



Looremeta v Kenya National Commission for Unesco (KNATCOM) (Employment and Labour Relations Cause 226 of 2020) [2024] KEELRC 38 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEELRC 38 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 226 OF 2020
MN NDUMA, J
JANUARY 25, 2024**

BETWEEN

DAVID LEIYAN LOOREMETA CLAIMANT

AND

**KENYA NATIONAL COMMISSION FOR UNESCO
(KNATCOM) RESPONDENT**

JUDGMENT

1. The claimant filed suit on 8/6/2020 following termination of his employment by the respondent seeking the following reliefs:
 - i. Leave days balance withheld (7.5 of 42 days) - Kshs 55,475.00.
 - ii. Balance of 30% leave allowance difference withheld – Kshs. 58,789.00.
 - iii. Refund of illegally surcharged imprest – Kshs. 106,800.00
 - iv. One-month salary in Lieu of Notice of termination – Kshs. 305,298.00
 - v. 31% service Gratuity on above one monthly salary in lieu of notice of termination – Kshs. 71,082.00
 - vi. One-month salary in lieu of notice on account of redundancy – Kshs. 305,298.00.
 - vii. 31% Gratuity on on-month salary in lieu of notice on account of redundancy – Kshs. 71,082.00.
 - viii. 14 years' severance pay at the rate of half at Kshs. 152,649.00 – Kshs. 2,137,086.00
 - ix. 12 months' salary penalty at Kshs. 305,298.00 on account of unfair termination Kshs. 3,663,576.00



- x. 31% service Gratuity on 12 months' monthly salary penalty at Kshs. 71,082.00 – Kshs 852,989
2. CW1, the claimant relied on a witness statement dated May 29, 2020 as his evidence in chief. CW1 stated that he joined Procurement Public Service in the capacity of Human Resource Management Officer II with effect from 29/8/2001. That he rose through the ranks to Ag. Chief Human Resource Management Officer from where he was head hunted by the Kenya National Commission for UNESCO State Corporation and seconded to them. That he joined the commission with effect from 1/01/2013 as Head of Human Resource and Administration Department at level 3 on a three-year renewable contract to manage the new state Corporation's staff transition process.
 3. That he served with distinction and the Board extended the contract for a second term up to 2017 and further for another third term of three (3) years from 1/4/2017 upto 31/3/2020 as manager, Human Resources, KNC at level 3 after which the claimant 'relinquished' his former post in the ministry.
 4. The contract was at all material time 'renewable' including the third contract extended on 2/12/2016 at clause 25. The contract period was 1/4/2017 to 31/3/2020.
 5. That before that contract expired, the former employer, the Public Service Commission undertook a restructuring exercise without the knowledge and/or information to the claimant in which the position held by the claimant was abolished despite the fact that the contract between the parties was renewable.
 6. That by a letter dated 6/1/2020, the secretary general/Chief Executive Officer served the claimant with a notice indicating that the contract of employment with UNESCO would not be renewed for the exclusive reason that the post had been abolished through a restructuring exercise.
 7. That the position had been casually abolished without informing the claimant in violation of Article 47(2) of *Fair Administrative Action Act*, 2015 and Section 28(3) of the *Public Service Commission Act*, 2007.
 8. CW1 testified that he was traumatized upon realization that the position he had held for a period of 7 years had been abolished while the contract was in place.
 9. CW1 stated that he protested the decision vide a letter dated 17/1/2020. That however, the management proceeded to advertise for recruitment of his replacement on 25/2/2020 while the claimant was still in office which action explicitly and publicly announced the redundancy to the world. The advertised job was deliberately graded one grade below the current grade at level 4 from the top most to lock the claimant out.
 10. CW1 protested the advertisement and brought the illegality to the attention of various government agencies to investigate the matter.
 11. UNESCO however remained mum and declined to follow the law on redundancy and instead allowed the contract to expire on March 31, 2020 under the pretext of effluxion of time.
 12. CW1 stated that UNESCO was not undergoing any economic or financial crisis to justify the abolition of the office and there was no valid reason for breaching the executed contract of December 2, 2016.
 13. CW1 states that the respondent violated sections 40, 43 and 45 of the *Employment Act* 2007.
 14. The consequence of the abolition was direct breach of clause 24 of the contract on notice and so the claimant is entitled automatically to one month salary in lieu of notice.



15. That the respondent failed to consider and exhaust the option of redeployment whereas there were numerous equivalent options available to them in the new organizational structure.
16. CW1 stated that his illustrious career was thus curtailed in the most cruel, vicious, unprotected and unlawful manner for no just cause bringing to an end expected employment and income to retirement upon attainment of 60 years, which loss the claimant prays to the court to award him at the rate of Kshs. 305,298 per month.
17. That the respondent withheld the benefit due and owing to the claimant in unclear circumstances forcing the claimant to repay back a sum of Kshs. 106,800.00 for the travel of August 2019 that was not in dispute on grounds that the claimant had not surrendered the boarding pass which was not true since the claimant had surrendered to the CEO who had duly approved the same together with Deputy CEO and manager, finance. That the surcharge was patently illegal.
18. CW1 testified that he was finally forced out of employment on 31/3/2020 without payment of any redundancy benefits. CW1 said he left the respondent without blemish despite intention to stain his illustrious career. That the claimant had cleared his name through an Ad-hoc investigation committee of the Board of the respondent as evidenced by the letter formally communicating to the Advocates for the claimant which clearly exonerated the claimant from any fault.
19. That the advocates for the claimant wrote a demand letter dated 21/4/2020 seeking specific performance of the redundancy provisions and damages for unfair termination. The respondent denied the claim.
20. CW1 itemized the specific claims to include:
 - i. Payment in lieu of Leave days balance withheld (7.5 of 42 days) - Kshs. 55,475.00.
 - ii. Balance of 30% leave allowance difference withheld – Kshs. 58,789.00.
 - iii. Refund of illegally surcharged imprest – Kshs. 106,800.00
 - iv. One-month salary in Lieu of Notice of termination – Kshs. 305,298.00
 - v. 31% service Gratuity on above one month salary in lieu of notice of termination – Kshs. 71,082.00
 - vi. One-month salary in lieu of notice on account of redundancy – Kshs. 305,298.00.
 - vii. 31% Gratuity on on-month salary in lieu of notice on account of redundancy – Kshs. 71,082.00.
 - viii. 14 years’ severance pay at the rate of half at Kshs. 152,649.00 – Kshs. 2,137,086.00
 - ix. 12 months’ salary compensation for unfair termination Kshs. 3,663,576.00 and
 - x. 31% service Gratuity on 12 months compensation at Kshs.– Kshs. 852,989.00
21. CW1 relies on Section 2.5.5 of the 2019 policy for payment of gratuity on all amounts covered as basic salary and above.
22. The claimant was cross-examined by Advocate Ojiambo for the respondent. The claimant confirmed that his last contract was to expire on 31/3/2020 and had commenced three years earlier. That the claimant was to apply for a renewal six (6) months before expiry but had not applied. CW1 said he would not do so since he had been sent on compulsory leave on 21/9/2019. CW1 confirmed that the



- contract was not renewed. CW1 said he had applied for renewal on 10/12/2019 with reasons why he had applied late attributed to the conduct of the employer.
23. CW1 said he had left the job with the Ministry upon taking another job with the respondent. That the application for renewal was declined because the post had been abolished. CW1 stated that due process was not followed in the restructuring of the respondent which led to abolition of his position. CW1 said the process he was involved in to restructure the respondent was abandoned overnight by the Advisory Committee in collusion with the respondent.
 24. That what was created is different from other state corporations. CW1 said he disagreed with its skewed outcome. That his position was recreated at a lower level unlawfully and same was advertised at level 4. That level 3 position was unlawfully abolished whilst his contract with the respondent was in place. CW1 said he was constructively dismissed from employment on grounds of redundancy without any valid reason. The new position created was named, Director Corporate Services. CW1 said in respect of other downgraded positions, incumbent officers were given letters of appointment to the new position except him. This included the position of Finance Manager. CW1 admitted that he was requested to apply for the new position but did not do so.
 25. CW1 admitted his benefits were paid until end of March 2020 but was on compulsory leave at the time. That the process of creating new position was imposed. He had participated in the process until June 2019. That this was a tainted process with political interference. CW1 said he did not sue Public Service Commission and the Advisory Committee.
 26. CW1 said he should have been lawfully declared redundant and all benefits paid. CW1 said he expected to work until retirement age of 60 but this had been unlawfully curtailed.
 27. CW1 said he was facing disciplinary hearing on fictitious charges which were dropped by the Board.
 28. CW1 insisted that refusal to renew his contract was based on malice and was unlawful and unfair.

Defence:

29. RW1 Nicholas Kuwe told the court that he was Acting Manager Human Resource and Administration of the respondent. RW1 relied on a written statement dated 30/7/2020 as his evidence in chief and produced bundle of documents dated 30/7/2020 as listed '1' to '8'.
30. RW1 stated that the claimant was employed by respondent as its Manager Human Resources Grade KNC – 9 upon terms set out in the letter dated 11/12/2016. That claimant was to serve on a fixed contract of three (3) years effective 1/4/2017 to end on 30/3/2020.
31. That clause 25 provided for renewal of contract upon a written request at least six (6) months before expiry of the contract. That the claimant lodged his written request on 10/12/2019 well outside the contemplated period.
32. That by a letter dated 6/1/2020, the respondent informed the claimant that his request for renewal had not been granted and that the new position of manager, Human Resource and Administration – ICNC – 4 would be advertised to be filled competitively. The claimant was requested to apply once the position was advertised. That the claimant did not apply for the job once advertised.
33. RW1 denied that the decision by the respondent contained in a letter dated 16/1/2020 refusing to renew the contract amounted to a redundancy. RW1 stated that the claimant was not entitled to work until retirement at the age of 60 years which was not provided in his contract.



34. That the respondent was not obligated to give reason for non-renewal of the contract but they did so in the letter dated 6/1/2020.
35. That the respondent had been required to review its Human Resource Instrument to comply with the Public Service guidelines by State Corporations Advisory Committee (SCAC) circular on 15/5/2017. That the said review was spear headed by the claimant who was in-charge of Human Resource docket under the guidance of State Corporations Advisory Committee (SCAC). That the claimant arranged and attended the meetings as shown in the attendance sheets on 2nd to September 7, 2019 at Mombasa Continental Hotel and August 8, 2019 at Pride Inn Flamingo Beach Resort.
36. That the claimant prepared the invitations; Appended the concept paper and the budget for the meeting on review of the Human Resource Instrument. That it is not true that the claimant was not informed or was unaware of the restructuring process. That the claimant's fixed term contract was insulated from the review and changes to the Human Resources Instruments until its expiry on 30/3/2020.
37. That when the new Human Resource Instrument came to force in October 2019, the claimant's contract was not adversely affected by the change until it expired on 30/3/2020.
38. That the claimant was in October 2019 tasked to implement the new structure and was therefore aware of the changes. That it is not true that the claimant was singled out for punishment. That the respondent was under no duty to deploy the claimant to another job as claimed or at all.
39. That this suit is entirely founded on the letter dated 6/01/2020 and is an afterthought by disgruntled claimant.
40. That the claim has no factual or legal basis and is denied in total.
41. That the claimant's performance in his last contract of employment was not satisfactory and had been subjected to a disciplinary process where he was found guilty of malpractice.
42. That the Board approved and directed the claimant to appoint one Bernard Nyarika, Chief Accountant and in the event Mr. Nyarika declined the position, he was to conduct background checks on Judy Wangui Mwangi and Catherine Nyakoboke Nyangai. The claimant in gross violation of his office and without Board approval appointed Catherine Nyakoboke Nyangai as Chief Accountant. The claimant failed to document the hiring process and undertake background checks on the said Ms. Nyangai who turned out to be unqualified and without necessary experience. The conduct of the claimant was therefore not satisfactory.
43. That the claimant set out on a vengeful course to report the Board and Chief Executive Officer to the parent ministry in the hope that the decision would be reversed.
44. That the suit lack merit and it be dismissed with costs.
45. RW1 was closely cross-examined by Mr. Bosire Advocate for the claimant. RW1 stated that the claimant spearheaded the restructuring process until it was approved. RW1 said he was not aware of any differences between the claimant and the Board on the review process since RW1 did not attend the review meeting. That SCAC had directed the restructuring to be conducted. That some positions were downgraded including that held by the claimant. That the existing fixed contract was not affected by the review. The abolition took effect on the 30/3/2020. That the claimant had no legitimate expectation to hold his position beyond the expiry of the fixed term contract on 30/3/2020. That renewal was not automatic. That the claimant was asked to apply for the new position but he



had declined. That the position was not abolished but was downgraded and remuneration was lower. That the suit lacks any merit at ll.

Determination

46. The parties filed written submissions which the court has carefully considered together with the evidence adduced by CW1 and RW1. The court has delineated the following issues for consideration:
- i. Whether the contract of employment of the claimant terminated by effluxion of time or the claimant was dismissed from employment on grounds of redundancy.
 - ii. If the answer to (i) is that the claimant was dismissed from employment on grounds of redundancy, whether the respondent had valid reasons to do so and if it followed fair procedure.
 - iii. Whether the claimant is entitled to the reliefs sought.
47. In answer to issue (i) and (ii) above, the court has carefully considered the evidence adduced by CW1 and that adduced by RW1. Indeed, the testimony of the two does not differ materially as regards the particulars of employment of the claimant; the period served by the claimant; the nature of the fixed term contract served by the claimant and in particular the last contract of employment dated 1/12/2016, effective 1/4/2017 and to expire on 31/3/2020 after 3 years' service. There is also no dispute that in terms of clause 25 of the said contract, the claimant was obligated to notify his intent to renew the contract at least six (6) months to the date of expiry.
48. It is common cause that the claimant applied for renewal on 10/12/2019 outside the said 6 months period. It is also not contested that the respondent wrote to the claimant on 6/1/2020 informing the claimant that it would not renew the contract of employment between it and the claimant upon expiry on 30/3/2020.
49. The court also finds that it is not in dispute, the reasons given for the non-renewal of the contract of employment between the claimant and the respondent, was stated in the letter of 6/1/2020 as follows:
- "However, the appointed KNAJ Committee Human Resource Instruments abolished the position of the manager Human Resource and Development, KNCA which you hold". This therefore means that your contract cannot be renewed due to the new structures in place. For this reason the post of the manager Human Resource and Administration ICNC 4 should be advertised to be filled competitively in accordance with the Constitution and ICNAT laid down policies. We advise you apply once the position is advertised and that you shall be considered based on the required qualification in the Act."
50. The evidence before court is that the claimant served the fixed term contract and that the same expired on 30/3/2020. It is also not in dispute that the claimant was paid all terminal dues in terms of the fixed term contract aforesaid.
51. What is however in dispute is whether the downgrading of the post of the manager Human Resource and Administration, KNC3 and creation of a new position namely Director Corporate Affairs ICNC 4 before the expiry of the fixed term contract between the claimant and the respondent amounted to a premature abolition of the office held by the claimant and therefore a declaration of redundancy of the claimant without following the mandatory due process provided under section 40 of the [Employment Act](#) and whether the said failure constituted unfair administrative action against the claimant in violation of article 47 (7) of the [Constitution](#) of Kenya 2010 and of section 28(3) of the [Public Service Commission Act](#), 2007.



52. It is the claimant's case that the respondent had only two options in the circumstance of the case, being to redeploy the claimant upon abolition of his office and or retire the claimant early on account of redundancy in line with Section 40 of the [Employment Act](#) 2007.
53. The claimant submits that failure by the respondent to take either of the two options amounted to unlawful and unfair constructive dismissal of the claimant on grounds of redundancy and so the court should find so and proceed to award the claimant the reliefs sought.
54. The claimant relies on the case of [Kenya Plantation and Agriculture Workers Union v Harvel Limited](#) (2014) eKLR on the need to adhere to mandatory provisions of Section 40(1) of the [Employment Act](#), 2007 and also the case of [African Nazarene University v David Muteru and 3 others](#) (2017) eKLR. The claimant urges the court to find that the mandatory principles outlined in these cases are applicable in the circumstances of this case and find therefore that the conduct by the respondent amounted to unlawful and unfair dismissal of the claimant on grounds of redundancy in that the respondent had no valid reasons to declare the claimant redundant and that the respondent did not follow the procedural edicts set out under Section 40(1) of the [Employment Act](#) 2007 in that the claimant was not notified of the intended declaration of redundancy within a period of at least one month, was not consulted and or engaged on the reason for the declaration and the option applicable to him under the circumstances. That the respondent did not pay the claimant severance pay for the period served nor did the respondent uphold the legitimate expectation by the claimant who had forfeited a permanent and pensionable position within the public service commission to serve the respondent on renewable fixed terms.
55. The claimant in that respect relies on the case of [Aenea Ongada v Kenya Electricity Transmission Company Ltd](#) (2016 eKLR where the court held:

A redundancy must therefore be justified before an employee can commence recruitment of new officer to replace existing employees who have ongoing contracts of employment and hold substantive offices in similar capacity as the advertised position. The justification for the redundancy is upon the employer as this cannot be applied as a general term just to lay off an employee as was held by the Court of Appeal in [Kenya Airways Limited v Aviation and Allied Workers Union Kenya and others](#) (2014) eKLR. A restructuring or abolition of office are not matters that just happen. They require serious consideration by the employer and based on the position held by various officers, all efforts must be shown to have been made to retain or redeploy such officers. To abolish office and then advertise for recruitment of persons with his/her skills or ability without giving a consideration internally, would be to abuse the very essence of a restructuring and purpose of abolition of office as held in [Aviation and Allied Workers Union and 7 others v Kenya Airways Limited](#) Civil No. 1616 of 2014, a position affirmed by the Court of Appeal in the same case upon appeal.

56. The claimant reiterates the matter citing the case of [Hesbon Nyeruiye Waigi v Equitel Commercial Bank Limited](#) [2013 eKLR where the court held that:

"Where redundancy is declared by an employer, the procedure to follow is as set out under the provisions of section 40 of the [Employment Act](#) and where not followed any termination as a result will be deemed un-procedural and unfair. Any termination of an employee following a declaration of redundancy must be based on the law, otherwise the same becomes wrong and if the grounds used to identify the affected employees are not as per the law, the same becomes unfair."



57. From the testimony of the claimant himself, he spearheaded and participated in the meetings conducting the restructuring of the respondent until June 2019, which process led to the new structures and various positions were downgraded.
58. The claimant testified that his position was not one of the three positions that were downgraded while he spearheaded the process but his position was maliciously downgraded in his absence upon collusion by senior management of the respondent and SCAC.
59. What is however clear is that the process of restructuring the respondent was fully supported by SCAC and Public Service Commission both of whom are not cited as respondents in this matter.
60. The facts of this case undoubtedly show that the respondent did not terminate the fixed term contract between it and the claimant until the same expired by effluxion of time on 30/3/2020. The facts of the case therefore do not support the allegations by the claimant that the claimant was declared redundant by the respondent. To the contrary, the contract of employment of the claimant expired by effluxion of time.
61. The claimant admitted that he did not comply with clause 25 of the said contract on renewal in that he did not apply for renewal of his contract within six months of the date of expiry of the contract. The respondent did not however rely on the failure by the claimant to apply for renewal of his contract within the six months period but instead stalked controversy by attributing the non-renewal of the contract to the abolition of the position the claimant held. The respondent was not obligated by the fixed contract of employment to provide any reason at all for non-renewal of the contract. The law of Kenya does not provide for provision of reasons for non-renewal of a fixed contract of employment as was stated in the case of *National Water Conservation v Jayne Kanini Mwenje* (2014) eKLR, where the Court of Appeal held:
- "The general principle as we understand it is that, 'a fixed term contract will terminate on the sunset date unless it is extended in terms stated in the contract'.
- A court cannot re-write the terms of a contract freely entered into between the parties. Once there is a written contract, the court will seek to give meaning to such contract giving ordinary meaning to its terms in determining any issue that may arise."
62. In this regard clause 25 renewal of appointment reads:-
- "At the end of your tenure, should you wish to be re-appointed in the same position, you will be required to make a written request at least six (6) months before the expiry date of this contract. However, please note that this post is a contract position. Therefore whilst you qualify for subsequent extensions pending your attainment of 60 years, the Board shall first make a decision on the treatment of your accumulated pension element under the remain of contract terms or you shall transfer your services pending attaining of 50 years".
63. The claimant told the court that he voluntarily relinquished his further service with his former employer the Public Service Commission in favour of serving the fixed term contract he entered into for the period 1/4/2017 to 30/3/2020.
64. The fixed term contract was binding between the claimant and the respondent and did not permit any variation based on extrinsic evidence outside the four corners of the said contract.
65. Had the claimant complied with clause 25, which he admittedly did not comply with, this case would then have been hinged on a proposition that the respondent pre-empted that clause upon abolition of



the office he held. On the facts before court, this position is untenable given that the claimant did not comply with clause 25 in the first place.

66. In any event the respondent was under no obligation to renew the contract or provide reasons for non-renewal.
67. In the whole, the suit by the claimant lack merit. The claimant has failed to prove that the respondent constructively dismissed him from employment on grounds of redundancy.
68. The court is satisfied that the claimant was paid all terminal benefits due to him upon expiry of the fixed term contract on 30/3/2020.
69. The claimant is not entitled to any of the claims set out under paragraph 42 of the statement of claim and in the final prayers set out thereof.
70. The court finds that the respondent did not violate any contractual and/or any legal rights vested on the claimant by dint of the fixed term contract between it and the respondent.
71. Accordingly, the court dismisses the case by the claimant against the respondent in its entirety.
72. In consideration of the long-term good service given to the respondent by the claimant and upon consideration of the entire circumstances leading to the separation of the parties, the court considers this an appropriate case for each party to bear their own costs of the suit.

It is so ordered.

MATHEWS N. NDUMA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY, 2024

Appearances

Mr. Bosire for claimant

Mr. Ojiambo for Respondent

Ekale: Court Assistant

