



**Gitonga v Care International Kenya (Cause E119 of 2021)
[2024] KEELRC 1397 (KLR) (12 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1397 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E119 OF 2021
NZIOKI WA MAKAU, J
JUNE 12, 2024**

BETWEEN

JACQUELINE GITONGA CLAIMANT

AND

CARE INTERNATIONAL KENYA RESPONDENT

JUDGMENT

1. The Claimant filed this suit against the Respondent through a Statement of Claim dated 12th February 2021. She averred that by a contract dated 2nd January 2018, the Respondent offered and she accepted employment as a Finance and Administration Manager in the Respondent’s Dadaab Refugee Assistance Program Office, on regular and fulltime terms. That on 17th June 2018, the Respondent wrote to her advising that her contract would be converted to a one (1) year fixed term contract with the option of renewal upon expiry, with effect from 1st July 2019. The Claimant signed the new one-year Contract on 20th June 2019 and states that at all material times, the employment relationship was governed by the terms of the Contract, the Respondent’s Human Resource Manual dated September 2012 ("HR Manual") and the law.
2. The Claimant averred that earlier on 12th June 2020, prior to signing of the fixed term contract, the Respondent through its HR Manager and Senior Deputy Director Refugee Operations, convened a meeting of all its employees seconded to the Dadaab Refugee Assistance Program office. That during the said meeting, the Respondent through its aforementioned agents represented to her and her colleagues inter alia that renewal of one’s contract would be pegged on availability of funds, one’s performance and discipline. She asserted that she relied upon the said representations, acceded to the said shift in policy and signed the new fixed term contract. According to the Claimant, her salary was paid out of funding received from the United Nations High Commission for Refugees (UNHCR), which catered for 75% and from the European Civil Protection and Humanitarian Aid Operations (ECHO) who catered for 25%. That by virtue of being a member of the Respondent’s



Senior Management Team in the Dadaab Refugee Assistance Program Office and the principal person in charge of the Finance Department that was tasked with the responsibility of preparing budgets, she was also aware that the funding for her position was budgeted for beyond 2020 and the budgets had been approved by UNHCR and ECHO.

3. Further, the Claimant averred that during the period of her employment at the Respondent, it conducted performance appraisals in June and December 2018, and June and December 2019 but has to date failed and/or refused to release to her the appraisal reports despite several follow ups. She asserted that the Respondent had also never had any disciplinary complaints against her and contended that both the Respondent and its donors relied greatly on her because of her competence and diligence, which gave her the impression that she was part of the Respondent's future plans. She went on to enumerate in the Statement of Claim the particulars of the said reliance and inclusion in future plans.
4. The Claimant's case was that on 29th May 2020, the Respondent wrote to her informing her that it would not be renewing her contract upon its expiry on 1st July 2020 and that the letter failed to accord any explanation for the action. That by its own admission on 28th June 2020, the Respondent did not consider either availability of funds, the Claimant's performance or her disciplinary record in making the decision not to renew her contract. She contended that the absence of any communication from the Respondent regarding the three material preconditions for renewal of her contract entitled her to legitimately expect that her contract would be renewed. That otherwise, the Respondent's failure and/or refusal to consider the said three factors before making its decision not to renew her contract breaches her legitimate expectation thereby making the decision unlawful, illegal and amounting to unfair termination of her employment. The Claimant further notified this Court that on decisions regarding renewal of employees' contracts in Dadaab, she was aware that the Respondent was wholly reliant on the judgment of specific employees of the NGO including one Mr. Bishar Salat Ahmed and her immediate boss. That during her employment with the Respondent, she found herself at the centre of several consequential incidents involving the said Mr. Bishar, the nature of which would predispose Mr. Bishar to get rid of her given an opportunity to do so. She believes that the Respondent's failure to enact clear provisions on how renewal of expired employees' contracts would be effectuated left her at the mercy of a fellow employee who craved for an opportunity to get rid of her. She went on to narrate events, which according to her, show a clear lack of bonafides on the part of the Respondent through Mr. Bishar. She asserted that to the extent that the Respondent renewed the contracts and paid the full salaries of other employees for May and June 2020 while she only received a fraction of her salary, her freedom from equality and discrimination had been infringed against. Further, her right to human dignity and the right to have that dignity respected and protected was also infringed upon when the Respondent took her in circles in a bid to ensure she did not resume work in Dadaab from her leave and that its seeking to abolish her position was against her right to fair labour practices.
5. Consequently, the Claimant sought damages for unfair dismissal and/or termination at 12 months' salary, one month's salary in lieu of notice, one year's salary for non-renewal of contract, unpaid salary for May and June 2020, and damages for breach of her constitutional rights. She further prays for judgment against the Respondent that: a declaration that her employment was wrongfully and unfairly terminated; a declaration that the Respondent violated her constitutional rights; that the Respondent be ordered and directed to pay her the specific damages claimed together with costs of the suit and interest at court rates from the date of filing of suit until payment in full.
6. Respondent's Case

The Respondent filed a Memorandum of Defence dated 31st March 2021, wherein it denied that the Claimant's employment contract was wrongfully and/or unfairly terminated and that she is entitled to the orders sought. The Respondent averred that the Claimant was employed on a fixed term



contract that expired by effluxion of time on 30th June 2020 and that her claims of ulterior motive, discrimination, malice or otherwise are all false and without any legal or factual basis. It explained that on 11th June 2019, following the reduction of funding from one of its major donors, it held a meeting with all staff members explaining inter alia that it was left with no recourse but to convert all open-ended employment contracts (and term contracts for periods in excess of one year) to one (1) year fixed term contracts. That the Claimant agreed to the said terms and was subsequently issued with a one year fixed term contract commencing on 1st July 2019 and terminating on 30th June 2020. The Respondent denied that it informed, assured or otherwise represented to the Claimant that the renewal of her contract would be automatic as alleged or at all. It asserted that it was at all times clear that the Claimant would be employed on the terms as set out in her employment contract and it did not exercise its discretion to renew the contract. That the tenure of the Claimant's employment was premised solely on the terms as agreed in her fixed term contract and not her performance as alleged or at all. It maintained that it did not conduct performance appraisals for the Claimant during the tenure of her fixed term contract and was not obligated to automatically renew her contract upon the expiry of the fixed term therein.

7. The Respondent's case was that one month prior to the expiry of the contractual period, it duly notified the Claimant of the non-renewal of her contract as indicated in clause 7.1 of her Employment Contract. That it was following the issuance of the said notice that the Claimant began to allege that reassurances were given on the renewal of her contract yet she was aware that renewal of the contract was not mandatory and/or guaranteed. The Respondent averred that upon the expiry of the Claimant's contract by effluxion of time on 30th June 2020, it computed and paid out her terminal dues in full including her salary for the days worked in June, Compensation Time Off ("CTO"), Telephone Allowance and Service Pay. It denied the assertion that the Claimant was targeted for dismissal by her Supervisor and/or any other employee and stated that the Claimant did not report any of the concerns she claims to have had with her Supervisor and/or any other employee during the tenure of her employment. It also denied the allegations of discrimination, stating that the events leading up to the expiry of the Claimant's contract were measures it took on the onset of the Covid-19 Pandemic. The Respondent noted that the Claimant having been on leave and impacted by a travel ban in place at the time, it wrote to her on 14th April 2020 explaining that it could not in the circumstances facilitate her return to Daadab on 15th April 2020. That it even asked the Claimant to apply for leave pending further directives from the Government on the travel ban, as Daadab staff were not expected to work from home. It further averred that the Claimant and other employees on administrative leave in May and June 2020 were consequently subject to a pay reduction as communicated vide a Notice of 6th May 2020.
8. The Respondent's stance is that the Claimant has in fact breached its right to confidentiality by introducing correspondence between the Respondent and its donors in her documents (at pages 32 to 36), which she was neither in copy nor privy to. It contended that the said correspondence was irregularly and/or illegally obtained and is thus inadmissible. The Respondent also averred that the imminent expiry of the Claimant's contract was independent of its engagements with donors. That the Claimant served her notice period in June 2020 and is therefore not entitled to pay in lieu of notice and that the Claimant did not discharge any duties for the Respondent after expiry of her contract to warrant the claim for one year's salary. Furthermore, that the Claimant is not entitled to the unpaid salary for May and June 2020 because she was on administrative leave during the said period and her salary was subject to the 50% pay cut. That notably, the Claimant only worked twice a week during the said months. It was the Respondent's submission that the Claimant is thus not entitled to damages and that she is not allowed to claim two separate heads of damage for the same alleged wrong. It prays that the Claimant's Claim should be dismissed with costs.



9. Claimant's Submissions

The Claimant submitted that the following issues are for determination before this Honourable Court:

- a. Whether the facts herein establish a case for legitimate expectation for renewal of the Claimant's contract;
 - b. In the alternative to (a) above, whether failure by the Respondent to renew the Claimant's contract discloses a case of unfair labour practice, discrimination and violation of human dignity; and
 - c. Whether the Claimant is entitled to the Orders sought.
10. It was the Claimant's submission that the general common law position is that a fixed term contract does not carry with it any expectation of renewal upon its expiry. That however, situations arise where the unique circumstances of the employment relationship may create a legitimate expectation that the fixed term contract would be renewed and cited the decision of Court of Appeal in *Keen Kleeners Limited v Kenya Plantation and Agricultural workers' Union (Civil Appeal 101 of 2019)* [2021] KECA 352. The Claimant submitted that it was her evidence in chief that the Respondent made an express promise that it would renew the fixed term contract during a meeting held with the Claimant and other employees. She submits that though the Respondent denied making any such promises/assurances, it did not deny that the said meeting happened despite having refused to produce in Court the minutes of the said meeting. She argued that where a Notice to Produce is issued and a party fails to avail the documents sought for despite having them, a presumption is made that had the documents sought been availed, they would have been unfavourable to that party's case per the holding in *West Kenya Sugar Co. Ltd v Patrick Mwakha Shihundu* [2019] eKLR. Moreover, where an employer does not produce employment records which they are obligated to keep under the law, the Court will take the employee's assertions in that regard as the objective truth and cited the holding in *Alice M'mboga Ogolla v Nyayo Tea Zones Development Authority* [2017] eKLR and *Abigail Jepkosgei Yator & another v China Hanan International Co. Ltd* [2018] eKLR. The Claimant thus invited this Court to find that the Respondent made an express promise to her that it would renew her contract subject to availability of funds, her good performance and discipline.
11. Furthermore, the Claimant submitted that to determine whether or not an employee had a legitimate expectation to renewal of their fixed term contract, one of factors the Court ought to interrogate is the purpose or reason for concluding the fixed term contract, as stated in the *Keen Kleeners Limited* case (supra). The Claimant noted that although the concept of "legitimate expectation" must be distinguished from "reasonable expectation" as understood in the context of the South African Labour Jurisprudence, the two are to be equated as was appreciated much earlier by the South African Supreme Court of Appeal in *Administrator, Transvaal v Traub* [1989] 10 ILJ 823. She further submitted that she had discharged the burden of placing on the Court record facts which, objectively considered, establish a legitimate expectation on her part that the fixed term contract would be renewed. That she thus legitimately expected the Respondent to renew her fixed term contract and failure to renew it resulted in unfair termination of the contract.
12. It was the Claimant's submission that article 2(3) of the Termination of Employment Convention No. 158 of 1982 and article 3(1) and (2) of the Termination of Employment Recommendation No. 166 of 1982 require that member states should take "adequate safeguards" to protect employees against the consequences of entering into "fixed-term contracts", as a mechanism to evade statutory protection against unfair dismissal. The Claimant argued that in the absence of a statutory provision



providing exceptions to the general common law position that a fixed term contract of employment terminates automatically, the constitutional imperative to fair labour practices in terms of Article 41(1) of *the Constitution* of Kenya ought to come in and remedy the situation. That it was unfair for the Respondent to convert her open-ended contract to a one (1) year fixed term contract under the guise of reduction in funding from a major donor and then fail to renew it upon its expiry a year later for unstated reasons that do not include unavailability of funds. That it was clear the Respondent wanted to rid her from its employment using the fixed term contract in view of the fact that an employer is not required to provide reasons for non-renewal of the fixed term contract. She further submitted that the Court has also affirmed the position that the decision not to renew a fixed term contract may be challenged where such decision is based on improper motives or there are countervailing circumstances as held in the case of *Margaret A Ochieng v National Water Conservation & Pipeline Corporation* [2014] eKLR. That accordingly, the failure to renew a fixed term contract because of improper motive amounts to unfair labour practice.

13. The Claimant submitted that upon a finding of unfair dismissal, the law entitles her to compensation under section 49 of the *Employment Act* No. 11 of 2007. That by dint of section 49(4) of the Act, the Court is enjoined to consider the circumstances of each case in awarding damages for unfair termination of a contract of service. She noted that in the case of *Angela Wokabi Muoki v Tribe Hotel Limited* [2016] eKLR, the Court awarded the claimant therein 12 months' salary as damages for unfair termination despite the fact that she had worked for 5 years and after considering the employer's conduct in terminating her employment. That in this case, the Claimant merits an award of 12 months' salary and one month's salary in lieu of notice for the unfair dismissal. The Claimant contended that since the failure to renew her contract of service was tantamount to breach of contract, she is entitled to one year's salary. That the deduction of her May and June 2020 salaries by 50% while on Special Administrative Leave was not provided for in the Respondent's HR Manual and should not therefore be allowed to stand. She cited on the case of *Jonathan Spangler v Centre for African Family Studies (CAFS)* [2017] eKLR in which the Court awarded the claimant the equivalent of Kshs. 18 Million as damages for constitutional breaches and violations. That in the case of *OI Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR where it was established that the claimant's constitutional rights had been violated in the context of an employer-employee relationship, the Court of Appeal considered an award of Kshs. 7.5 Million as sufficient. The Claimant maintained that for the violation of her right to fair labour practices, this Court should award her Kshs. 10 Million as prayed in the Statement of Claim.

14. Respondent's Submissions

According to the Respondent, the main issues for determination are:-

- i. whether the termination of Claimant's contract through effluxion of time was lawful, procedural and justified and
- ii. whether the Claimant is entitled to the reliefs sought in in the Statement of Claim.

15. It was the Respondent's submission that the Court of Appeal has made a determination on expiry of fixed period contracts with finality and clarity in the case of *Transparency International Kenya v Teresa Carlo Omondi* [2023] eKLR wherein it overruled the trial Court's holding that limited term contracts do not have legitimate expectation of renewal. It posited that under section 47(5) of the *Employment Act*, the Claimant has the burden of proving that termination of her employment was unfair while the employer's burden is to justify the reason for the termination. It contended that the Claimant has not discharged the burden of proof vested upon her and that her case relating to a legitimate expectation of continuing in employment for a further one-year term has no basis and foundation because she



- was notified of the non-renewal a month prior to the end date of her contract. The Respondent cited section 10(3)(c) of the *Employment Act*, which provides that where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end; which particulars constitute those of a fixed term contract.
16. The Respondent further submitted that the Claimant had failed to prove her claims as pleaded. That when the Claimant signed the contract on 2nd July 2019 it signified her agreement to the terms and conditions set therein; one being the change from the open-ended contract to a one year fixed contract. That its failure to renew the contract did not therefore amount to unfair termination as the Claimant was in employment until the last day of her contractual period. The Respondent relied on the holding of the Court in *Apex Steel Limited v Dominic Mutua Muendo* [2020] eKLR that the general principle is that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry. It argued that the allegation that it did not furnish the Claimant with reasons for non-renewal of the contract is unmerited and unsupported by law. That there is no obligation in law imposed on the Respondent to give reasons for non-renewal of a fixed period contract since the same determines itself by effluxion of time unless renewed. That in the case of *Johnstone Luvisia v Allpack Industries Limited* [2019] eKLR, the Court declined to give a declaration of unfair termination as the fixed term contract had come to an end.
 17. As regards the alleged discrimination, the Respondent submitted that the Claimant has not discharged her burden of proof to that effect. That the issue of discrimination at the workplace was addressed in the Supreme Court decision in *Gichuru v Package Insurance Brokers Ltd (Petition 36 of 2019)* [2021] KESC 12 (KLR) where the Court affirmed the provisions of section 5(7) of the *Employment Act* that an employer alleged to have engaged in a discriminatory practice must give reasons for taking certain actions against the employee. The Respondent submitted that the Claimant in the instant case has not proved how she was discriminated against or how her right to fair labour practices was breached in reference to the law, while it had explained that it relied entirely on the fixed contractual terms resulting in the expiry of the Claimant's contract.
 18. It was the Respondent's submission that the Claimant is not entitled to any reliefs sought in the Statement of Claim. That notwithstanding that the Claimant sought two heads of damages for the same alleged wrong, the same have not been proved and that it is trite law that non-renewal of contract does not amount to unfair termination. It further submitted that the Claimant is not entitled to notice pay while relying on the holding of the Court in *Anne Theuri v Kadet Limited* [2013] eKLR that there would be no justification in seeking notice pay, when the claimant was at all times aware that she was on a 3-year contract, with specific starting and ending dates. Regarding the claim for one year's salary for non-renewal of contract, the Respondent reiterated that fixed term contract carries no rights, obligations, or expectations beyond the date of expiry. It maintained its pleading on the claim for unpaid salary for May and June 2020 and further submitted that having proved on a balance of probabilities that the non-renewal was lawful and justified, it should be granted costs of the suit.
 19. The Claimant was placed on a fixed term contract and then in May 2020 was placed on what the Respondent termed as administrative leave. Administrative leave is a creature unknown to the *Employment Act*. It is however known in North America where it is the form of leave given to an employee to allow the employer undertake say, investigations. It is defined as a temporary leave from a job assignment. It is with full pay and benefits meaning the pay remains intact and not deducted or otherwise reduced. In the Claimant's case, the so-called administrative leave led to a 50% pay cut. As it was not of the Claimant's doing, the Respondent would be liable to meet the sum claimed as unpaid salary during the period of the said 'administrative leave' in May and June 2020.



20. The Respondent seems to have negotiated the Claimant into a corner. The Claimant had an assurance that her continued service was guaranteed if there was donor funding. There is no indication that donor funds were depleted to the extent of placing her position in jeopardy. It seems the Respondent's supervisor who from the accounts before the Court was a misogynist ensured the Claimant's contract came to an end without any hope of renewal. She had served the Respondent for a number of years before the contract was amended to a fixed term contract. It is odd that others were permitted to renew their contracts yet she was not. Despite seeking to be shown her appraisals for the year preceding her exit, the Respondent declined to avail these perhaps acutely aware that the same showed a hardworking employee who was a performer and therefore not one it would willingly shed. Or perhaps it was to maintain the façade that the Respondent was mindful of its employees or to show that it did not discriminate against her when the employee was singled out for termination. The Court finds that the conduct of the Respondent was less than honest in the manner it terminated the Claimant and that invites the grant of the maximum compensation to the Claimant. The Claimant will not receive a double compensation in as far as compensation for the unfair and unlawful dismissal. She will have the costs of the suit as well as interest at court rates from the date of judgment till payment in full in respect to the monetary claims save for the underpayment for which interest at court rates will run from the date of filing suit till payment in full.
21. In the final analysis I enter judgment for the Claimant against the Respondent for:-
- a. One month's salary in lieu of notice – Kshs. 295,950.55
 - b. 12 month's salary as compensation – Kshs. 3,551,406.60
 - c. Underpayment of wages (money deducted and withheld unlawfully) – Kshs. 591,900/-
 - d. Costs of the suit
 - e. Interest on the sums in (a) and (b) at court rates from the date of judgment till payment in full.
 - f. Interest at court rates on the sum in (c) above from the date of filing suit till payment in full.
 - g. Certificate of service in terms of section 51 of the [Employment Act](#).

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JUNE 2024

NZIOKI WA MAKAU

JUDGE

