



**Nambwaya v Egerton University (Cause E003 of 2022)  
[2024] KEELRC 994 (KLR) (16 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 994 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE E003 OF 2022  
DN NDERITU, J  
APRIL 16, 2024**

**BETWEEN**

**CLARIS NAFUA NAMBWAYA ..... CLAIMANT**

**AND**

**EGERTON UNIVERSITY ..... RESPONDENT**

**JUDGMENT**

**I. INTRODUCTION**

1. The claimant commenced this cause by way of a statement of claim dated 14<sup>th</sup> February, 2022, filed in court on 16<sup>th</sup> February, 2022, through Sheikh & Company Advocates. As expected, the memorandum of claim is accompanied with a verifying affidavit, sworn by the claimant on even date, the claimant's written witness statement, a list of documents, and a bundle of copies of the listed documents.
2. The claimant is seeking the following -
  - a. One month's salary in lieu of notice Kshs. 84, 938/=
  - b. 18 days annual leave not taken Kshs. 42, 469/=
  - c. 2-year gratuity Kshs.245,000/=
  - d. CBA arrears @ Kshs 10,000 for 15 months Kshs.150,000/=
  - e. Unpaid per diem voucher No. MB001-04848-20/21 Kshs.17,500/=
  - f. 12 months' gross pay as damages for unfair termination Kshs.1,019,256/=



- g. PAYE deducted and not remitted Kshs. 945,680/=
  - TOTAL Kshs. 2,504, 843.62
  - h. The respondent to issue a certificate of service to the claimant, no later than seven (7) days of the order by court.
  - i. Costs of the suit
  - j. Such further relief that the court deems fits.
3. On 1<sup>st</sup> April, 2022, the respondent entered appearance through Sheth & Wathigo Advocates and filed a response to the statement of claim on 9<sup>th</sup> May, 2022. The respondent prays that the cause be dismissed with costs for lack of merits.
  4. The respondent filed a list of witnesses, a list of documents and a bundle of copies of the listed documents on 3<sup>rd</sup> June, 2022 together with a witness statement by Janet C. Bii (RW1), the legal officer, filed on even date.
  5. The claimant filed a supplementary list of documents dated 20<sup>th</sup> February, 2023, without the leave of the court, filed on even date, but the same was expunged from record on 21<sup>st</sup> February, 2023 for that reason.
  6. The cause came up for virtual hearing on 21<sup>st</sup> February, 2023 when the claimant testified and closed her case. The defence was heard on the same day with RW1 testifying and the respondent's case was also closed.
  7. By consent, counsel for both parties summed up their respective client's case in written submissions. Mr. Ochieng for the claimant filed his submissions on 19<sup>th</sup> April, 2023, while Miss Oteyo for the respondent filed on 8<sup>th</sup> May, 2023.

## II. THE CLAIMANT'S CASE

8. The claimant's case is expressed in the statement of claim, the oral and documentary evidence by the claimant (CW1), and the written submissions by her counsel. The same is summed up as hereunder.
9. In the statement of claim, it is pleaded that the claimant was employed as an Assistant Procurement Officer 1- Grade 8 by the respondent after a 10-month internship from January, 2013 to October, 2013. She was absorbed on a renewable annual contract from November, 2013.
10. It is pleaded that the claimant's contract was consistently renewed every year since November, 2013, demonstrating her reliability and dependability. She handled audit queries effectively, establishing a strong foothold in the procurement department. Her responsibilities specifically included handling tenders, requests for quotations and other procurement duties within the department. Additional responsibilities entrusted to her were transport and catering functions for all management, staff, and students, over 20,000 people, and preparing statutory reports to various government agencies which required meticulous coordination with management, suppliers, and employees. It is pleaded that there were no disciplinary complaints, cautions, or reprimands against the claimant during her 8 years of diligent service.
11. It is pleaded that the claimant applied for renewal of her annual contract on 24<sup>th</sup> September, 2021, which was recommended by her supervisor based on appraisal of her performance. It is pleaded that despite receiving positive performance appraisal reports, the respondent abruptly terminated the claimant on 3<sup>rd</sup> November, 2021. It is the claimant's case that the termination was in breach of the



contract, devastating to the claimant's legitimate expectation for renewal of the contract, and contrary to the provisions of the *Employment Act* (the Act).

12. It is pleaded that the respondent's decision to terminate the claimant violated the provisions of the Fair Administrative Actions, Act. Further, it is pleaded that the termination was done without cause and there is no evidence of any violation under the law or the Egerton University Terms and Conditions of Service (2008) by the claimant as to justify the alleged summary dismissal or termination. It is pleaded that the dismissal/termination constituted unfair labour practice in breach of Article 41 of *the Constitution*.
13. It is pleaded that the respondent failed to remit the pay-as-you-earn (PAYE) deductions to Kenya Revenue Authority (KRA), resulting in tax default for the stated sum against the claimant's tax record. It is further alleged that the respondent failed to pay the claimant's collective bargaining agreement (CBA) arrears for the period 2017-2021, as per the agreement signed between the Inter-Public Universities Consultative Forum (of the Federation of Kenya Employers) and the Kenya University Staff Union dated 28<sup>th</sup> October, 2019, which qualified the claimant for a Kshs.10,000/= pay increase per month.
14. Further, it is pleaded that the respondent unlawfully failed to issue a certificate of service to the claimant. Despite demand made and notice of intention to sue issued, the respondent has failed and or refused to make good the claim.
15. In her testimony in court, the claimant reiterated the contents of the pleadings as stated above and relied on her filed statement dated 14<sup>th</sup> February, 2022. She produced her filed documents as exhibits 1 to 9. She stated that she applied for renewal of the contract through her supervisor who appraised her performance recommending renewal. On 3<sup>rd</sup> November, 2021, she was informed that her contract would not be renewed and that her last day at work would be 7<sup>th</sup> November, 2021, as per the then subsisting contract. No reasons were given as to why her contract was not to be renewed. Her disciplinary record had been exemplary for the eight years that she worked for the respondent.
16. In cross-examination by counsel for the respondent, the claimant confirmed that during the entire period of her working with the respondent she served on periodical contracts and that each contract lasted for one (1) year. The last contract was to lapse on 7<sup>th</sup> November, 2021.
17. She contended that the respondent ought to have given a valid reason for not renewing the contract, considering that she had served for eight continuous years. She stated that failure by the respondent to renew the contract greatly prejudiced her. While she conceded that the respondent was under no obligation to renew her contract, she stated that once her supervisor recommended renewal of her contract upon evaluating her, she expected the same to be renewed and hence the refusal was unfair, notwithstanding that the contract was to either way expire on 7<sup>th</sup> November, 2021.
18. In re-examination, the claimant stated that she received the letter of non-renewal of the contract on 5<sup>th</sup> November, 2021, just two days before expiry of the contract. She stated that for the eight years that she served she was at no point called for an interview on renewal of the contract and the renewal was always automatic.
19. Responding to a question by the court the claimant stated that she secured another job in June, 2022 with the US Aid. She also admitted that the renewal of her contract was neither automatic nor guaranteed.



20. It is on the basis of the foregoing evidence and circumstances that the claimant is seeking that judgment be entered in her favour as prayed in the memorandum of claim. The submissions by her counsel shall be considered in the succeeding parts of this judgment.

### **III. THE RESPONDENT'S CASE**

21. The respondent's case is contained in the response to the statement of claim, the oral and documentary evidence adduced through RW1, the legal officer, and the written submissions by its counsel, as summarized hereunder.
22. The respondent pleaded that the claimant's contract was for the eight years renewed based on mutual agreement between both parties. The renewal of the contract was neither automatic nor a right to either party but rather based on mutual consent and agreement.
23. The respondent pleaded that the claimant's supervisor's personal opinion and recommendations in support of the renewal of the contract did not necessarily guarantee that the contract was to be renewed nor did it amount to an undertaking, guaranteeing, or a promise on the part of the respondent to renew the contract.
24. It is denied that the claimant was summarily dismissed or in any other manner terminated from her employment. The contractual agreement was simply not renewed, as the renewal was never automatic. The alleged breach of contract and unfair termination is denied as the respondent takes the position that it reserved the right to either renew or walk away from the contract.
25. The respondent avers that the claimant's certificate of service is readily available at the university for collection by the claimant upon clearance.
26. The respondent avers that the claimant's employment terminated by effluxion of time, and as such there was no legal requirement for the respondent to apply Section 41 of the Act. The respondent vehemently denies that the claimant is entitled to the reliefs sought and prays that the claim be dismissed with costs.
27. In her testimony in court RW1 relied on her filed statement and the listed documents producing them as exhibits 1 to 10. She stated that the claimant was initially engaged in 2013 on a one (1) one-year contract renewable by mutual consent. She testified that no reasons were given whenever the contract was renewed and it was so renewed for eight (8) straight years. The last such annual contract was to lapse on 7<sup>th</sup> November, 2021. The non-renewal of the contract was communicated to the claimant via the respondent's letter dated 3<sup>rd</sup> November, 2021 which clearly stated that the last contract was to lapse on 7<sup>th</sup> November, 2021. She stated that no termination occurred as the contract terminated through effluxion of time stating that the claim and the cause by the claimant is misconceived and misguided.
28. RW1 stated that the claimant has not been cleared by the respondent as she was supposed to submit a final clearance report and also cause a form to be filled and signed with all the departments. It is stated that the claimant did not hand over her staff identity card.
29. She testified that the recommendation report by the claimant's supervisor for the renewal of the contract was not binding on the respondent. She testified that the respondent was not obligated to renewing the contract.
30. On the certificate of service, RW1 stated that the same is ready for collection at the claimant's convenience and that no rights of the claimant were violated in the respondent taking the option not to renew the contract.



31. In cross-examination, she stated that the procurement department is directly answerable to the Vice Chancellor as the accounting officer. She stated that the recommendation for the renewal of the contract by claimant's supervisor was official but not binding on the respondent. RW1 confirmed that the claimant's contract was consistently renewed for eight (8) years straight. She admitted that the terms of the contract improved with each renewal but she did not possess the details as that was subject to the terms of service and the grades. RW1 also confirmed that the claimant was not subjected to any disciplinary hearings during her entire eight (8) years of service and that her performance was good.
32. She admitted that the letter of 3<sup>rd</sup> November, 2021 informing the claimant of the intention of the respondent not to renew the contract did not state the reason therefor as the contract was coming to an end by effluxion of time. However, she stated that the respondent must have considered various factors before deciding not to renew the claimant's contract which might have included aspects such as the financial and staff establishment.
33. She stated that she was not aware of the fact that the claimant submitted a handover report but later in her testimony she confirmed that indeed the claimant handed over a report dated 5<sup>th</sup> November, 2021. Although she alleged that a certificate of service was available for collection by the claimant, she did not avail the same in court.
34. It is on the basis of the foregoing that the respondent prays that the claimant's cause be dismissed with costs. The submissions by counsel for the respondent shall be considered in the succeeding parts of this judgment alongside those by counsel for the claimant.

#### **IV. SUBMISSIONS BY THE CLAIMANT'S COUNSEL**

35. The claimant's counsel identified three issues for determination - Whether the claimant had a legitimate expectation for renewal of her contract; Whether the respondent's decision dated 3<sup>rd</sup> November, 2021 constitutes unfair termination of the claimant's employment; and, Whether the claimant is entitled to the reliefs sought.
36. It is submitted that the claimant had a legitimate expectation for the renewal of her contract of employment as her last contract dated 21<sup>st</sup> September, 2020 was silent on the timelines for giving a response to the application for renewal. It is submitted that the continued and unhindered renewal of the contract for a continuous period of eight years created genuine and legitimate expectation to the claimant that the contract was to be renewed, either way.
37. Citing Synergy Industrial Credit Limited V Oxyplus International Limited & 2 Others (2021) eKLR the court is urged to enter judgment on an allegedly admitted part of the claim. However, the court has not established the alleged admission from the pleadings as the contents of paragraph 18 of the memorandum of claim, which were allegedly admitted, are denied by the respondent in paragraph 24 of the response to the memorandum of claim.
38. On legitimate expectation, counsel cited John Nduba vs Africa Medical and Research Foundation (AMREF Health Africa) (2020) eKLR wherein it was held that an employee who is on a fixed-term contract may have, develop, or hold a legitimate expectation that the contract will be renewed based on conduct of the parties over the period of the term contract or over a series or sequence of such renewed contracts. Further, counsel cited Keen Kleeners Limited vs Kenya Plantation and Agricultural Workers Union [2021] KECA 352 (KLR) whereby the Court of Appeal held that the continued renewal of the subject contracts had convinced the grievants that they genuinely and legitimately expected renewal based on the fact that the parties had had a lengthy relationship whereby contracts had been renewed without fail. The long-standing, uninterrupted, and consistent practice of renewing or extending of



- the grievant's contracts had led the grievants to believing that their last contracts were to be renewed, more so in the absence of any reasonable notice to the contrary given to them by the employer.
39. Counsel urges that the general rule and jurisprudence emerging from these cases is that whereas there is no legitimate expectation of automatic renewal of fixed-term employment contracts, the law accommodates exceptions to the general rule, based on factors such as the employer's conduct, previous renewal(s), and practice by the employer.
  40. It is submitted that the claimant herein was genuinely justified to hold reasonable, substantive, and legitimate expectation that her contract was to be renewed. It is submitted that the expectation was not a mere hope or wish but a genuine and honest believe. It is submitted that the expectation was based on the uninterrupted and consistent practice of the respondent renewing her contract, the positive reports by her supervisor, and the fact that no speculative, objective, or substantive grounds existed for ending her employment that had subsisted for 8 years.
  41. Counsel cited the Court of Appeal in Transparency International- Kenya vs Teresa Carlo Omondi, CA No. NAI 81 of 2018 and submitted that the factual circumstances and foundations of the subject of that cause are distinguishable from the current cause on several fronts. It is submitted that the Court of Appeal noted that the contract in Omondi (Supra) provided for a three months' notice in case of non-renewal of the contract unlike in this cause. It is submitted that in the above decision the contested non-renewal of the contract was only the first as opposed to the seven or so renewals for the claimant herein. It is also submitted that the report by the claimant's supervisor in this cause clearly pointed towards the dire need for the respondent to renew the contract which allegedly enhanced, firmed, and justified the claimant's legitimate expectation.
  42. On the issue of alleged unfair termination, as that is what the claimant considers the non-renewal to amount to, counsel urges that the respondent unfairly terminated the claimant's employment through the letter dated 3<sup>rd</sup> November, 2021. It is submitted that no reason was given for termination of the employment relationship. It is further submitted that the termination was neither procedurally nor substantially justified. Counsel has cited Section 45(2) of the Act and submitted that the respondent failed to give or prove any reasons or follow due process in bringing the relationship to an abrupt end. The decisions in Kenya Plantation & Agricultural Workers Union (KPAWU) vs Finlays Tea (K) Limited and Mary Chemweno Kiptui vs Kenya Pipeline Company Limited (2014) eKLR are cited in demonstrating what amounts substantive and procedural fairness in termination or dismissal. Counsel submits that the claimant's termination was unfair and unlawful under Section 43 of the Act for want of substantive and procedural fairness.
  43. On reliefs, it is submitted, that the claimant is entitled to one month's notice, annual leave, gratuity, unpaid per diem as per the voucher produced, and damages for unfair termination. For PAYE deducted but not remitted, counsel has cited Sections 37(2), (4) and (5) of the *Income Tax Act* and urged that the respondent should be compelled to remit to KRA the outstanding income tax arrears deducted during the period of the claimant's employment. Counsel has also cited Wambati Simiyu Merit vs Music Copyright Society of Kenya, Nairobi ELRC Pet 111 of 2018 [2021] eKLR wherein the court held that the respondent was liable to remit all statutory deductions made from the petitioner's salary for the period that he was employed.
  44. Counsel submits that the claimant is entitled to a certificate of service, costs of the cause and interest thereon, alongside all the other reliefs as set out in the memorandum of claim.



## V. SUBMISSIONS BY THE RESPONDENT'S COUNSEL

45. Counsel for the respondent identified the following issues for determination by the court - Whether there was unfair termination, summary dismissal or whether the employment was terminated through effluxion of time; Whether there was legitimate expectation on the part of the claimant to have the contract renewed; and, Whether the claimant is entitled to the reliefs sought.
46. It is submitted that it is not in dispute that the claimant was employed by the respondent on contractual basis and the same was to be renewed annually by mutual agreement. It is also not in dispute that when the claimant applied for renewal of her employment contract and that the same was renewed from time to time. Counsel urges that the claimant was neither unfairly terminated from employment nor that she had legitimate expectation for the renewal of her contract. It is submitted that the employment contract lapsed by effluxion of time and that that was it.
47. It is submitted that the respondent was not under a legal, contractual, or moral obligation to renew the fixed term contract and counsel has cited *Oshwal Academy (Nairobi) & Another vs Indu Vishwanath [2015] eKLR* wherein *Carolyne Nasimiyu vs Agricultural Finance Corporation Limited [2020] eKLR* was cited and the court held that the claimant's employment contract had lapsed by effluxion of time. The cases of *Ronald Ongori Gwako vs Styroplast Limited [2022] eKLR* and *Dan Caxton Chogo Undusu vs Jubilee Insurance Company Limited [2020] eKLR* are also cited as having held that the contract of employment had lapsed through effluxion of time and as such there was no obligation on the part of the employer to renew the contract, and that likewise the employee had no basis for any legitimate expectation.
48. On the issue of legitimate expectation, it is submitted that no evidence was adduced by the claimant establishing sound, genuine, and honest believe or expectation that her employment contract was to be automatically renewed. Counsel has cited *John Nduba vs Africa Medical and Research Foundation (AMREF Health Africa) Nairobi ELRC Cause No. 388 of 2016 [2020] eKLR* wherein the court gave an outline on what may constitute or give rise to legitimate expectation as follows -
- a. That the employer must have promised the employee that the employment contract would be renewed upon fulfilment of certain conditions by the employee which conditions the employee must have fulfilled but afterwards the employer declined to renew the contract.
  - b. That the employer must have unilaterally renewed the employment contract and as such the employee would have expectation of automatic renewal of such contract.
  - c. That the employment contract between the employer and the employee must have stated plainly that the contract would be renewed every time it lapsed.
49. Counsel submits that the claimant did not adduce any evidence that may have caused her to have the alleged legitimate expectation to having her contract renewed. Counsel argues that non-renewal of the employment contract cannot be considered to be or to amount to unfair termination. It is submitted that had the respondent stopped the claimant from working earlier than 7<sup>th</sup> November, 2021, when the contract was to expire, then, such action would have resulted or amounted in unfair termination. Counsel cited the case of *Carolyne Nasimiyu vs Agricultural Finance Corporation (supra)* where the Court of Appeal dismissed an appeal on allegations of legitimate expectation on grounds similar to those advanced by the claimant in this cause.
50. Counsel has also cited *Margaret A. Ochieng vs National Water Conservation & Pipeline Corporation [2014] eKLR* and *Registered Trustees of the Presbyterian Church of East Africa & another vs Ruth Gathoni Ngotho [2017] eKLR* on the issue of automatic renewal of employment contracts.



51. It is submitted that the opinion of the claimant's supervisor was not binding on the respondent and that the respondent did not need to give the claimant any reason for failing to renew her contract. Again, counsel cited Oshwal Academy (Nairobi) & another vs Indu Vishwanath (supra) and Bernard Wanjohi Muriuki vs Kirinyaga Water & Sanitation Co. Ltd & another [2012] eKLR both of which followed the reasoning in Carolyne Nasimiyu vs Agricultural Finance Corporation Limited (supra) in holding that an employer is under no obligation to give reasons to an employee for failure to renew an employee's fixed term contract.
52. On the issue of relief of one month's notice, counsel cited Margaret A. Ochieng vs National Water Conservation & Pipeline Corporation (supra) which cited Dan Caxton Chogo Undusu vs Jubilee Insurance Company of Kenya [2020] eKLR and Francis Odero Okello vs Kenya Power and Lighting Company [2019] eKLR which again cited Dan Caxton (supra) wherein the court held that an employer is not under legal obligation to pay on notice where the contract terminates through effluxion of time as such expiry does not amount to premature termination of the fixed term contract. Likewise, in Dan Caxton (supra) and Josephat Rubia Oyangi vs Kenya Education Management Institute (KEMI) [2018] eKLR the court held that no compensation was payable as the contract had expired through effluxion of time.
53. On the reliefs sought by the claimant it is submitted as follows. On the 18 days' annual leave, it is submitted that the claimant is entitled to Kshs.18,775.98 as opposed to the claimed sum of Kshs.42,469.00. On the gratuity for two years, it is submitted that the claimant is entitled to Kshs.245,000/=. On CBA arrears, it is submitted that the claimant is entitled to Kshs.24,862.60 as opposed to the claimed Kshs.150,000/=. It is admitted that the claimant is entitled to unpaid per diem of Kshs.17,500/= as per the voucher availed and produced in court.
54. On damages for unfair termination, it is submitted that the claimant is not entitled to any compensation for the contract came to its legal and lawful end through effluxion of time.
55. In regard to pay-as-you-earn deductions made and not remitted to KRA in the sum of Kshs.945,680.62, it is submitted that the respondent shall remit the same once the claimant clears with the respondent. Counsel has cited Lilian Mwendu Nzabu vs Trustees and Office Bearers of Diocese of Anglican Church of Kenya [2018] eKLR wherein in reference to dues payable to the NSSF the court held that statutory dues are recoverable by the relevant statutory body and the same neither belong nor are they due and payable to the employee so deducted.
56. On costs, it is submitted that the same be declined as the claimant has failed to prove her case. It is submitted that it is the claimant who should pay costs to the respondent upon dismissal of her cause for lack of merits.
57. On certificate of service, it is submitted that the respondent was always ready and willing to issue the same upon the claimant clearing as per the procedures provided for by the respondent which are well within the knowledge of the claimant.
58. In conclusion, counsel submits that the claimant's claim should be dismissed with costs since the claimant had no cause of action in the first place as the employment contract lapsed through effluxion of time.

## **VI. ISSUES FOR DETERMINATION**

59. The court has carefully and dutifully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and the written submissions by counsel for both parties. The following issues commend themselves to this court for determination -



- a. Was there a legitimate expectation from the claimant for renewal of her contract by the respondent?
- b. Was the claimant unfairly or otherwise terminated by the respondent?
- c. Is the claimant entitled to the reliefs sought?
- d. Costs

## VII. LEGITIMATE EXPECTATION

60. It is not in dispute that the claimant worked for the respondent from 2013 as an intern in the position of assistant procurement officer 1-Grade 8 and later she was absorbed in employment on a renewable annual contract basis. The contract was renewed annually upon her applying for the renewal and the claimant was so engaged by the respondent for straight eight (8) years. Her supervisor gave good feedback on her appraisal recommending the renewal of her contract. Her last such annual contract was to lapse on 7<sup>th</sup> November, 2021.
61. In her appraisal report by her supervisor, it was indicated that the procurement department where she served was understaffed and thus the recommendation made was for retaining the claimant. As fit would have it, via a letter dated 3<sup>rd</sup> November, 2021 the respondent communicated that it did not intend to renew her contract.
62. For the foregoing reasons and circumstances, it is the claimant's case that she expected her contract to be renewed having served the respondent for eight (8) years. Further, she did not have any disciplinary issues with the respondent. Besides, the supervisor praised the claimant in the performance appraisal for doing a good job and recommended for renewal of the contract. From the evidence on record, it is indeed clear that the claimant was a shining star in execution of her duties and as such she expected and anticipated renewal of her contract.
63. In law, legitimate expectation is a technical legal expression that captures a human condition or behavioural trend created by the conduct of other humans or juridical bodies in which the subject expects some legal or moral obligations to arise and crystallize based on a promise, undertaking, expectation, assumption, presumption, etc, which of themselves do not amount to legal obligations but which may give rise to some legal rights and or obligations. The Black's Law Dictionary, Tenth Edition, defines legitimate expectation as – Expectation arising from the reasonable belief that a private person or public body will adhere to a well-established practice or will keep a promise.
64. There is no dispute as to the terms and conditions of engagement of the claimant by the respondent. It is indisputable that for the entire period during which the claimant served the respondent, she was on annual contract that was renewed over and over again for straight eight years. Before she was issued with her last annual contract, the claimant wrote to the respondent on 12<sup>th</sup> August, 2020 in the following terms –

Claris Nafua Nambwaya

Box 4291-20100

NAKURU

The vice Chancellor,

Egerton University,

BOX 536-20115,



EGERTON.

Thro,

The Ag. Deputy Chief Procurement Officer,

Egerton University,

BOX 536-20115,

EGERTON.

Dear Sir/Madam,

RE: CHANGE OF EMPLOYMENT TERMS AND OR RENEWAL OF MY  
EMPLOYMENT CONTRACT

This is to request your office to change my employment terms from Contract to Permanent and Pensionable and/or renew my employment contract which comes to an end on 7<sup>th</sup> November, 2020 and subsequently begin to process my gratuity.

Currently, I work as an Assistant Procurement Officer I grade VIII at the Procurement Department.

I look forward to your positive response.

Thank you.

Claris Nafua Nambwaya

P/N: 11286

65. In response to the above request from the claimant, the respondent addressed her in a letter dated 21<sup>st</sup> September, 2020, in which the claimant was awarded a new one-year contract extension to run from 8<sup>th</sup> November, 2020 to 7<sup>th</sup> November, 2021. Among the terms in this last contract was that either party may terminate the same by issuing one month's notice or payment of one month's salary in lieu thereof. It was also provided that the contract may be mutually renewed or extended and that in case the claimant desired for an extension, she was to apply one month in advance prior to the lapsing of the contract.
66. In a letter received by the respondent on 24<sup>th</sup> September, 2021, the claimant duly applied for renewal or extension of the above contract and or conversion of her terms of service from contractual to permanent and pensionable. The claimant's supervisor recommended and supported renewal of the contract supporting and backing the renewal with a detailed report. However, in a letter dated 3<sup>rd</sup> November, 2021 the respondent declined renewal or extension of the contract in the following terms –

EU/APD/11286/81 03/11/2021

Claris Nafua Nambwaya

Procurement Department

Dear Ms. Nambwaya

RE: NON RENEWAL OF CONTRACT

The above subject matter refers.



This is to inform you that the University Management Board (UMB) at its 558<sup>th</sup> meeting did not approve your request for renewal of contract of employment. Please note that your last date in service is 7<sup>th</sup> November, 2021.

On behalf of the University Management, I wish to thank you for the good service you have rendered to this institution and wish you well in your future endeavours.

Yours sincerely,

Stellah J. Kereto

AG. REGISTRAR (HUMAN CAPITAL & ADMINISTRATION)

CC: VC

Ag. DVC (AP&D) ]

Ag. DVC (AA) ]

Ag. R (AA) ]

Ag. SAR (HC) ]

Ag. Chief Medical Officer

Ag. Deputy Chief Procurement Officer

Branch Secretary – KUSU- EU

SJK/LJR/ha

67. According to the claimant, on the one hand, the above refusal by the respondent to renew or extend her contract amounted to unfair termination. On the other hand, the respondent takes the position that it was within its legal right to refuse and decline the renewal or extension of the contract and as such the contractual relationship between the two parties came to a peaceful end through effluxion of time.
68. It is the claimant's case that the uninterrupted renewal of her contract for eight continuous years, the well-grounded recommendation for renewal by her supervisor, based on her perceived excellent performance, the respondent's need for her services in the procurement department, her timely application for renewal of the contract, and absence of any signal from the respondent that it did not intend to renew her contract, gave to her hope and expectation that the contract was to be renewed and extended, anyway. This, in my understanding, is the basis and foundation of the legitimate expectation as pleaded and urged by the claimant.
69. This court (ELRC) through the judges thereof, and of course other courts in Kenya, have made numerous pronouncements on the doctrine of legitimate expectation. For example, in *John Nduba V Africa Medical & Research Foundation (AMREF)*(supra) which has been cited by counsel for both parties, Makau J proposed some three factors for consideration by a court in determining whether legitimate expectation is established as reproduced in a preceding part of this judgement. The evidence in this cause does not disclose any conditions that had been set by the respondent as pre-conditional to renewal of the contract. The eight renewals were done unilaterally by the respondent upon application by the claimant and presumably based on her appraisal by her supervisor and recommendation therefrom. Each of the annual contracts provided that the contract may be renewed upon expiry dependent on the foregoing conditions.
70. One evidently clear fact is that the renewal of the contract was not automatic. It was dependent on the mutual consent and agreement of the parties. Counsel for the respondent has cited decisions



in demonstrating that the renewal was neither automatic nor obligatory upon the respondent. It is vehemently submitted that the respondent neither made any promise on renewal of the contract, nor conducted itself in a manner to suggest that it was to renew that last contract.

71. The court has seriously considered the arguments for and against legitimate expectation as pleaded and propagated by the claimant. There is no argument that the contract between the parties came to an end by way of effluxion of time and in my considered view, and I so find and hold, no termination or dismissal occurred. However, does the entire circumstances of this cause point towards the direction of legitimate expectation on the part of the claimant that her contract was to be renewed? Did the respondent expressly and or impliedly signal to the claimant that it was to renew the contract?
72. This court cannot rewrite the contract between the parties herein. In case either party desired to terminate the contract before it lapsed, such a party had to issue the other with one month's notice or pay to the other one month's salary in lieu thereof. Such termination can only occur prior to the lapse of the contract period. Lapse of the contract through effluxion of time does not amount to and is not termination or breach of the contract by either party.
73. Another important term of that last contract is that in case the claimant desired for a renewal she had to apply for such renewal at least one month to the expiry or lapse of the same on 7<sup>th</sup> November, 2021. The claimant applied for renewal in a letter received by the respondent on 24<sup>th</sup> September, 2021, well within the period provided for.
74. It has not been explained to the court how the claimant was able to obtain the report and recommendation by her supervisor, which procedurally should be confidential. It is also not clear in evidence as to the point at which the claimant obtained the above information, whether it was before or after the renewal of the contract was denied. Suffice to state that the recommendation by the claimant's supervisor was not binding on the respondent and the same was not an official communication to the claimant, or an undertaking, or a promise by the respondent that the contract was to be renewed.
75. However, having served them for eight years, was the respondent not equitably and as a matter of good labour practice obligated to communicate to the respondent well in advance of its decision not to renew the contract to enable her start preparing for her departure, including looking for another job? The evidence on record is that the respondent received the request for renewal of the contract from the claimant on 24<sup>th</sup> September, 2021, yet the respondent did not communicate its decision not to renew the contract to the claimant until 3<sup>rd</sup> November, 2021, and the claimant's evidence is that she was served with this letter on 5<sup>th</sup> November, 2021, a day to the expiry of the contract.
76. While the court is of the considered view that the respondent did not at any point expressly or impliedly promise, undertake, or intimate to the claimant that it intended to renew the contract, its conduct in serving the claimant with the decision not to renew the contract too late in the day was neither fair, just, reasonable, logical, equitable, nor in accord with fair labour practices. This misconduct by the respondent of delivering the notice too late certainly prejudiced the claimant, a young professional, and denied her advance warning for her to set in motion all her efforts to look for a new job. Mind you, the claimant had served the respondent for an aggregate continuous period of eight years.
77. For all the foregoing, I find and hold that the respondent ought to have given to the claimant one month's notice or salary in lieu thereof to alleviate and ameliorate the prejudice and hardship that the claimant was likely to suffer as a young professional. The evidence on record is that it took the claimant over six months to secure another job.
78. Otherwise, the court is of the considered view and holds that the claimant has not established any reasonable or genuine basis or grounds for her alleged legitimate expectation.



## VIII. UNFAIR TERMINATION\*\* \_\_\_

79. As it is noted above, the contract between the parties herein lapsed by effluxion of time. Bar the misconduct in delay in communicating its decision not to renew the contract, the respondent was neither under any obligation to renew or extend the contract nor giving reasons for such refusal or denial.
80. In the circumstances, no termination, unfair or otherwise, occurred between the parties.

## IX. RELIEFS

81. Having found and held as above, the court shall now consider each of the reliefs sought by the claimant as hereunder. The reliefs sought are also set out in the introductory part of this judgment.
82. Prayer (a) is for one month's gross pay in lieu of notice in the sum of Kshs.84, 938/=. The court has found and held that the late communication from the respondent of its decision not to renew the contract prejudiced the claimant. That misconduct was neither fair or reasonable, nor equitable or in accordance with good labour practices. It is my view that although the contract did not provide for the timelines within which the respondent ought to have made and or communicated its decision, especially the one not to renew or extend the contract, it ought to have given the claimant reasonable time to manage and plan for her exit, notwithstanding that the contract was to come to an end by 7<sup>th</sup> November, 2021 if it was not to be renewed.
83. Viewed from another angle, and for fairness and equity, since the contract provided that if the claimant desired to have the contract renewed she ought to apply at least one month prior to the expiry of the contract, similarly a reasonable period ought to apply to the respondent to notify the claimant in case it did not desire to renew her contract. It is for this reason, alongside what is stated above, that the court shall grant this prayer for one month's pay to the claimant in lieu of reasonable notice from the respondent that it did not wish to renew the contract. The above claimed amount is therefore awarded as prayed, in the context explained and expressed herein.
84. Prayer (b) is for 18 days' annual leave not taken in the sum of Kshs.42,469/=. Under Section 10 & 74 of the Act it is the legal duty and obligation of an employer, the respondent herein, to keep employment records and to avail the same to a labour officer or the court whenever necessary. Failure by the respondent to produce such records to rebut and dislodge the allegations made by the claimant leaves the court with no option other than to believe and go with the claimant's evidence. The respondent did not avail the leave records for the claimant and in the circumstances this prayer is allowed as prayed.
85. Prayer (c) is for the two years' gratuity in the sum of Kshs. 245,000/=. Counsel for both parties agree that this amount is due and payable to the claimant as prayed with the respondent arguing that the same should only be paid upon the claimant clearing with the respondent. The court agrees with both parties and the claimed amount is awarded as prayed. The court shall comment on this issue of clearance below.
86. Prayer (d) is for CBA arrears @ Kshs.10,000 for 15 months amounting to Kshs.150,000/=. The court agrees with the computation provided by the claimant as demonstrated in the exhibits availed indicating that the claimant was entitled to Kshs.10,000/= per month for the claimed 15 months. As the custodian of employment records, the respondent ought to have availed records in support of the position it took that the claimant is entitled to Kshs.24,862.60 only under this head. This award is thus allowed as prayed.



87. Prayer (e) is for unpaid per diem as per voucher No. MB001-04848-20/21 amounting to Kshs.17,500/= . This claim is not in dispute and the court allows the same as prayed.
88. Prayer (f) is for 12 months' gross pay as compensation for unfair termination Kshs.1,019,256/=. The court has already found in the foregoing paragraphs of this judgment that no unfair or any other form of termination was occasioned against the claimant. This claim is thus denied in toto and dismissed.
89. Prayer (g) is for PAYE deducted from the wages of the claimant by the respondent and not remitted to KRA in the sum of Kshs.945,680.62. It is grossly dishonest, unfair, and unpatriotic for the respondent to have deducted the said amount of money and not remit the same as required in law. It is trite law that once the said statutory deductions were made, the money became the property of KRA. The money once deducted ceased to be property of the claimant as she is not an authorized agent of KRA. She is a payee.
90. In the circumstances, the claimant shall report the said unlawful withholding of the amounts by the respondent to the KRA for the latter's swift action in collection and recovery of the same including the penalties thereon which are certainly payable by the respondent not by the claimant. The court cannot legally and lawfully order that the said sum of money be paid to the claimant as it is clearly and legally not her property. This prayer is thus denied and dismissed with the instructions to the claimant to report the issue to KRA.
91. Prayer (h) is for certificate of service. Section 51 (1) of the Act provides that "An employer shall issue to an employee a certificate of service upon the termination of his employment, unless the employment has continued for a period of less than four consecutive weeks." The respondent is therefore ordered and directed to issue and deliver a certificate of service to the claimant within 30 days of this judgment.
92. Prayer (i) is for costs. The claimant is awarded costs of this cause.
93. Finally, let the court state as follows. The claimant has been out of employment of the respondent since November, 2021. She presented to court a clearance form filled and signed by various departments and officers of the respondent. There is no evidence from the respondent as to what comprises in the clearance allegedly not yet undertaken by the claimant or what it shall or should entail. The claimant has clearly and evidently moved on and the respondent should gladly move on as well. If there was any clearance to be done by the claimant it was incumbent upon the respondent to ensure that the same was done prior to the 7<sup>th</sup> November, 2021 when the contract was coming to an end and it had decided not to renew the same. The alleged non-clearance is not only vague and ambiguous but also an immoral and unprofessional misconduct by the respondent to unlawfully withhold, fail, or refuse to settle dues payable to the claimant.
94. For avoidance of doubt, the respondent's legal duty and obligation to comply with the orders in this judgment are not and shall not be subject to any clearance and or any other conditions from the respondent or any person acting on its directions, request, behest, acting for and or on its behalf.

## **X. DISPOSAL**

95. In the disposal of this cause, the court issues the following orders:
  - a. A declaration be and is hereby issued that the contract of employment between the claimant and the respondent terminated through effluxion of time and hence the claimant was neither unfairly nor unlawfully or otherwise terminated.
  - b. The claimant is awarded a sum of Kshs.539,907/= made as follows



- i. Pay in lieu of notice pay .....Kshs.84, 938/=
  - ii. 18 days annual leave..... Kshs. 42, 469/=
  - iii. 2 years' gratuity.....Kshs.245,000/=
  - iv. CBA arrears.....Kshs.150,000/=
  - v. Unpaid per diem..... Kshs. 17,500/=
  - Total..... Kshs.539,907/=
- c. The above amount shall earn interest at court rates from the date of this judgment till payment is full.
  - d. The respondent shall issue and deliver to the claimant a certificate of service within 30 days of this judgment.
  - e. Costs of the cause to the claimant

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 16<sup>TH</sup> DAY OF APRIL, 2024.**

.....

**DAVID NDERITU**

**JUDGE**

