act*. The grounds are misconduct, poor performance or physical incapacity.
19. The evidence placed before the Court was that the Respondent notified the Claimant that her fixed term contract was lapsing and she should prepare to hand over and clear.
20. The Court finds that the Claimant did not prove to the required standard that her contract was unfairly terminated as contemplated by section 41 of the *Employment Act*, 2007.

Legitimate expectation

21. The Claimant relied on the doctrine of legitimate expectation to challenge the fairness of the decision by the Respondent not to renew her contract.
22. To develop the narrative on legitimate expectation, the Claimant stated that she was first engaged by the Respondent in 2005 on a 2-year fixed-term contract and that the contract was renewed multiple times without a break. She also pointed out that she was promoted over time up to the sensitive managerial position of Grants Coordinator and even had a salary increment a year before the lapse of the contract.
23. The Claimant asserted that the multiple renewals, promotions, and salary increments indicated that the Respondent had faith and confidence in her, and that this implied a long-term contractual relationship.
24. The Respondent denied that it had created a legitimate expectation that it would renew the Claimant's contract.
25. The Respondent's point of departure was that renewal was upon mutual agreement and that notice of non-renewal was not required under the contract.
26. The Court of Appeal dealt with the question of lapse of fixed-term contracts and doctrine of legitimate expectation in *Registered Trustees of the Presbyterian Church of East Africa & Ar v Ruth Gathoni Ngotho- Kariuki* (2017) eKLR and stated:

we note that fixed-term contracts carry no rights, obligations, or expectations beyond the date of expiry.

27. In *Keen Kleeners Limited v Kenya Plantation and Agricultural Workers Union* (2021) KECA 352 (KLR), the Court of Appeal addressed the question of legitimate expectation thus:

There may, however, be instances where the unique circumstances of the employment relationship may create a legitimate expectation that a fixed-term contract would be renewed. In the *Oshwal Academy Case* (supra), for instance, this Court upheld the trial court's determination that despite the fixed term contract lapsing by effluxion of time, the respondent had a legitimate expectation of continuity from the conduct of the parties in the course of the employment relationship; and that the respondent was in employment for over 23 years and had developed a bond as to expect to work until retirement.

Regarding the considerations to be made when considering whether a legitimate expectation for renewal of a fixed-term contract was created, the sentiments of Rika J. in *Teresa Carlo Omondi v Transparency International- Kenya* [2017] eKLR are particularly persuasive:

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 thing as anticipation, desire or hope. It is a principle based on



a right, grounded on the larger principles of reasonableness and fair dealing between Employers and Employees. The Employee must demonstrate some rational and objective reason, for her expectation. The representation 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 renewals, extended 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.

28. Within comparative jurisdictions, it has been held that legitimate expectation goes beyond enforceable legal rights provided that there is a reasonable foundation to the expectation (see *AG of Hong King v Ng Yuen Shiu* (1983) 2 AC 629 and *Breen v Amalgamated Engineering Union & Ors* (1971) 1 All ER 1148).
29. By the time the parties were separating, the Claimant had served the Respondent continuously for 15 years. The Respondent had repeatedly renewed the contract and also promoted the Claimant. The Respondent increased the Claimant's salary a year before the lapse of the contract, and the Claimant had no disciplinary history during the 15 years of service.
30. The Respondent did not suggest in Court even remotely that the role the Claimant was performing as a Grants Coordinator had become superfluous, or that it was necessary to alter or change its institutional design/ organogram.
31. If indeed there was restructuring, the Respondent owed a duty under the principle of fair dealing to formally engage the Claimant to find out if there were alternative openings.
32. The Respondent did not put before this Court any evidence that there was a need to restructure. It appears to have taken a casual approach to the restructuring, if there was one.
33. This Court is satisfied that the Respondent's conduct was an affront to the Claimant's legitimate expectation that the contract would be renewed and that the Claimant is entitled to remedy in damages.

Discrimination

34. The Claimant also alleged discrimination on account of her pregnancy in that she was only given 1-month instead of the statutory 3-months maternity leave.
35. She also asserted that the Respondent failed to renew her contract on the ground of pregnancy and changed her job designation but maintained the job description.
36. Further, the Claimant contended that the Respondent took advantage of her pregnancy to deny her a chance at exiting through redundancy and the resultant redundancy benefits.
37. The Claimant applied for maternity leave to start on 26 August 2020. Her contract was set to lapse on 30 September 2020.
38. The Respondent had already intimated to her on 21 July 2020 that the contract would lapse and she was expected to handover and clear.
39. Without further evidence, the Court is unable to agree that the failure to approve maternity leave beyond the expiry of the contract was discriminatory.



Appropriate remedies

40. The Court has concluded that the Respondent breached the Claimant's legitimate expectation on the renewal of the contract.
41. The Court is of the view that damages equivalent to the Claimant's 10 months' gross wages at the point of separation would be appropriate (gross wages was Kshs 319,672/-).

Conclusion and Orders

42. The Court finds and declares that the Respondent breached the Claimant's legitimate expectation of the renewal of the contract.
43. The Claimant is awarded:
 - (i) Damages Kshs 3,196,720/-
44. The Claimant to have costs and interest on the award from the date of judgment.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 31ST DAY OF JANUARY 2024.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Claimant Oscar & Associates Advocates

For Respondent Kibatia & Co. Advocates

Court Assistant Chrispo Aura

