



Kimeu v International Cooperative Alliance Africa (Cause E666 of 2021) [2024] KEELRC 735 (KLR) (5 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 735 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E666 OF 2021**

SC RUTTO, J

APRIL 5, 2024

BETWEEN

SALOME WAVINYA KIMEU CLAIMANT

AND

INTERNATIONAL COOPERATIVE ALLIANCE AFRICA RESPONDENT

JUDGMENT

1. The suit herein was commenced by way of a Memorandum of Claim filed on 12th August 2021, in which the Claimant avers that she was employed by the Respondent in the year 1993 as an Administrative Assistant. She avers that on or about 29th October 2020, the Respondent without cause and or justification unilaterally sacked her from gainful employment. According to the Claimant, her termination from employment was unjustified, unlawful, illegal and in breach of her contract of employment with the Respondent. To this end, she claims against the Respondent the sum of Kshs 6,464,008.23 being severance pay for 12 years and compensatory damages for unlawful dismissal.
2. Opposing the Claim, the Respondent avers that the Claimant was only its employee for a total period of four years and seven months. The Respondent further contends that the Claimant's contract of employment was lawfully terminated. In the Respondent's view, the Claimant's suit reeks of dishonesty, greed and underhand machinations with the sole aim to unduly coerce and blackmail it into making more payments than it is connaturally or statutorily required to make. Consequently, the Respondent has asked the Court to dismiss the Claim with costs.
3. During the trial which took place on 4th December 2023, both parties called oral evidence in support of their respective cases.



Claimant's Case

4. The Claimant testified in support of her case and at the outset, sought to adopt her witness statement and the list and bundle of documents filed alongside the Memorandum of Claim to constitute her evidence in chief.
5. It was the Claimant's evidence that she was employed by the Respondent as an Administrative Assistant and later elevated to the position of Office Manager in charge of Finance and Administration. In 2016, she was appointed to the position of Finance and Administration Manager.
6. The Claimant averred that in 2016, the Respondent organization got funding from the European Union (E.U). At first, she was being paid from the Administrative Governance Budget but thereafter, she was reallocated to be paid under the E.U budget together with the E.U Project staff.
7. She stated that they were given fresh contracts from 2016 to end in December 2020. The project was however extended to August 2021. On 23rd October 2020, the Regional Director directed her and the Finance Officer to draft new Contracts/addendums for the EU staff. The draft addendums were done for the extension of the contracts.
8. The Claimant further averred that on 26th October 2020, she proceeded on leave for four days. That on the regular meetings scheduled every Monday, the Respondent's Regional Director resolved that fresh contracts ought to be issued after the lapse of the contracts in December 2020.
9. That the Regional Director issued directions for renewal of the contracts except her contract. On 29th October 2020, she received her termination letter via email. She responded to the Regional Director expressing her disappointment via a letter dated 30th October 2020.
10. She took the reasons afforded by the Regional Director for her termination to being further from the truth. According to the Claimant, the EU project benefitted the company to the extent that it could remain with a surplus of approximately 80,000 Euros at the end of the project. This was known by the Regional Director and the senior management level, including herself hence there was no lack of funds to support her position.
11. Further, immediately after her termination, her role was taken up by the Finance Officer with whom they were working together but was not being paid from the EU project. That the Finance Officer would then be paid from the EU Project budget.
12. The Claimant further stated that the Regional Director informed the head office EU Project Finance Manager that she would be leaving the organization after January because she was going on a well-deserved retirement which was not true.
13. Whereas she acknowledges being served with the termination letter, she contended that fair ground for her termination was not afforded. That the reason given for her termination was to result in redundancy hence the redundancy clause in the Human Resource Policy applied to her.

Respondent's Case

14. The Respondent called oral evidence through Dr. Sifa Chiyoge, its Regional Director, who testified as RW1. Similarly, she adopted her witness statement and the list and bundle of documents filed on behalf of the Respondent to constitute her evidence in chief.
15. RW1 stated that on 1st August 2007, an official contract was drafted between the Claimant and the Respondent effectively procuring the services of the Claimant as a consultant and not an employee, to



- provide accounting and administrative services for the period between 1st August, 2007 to 31st March, 2008.
16. Additional consultancy contracts were entered into between the Claimant and the Respondent for the period between 1st January 2009 to 31st December 2009, 1st January 2010 and 31st December 2012, 1st January 2013 to 31st December 2015.
 17. However, on 1st July 2016, the Claimant was engaged in an employment contract until 31st December 2020, with the agreement that either party may terminate the contract by giving not less than three months' written notice or three months' remuneration in lieu of notice.
 18. The Claimant was employed in the capacity of the Finance and Administration Manager and subsequently put under probation for a period of six months from 1st July 2016 to 31st December 2016. The Claimant was under her (RW1) supervision.
 19. That the Respondent offered the Claimant an extension of her contract for a further period of one month thereby varying the employment period from 1st July 2016 to 31st January 2021. The contract was signed by both parties by mutual consent and understanding.
 20. Subsequently, the Respondent terminated the contract by issuing three months' notice to terminate to the Claimant vide a letter dated 29th October 2020 with the notice being from 1st November 2020 to 31st January 2021.
 21. RW1 averred that the Claimant was paid all her dues until 31st January 2021 when the contract ended. At the point of termination of the employment contract, the Respondent prepared the Claimant's Certificate of Service and notified her that the same was ready for collection at its office. However, the Claimant has neglected and/or ignored this communication from the Respondent.
 22. The Respondent sent the Certificate of Service to the Claimant vide registered post to her recognized postal address but she refused to acknowledge the same hence it was returned to the Respondent.
 23. According to RW1, severance pay is not applicable in this case because the Claimant's termination was provided for in the contract of employment and when the Respondent did not wish to renew the contract, it acted guided by the terms in the employment contract that provided for termination of contract by issuing three months' notice which ran from 1st November 2020 to 31st January 2021.
 24. In RW1's view, termination of the Claimant's contract by the Respondent was legal and in conformity with the terms of the employment contract.

Submissions

25. The Claimant submitted that the Respondent did not provide valid reasons for her termination from employment. It was her position that Section 45 of the [Employment Act](#) bars an employer from terminating the services of an employee except if there is a valid reason for that and the same is through a fair procedure.
26. The Claimant maintained that the reason for her termination was not proved and was therefore an invalid reason. That further, the Respondent has failed to discharge its burden of proof under Sections 43 and 47 of the [Employment Act](#).
27. The Respondent on the other hand submitted that the Claimant was not its employee from 1st April 2007 to 31st June 2016. That the Claimant was consciously aware that she was a consultant and signed multiple contracts time and time again that continuously confirmed to her that she was not an employee of the Respondent. In the same breath, the Respondent submitted that the Court lacks



jurisdiction to hear and make any determination pertaining to any dispute arising out of the various consultancy agreements during the period 1st August 2007 to 31st December 2015.

28. Referencing the case of *Transparency International Kenya v Teresa Carlo Omondi*, Civil Appeal no. 81 of 2018 (2023) KLR, the Respondent submitted that the Claimant's employment contract commencing 1st July 2016 was a fixed term contract, which both parties voluntarily entered into.
29. In further submission, the Respondent submitted that the Claimant was offered a reason as a matter of professional courtesy. In support of this line of argument, the Respondent placed reliance on the case of *Anne Theuri v Kadet Limited* (2013) eKLR.

Analysis and Determination

30. Arising from the pleadings and the evidence on record, the following issues stand out for determination:
 - i. Whether termination of the Claimant's contract of employment was fair and lawful.
 - ii. Whether the Claimant is entitled to the remedies sought.

Whether termination of the Claimant's contract of employment was fair and lawful

31. As can be discerned from the record, the Claimant's termination from employment was communicated through a letter dated 29th October 2020, which was partly couched as follows:

“It is with regret that I wish to inform you that your employment with the International Cooperative Alliance-Regional Office for Africa (ICA-Africa) has been terminated with immediate effect from 1st November 2020. This is because of the financial crisis facing the organization at the moment which has resulted to (sic) the dissolution of the Finance and Administration Manager position.

This serves as a three (3) months termination notice from 1st November 2020 to 31st January 2021.”

32. Whereas the Claimant contends that she was declared redundant, the Respondent opines otherwise and avers that the contract of employment ended after it opted not to renew the same.
33. From the evidence on record, the Claimant and the Respondent entered into a number of contracts with the last one commencing on 1st July 2016 and ending on 31st December 2020. Notably, clause 3 of the said contract indicates that it canceled out any previous contracts the Claimant may have signed with the Respondent. My understanding of this clause is that the contract executed on 29th July 2016, was standalone and was not a continuation of the previous contracts.
34. It is also apparent from the record that the said contract was later extended for a period of one month hence was to take effect from 1st January 2021 up to 31st January 2021.
35. What manifests from the foregoing is that the Claimant's engagement with the Respondent was in the nature of a fixed-term contract. I say so because the contract had a start date and an end date.
36. As has been held in numerous decisions by the Court of Appeal and this Court, fixed-term contracts ordinarily carry no obligation or expectation of renewal. In the case of *Registered Trustees of the*



Presbyterian Church of East Africa & another v Ruth Gathoni Ngotho- Kariuki [2017] eKLR the learned Judges of the Court of Appeal expressed themselves on the issue as follows: -

“ [29]. Bearing the foregoing in mind, we note that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry.”

37. In the instant case, the Claimant’s contract of employment which was executed on 29th July 2016 was very explicit that its duration was up to December 2020. Thereafter, the same could either be renewed or not. Indeed, and as earlier stated, through a further contract, the employment relationship was extended from 1st January 2021 to 31st January 2021. Therefore, past 31st January 2021, the parties could either extend the contract or cease further engagement. Differently expressed, the employment relationship could go either way. In this case, the Respondent opted not to renew the contract. Therefore, the contract terminated on its end date being 31st January 2021.

38. On this issue, I will follow the determination of the Court of Appeal in the case of Transparency International Kenya vs Teresa Carlo Omondi (2023), in which it was held as follows: -

“ We dare say that 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 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 appellants’ 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...”

39. Applying the above determination to the instant case, it is clear that the lifespan of the Claimant’s contract was already predetermined. Therefore, at the end of the identified contractual period, the employment relationship was extinguished by effluxion of time. If I may add, the Claimant was also at liberty to opt for a non-renewal of the contract.

40. It is also noteworthy that the Claimant was well aware of the terms of her engagement. This is confirmed by her letter dated 27th January 2021 through which she was protesting the termination of her contract. In this regard, she addressed the Respondent’s Board/HR Committee members as follows:

“ As you are all aware on 30th October 2020, I appealed to the ICA Africa Regional Board and HR Committee through the Chairman requesting you to consider extending my contract for a further period of four (4) months to end in May 2021 as I psychologically prepare myself for the unexpected abrupt exit.”

41. Before I pen off, I find it imperative to address the Claimant’s contention that she was declared redundant. The fact that the Respondent indicated in the letter of termination that it was facing a financial crisis, did not take away the fact that the Claimant’s contract of employment had come to a close by effluxion of time.

42. In so holding, I am fortified by the determination of the Court of Appeal in the case of Trocaire v Catherine Wambui Karuno [2018] eKLR, thus: -

“ In our view, the duration for the third contract was expressly stipulated therein, that is, for a period of four months running from 1st March, 2014 up to 30th June, 2014.....



[19] It follows that the contract in question automatically lapsed on 30th June, 2014 by effluxion of time. That being the case the reason given by the appellant in its letter to the Ministry of labour for its decision not to renew the respondent’s contract and the payment of what was termed as a redundancy package in our view, has no relevance to this dispute...” Underlined for emphasis

43. The total sum of my consideration is that the termination of the Claimant’s contract of employment was not unfair and unlawful as the same ended by effluxion of time. Consequently, a claim of unfair termination and payment of severance pay does not lie.

Orders

44. In the final analysis, it is the Court’s finding that the Claimant was not unfairly and unlawfully terminated from employment hence is not entitled to compensation on account of unfair termination. Accordingly, the claim is dismissed in its entirety with an order that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF APRIL 2024

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Ms. Mburia

For the Respondent Ms. Munyi

Court Assistant Millicent Kibet

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

