



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Lumutu v Kenya Civil Aviation Authority (Petition E074 of 2024)
[2024] KEELRC 13242 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13242 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E074 OF 2024**

B ONGAYA, J

NOVEMBER 27, 2024

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 22, 23, 34, 35, 46, 48, 73, 75, 156, 159, 161,
162, 165, 201, 232, 233, 234, 235 AND 258 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007, LAWS OF KENYA

AND

**IN THE MATTER OF KENYA CIVIL AVIATION
AUTHORITY ACT, CAP. 394, LAWS OF KENYA**

AND

**IN THE MATTER OF KENYA CIVIL AVIATION AUTHORITY HUMAN
RESOURCE MANUAL FOR STAFF REGULATIONS AND ADMINISTRATION**

AND

IN THE MATTER OF THE STATE CORPORATIONS ACT

AND

**IN THE MATTER OF MWONGOZO, THE CODE OF
GOVERNANCE FOR STATE CORPORATIONS, JANUARY, 2015**

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

ALLOICE ODHIAMBO LUMUTU PETITIONER

AND

KENYA CIVIL AVIATION AUTHORITY RESPONDENT



JUDGMENT

1. The petitioner filed the petition dated 10.05.2024 through Kurauka & Company Advocates. He seeks the following reliefs:
 - a. A declaration that the respondent has infringed the petitioner's rights under Article 27 of *the Constitution*, which guarantees the petitioner the right of equality and freedom from discrimination by discriminating against the petitioner and offended the provisions of the *Fair Administrative Action Act*, 2015.
 - b. A declaration that the respondent has infringed the petitioner's rights under Article 41 of *the Constitution*, which provides that every employee has a right to fair labour practices and to fair remuneration and that the respondent's continued service after expiry of the contract amounted to renewal of the contract and created an implied contract of employment and legitimate expectation thereof.
 - c. A declaration that the complained actions of the respondent's Director General, one Mr. Emile Arao, has infringed Article 73 of *the Constitution* of Kenya that provides for responsibilities of leadership, which include but not limited to a public trust to be exercised in a manner that brings honour to the nation and dignity to the office and promote public confidence in the integrity of the office.
 - d. That an injunction be and is hereby issued to prevent the respondent from recruiting for the positions of Airworthiness Inspector and Chief Airworthiness Inspector – Avionics until the petitioner's contract is renewed hereof.
 - e. That an order of certiorari be and is hereby issued to quash the respondent's letter dated 04.04.2024 and delivered to the petitioner on 26.04.2024, purporting that the respondent had opted not to renew the petitioner's employment contract that expired on 31.03.2024.
 - f. That a mandatory injunction be and is hereby issued to compel the respondent to forthwith reinstate and renew the petitioner's contract with effect from 01.04.2024 for a term of 5 years, with prevailing terms and conditions of his rightful next position; in accordance with section C12 of the respondent's HR Manual which provides for a contract of 5 years for a subsequent contract thereof.
 - g. That a mandatory injunction be and is hereby issued to compel the respondent to forthwith pay the petitioner dues; 23 unutilized leave days; unpaid allowances and gratuity as per clause 23 of the contract that expired on 31.03.2024.
 - h. That a mandatory injunction be and is hereby issued to compel the respondent to forthwith pay the petitioner imprest amounting to Kshs. 370,734.80 and other dues in respect of the services rendered by the petitioner between 01.04.2024 and 26.04.2024 when he received the respondent's letter for non-renewal of his contract.
 - i. An order for compensation of the petitioner equivalent to his 12 months' pay thereof.
 - j. Other of further orders that this Honourable Court may deem fit to grant hereof.
 - k. That the respondent to pay the petitioner the costs of this petition.



2. The petitioner's case was that the respondent's Director General (DG) purported to act capriciously, unjustly, unfairly, irrationally, unreasonably, maliciously, in bad faith and unlawfully against him. He further averred as follows:
- i. By an employment agreement dated 30.11.2020, the petitioner and the respondent entered an employment contract with effect from 01.04.2020 to 31.03.2021. Upon expiry of this first contract and pursuant to the petitioner's letter dated 21.04.2021, the employment contract was renewed for a further three (3) years with effect from 01.04.2021 up to and including 31.03.2024.
 - ii. Upon expiry of the second employment contract, the petitioner formally issued the respondent with a letter dated 20.12.2023 expressing his willingness to continue serving the respondent. His immediate supervisor, Manager Airworthiness and later on the Director (Ag. DASSR) recommended renewal of contract on 21.12.2023. Further, the Human Capital Management Advisory Committee (HCMAC), in its 71st meeting, recommended renewal of the petitioner's contract.
 - iii. It was because of his exceptional services that the respondent approved his nomination and appointment as acting Chief/Principal Airworthiness Inspector through memo Ref: KCAA/4/163(111) dated 04.03.2024. The respondent duly nominated him on 22.03.2024 to attend a training from 13th to 17th May 2024 thus creating a legitimate expectation and an implied renewal of his contract.
 - iv. On 26.04.2024, the petitioner received the respondent's letter dated 04.04.2024 in which the respondent's DG indicated that the respondent had opted not to renew the contract that expired on 31.03.2024. This response for non-renewal of contract was belated and made after four (4) months of receipt of his letter expressing willingness to continue working for the respondent. Furthermore, the petitioner had worked the whole of April 2024 thus creating a legitimate and implied contract of employment. The notice of intention not to renew his contract was therefore not given within a reasonable period.
 - v. The petitioner lodged an appeal against the respondent's decision by a letter of appeal dated 26.04.2024 but the respondent did not grant the appeal within a reasonable time.
 - vi. By a public advertisement calling for applications latest 14.05.2024, the respondent purported to advertise for job opportunities including the petitioner's position of Airworthiness Inspector and Chief Airworthiness Inspector -Avionics. This is despite the petitioner having diligently served and obtained appraisal rating of over 87% by the respondent. The advertisement indicated that the petitioner's position was available and may be given to another person.
 - vii. The respondent's decision not to renew the petitioner's contract was unconstitutional. The petitioner possesses a job card issued by the respondent, which expires on 30.09.2024, implying intention of renewal of his contract. Moreover, the respondent continued assigning him tasks and official duties which he diligently executed even after expiry of the second contract on 31.03.2024, meaning the respondent required his services.
 - viii. For instance, he was sent on assignment to conduct aircraft inspection in Sweden between 13th to 19th April 2024 and was to receive an imprest of Kshs. 370,734.80. The cost of the trip was invoiced to the operator and payment made to the respondent and receipted on 03.04.2024 under the petitioner's name and one Mr. David Kiarie. Whereas Mr. Kiarie was paid his



imprest, the petitioner was not paid his for reason that his employment contract had not been renewed by then. The petitioner also executed other assignments in Sweden between 13th to 25th April 2024 by carrying out inspection of aircraft under instructions of the respondent.

- ix. The respondent has retained in its employ some of the petitioner's colleagues recommended for renewal together with him. The petitioner was therefore discriminated upon without any reasonable cause or subjecting him to any due process. His salary remained constant at Kshs. 350,000/= despite his excellent performance while the salaries of his comparable colleagues with similar qualifications and performing similar functions were reviewed to Kshs. 450,000/=.
 - x. Consequently, the petitioner is entitled to overtime due and payable for services rendered at the rate of 1.5 times the regular hourly pay. The respondent has refused and failed to pay him his dues and compensation and its said infringement of his rights has made him suffer great loss, damage, stress, psychological and mental anguish, and trauma.
 - xi. The respondent has also infringed on the petitioner's right to freedom of association and to collective bargaining in contravention of Article 36 of *the Constitution*.
3. The respondent filed a replying affidavit sworn by its DG, Emily N. Arao on 20.09.2024, through The Corporation Secretary, Kenya Civil Aviation Authority. She averred that:
- i. The petitioner's first contract of employment commenced on 05.06.2018 and lapsed on 04.06.2019. The respondent had consequently been renewing his contract up until his last fixed contractual engagement that commenced on 01.04.2021 and ended on 31.03.2024 after three years.
 - ii. The respondent was not privy to the petitioner's averments on the several recommendations made for his contract-renewal as alleged.
 - iii. The petitioner's contract was not renewed pursuant to clause 21 of his employment contract and the respondent has the discretion to decline or renew the contract. In any event, fixed term contracts carry no expectation of automatic renewal and the petitioner's contract expired through effluxion of time on 31.03.2024.
 - iv. The respondent denies that the petitioner had any legitimate expectations for renewal of his contract as he was at all times aware of the contract expiry date. Furthermore, nothing stopped the petitioner from reapplying for any positions advertised by the respondent as he deems fit.
 - v. The petitioner being in possession of a job card expiring on 30.09.2024 did not imply intention of renewal of his contract but a working mechanism. In any case, the terms of the contract supersede any other documentation.
 - vi. Furthermore, the petitioner was not an employee of the respondent and not authorized to transact on behalf of the respondent between 13th to 25th April 2024 as his contract had expired on 31.03.2024. On 11.04.2024, the petitioner had already received communication from the HR department on non-renewal of his contract but he still proceeded to Sweden to conduct the said assignments without the respondent's acquiescence. Even though on 22.03.2024 he was granted approval to travel to Sweden, the same was overtaken by events when his contract expired on 31.03.2024 and he was informed of the same on 11.04.2024 prior to his departure out of the country on 14.04.2024.



- vii. The petitioner's appointment in acting capacity as a Principal Airworthiness Inspector (Avionics) was done within the period he was still an employee of the respondent. He was also nominated for training in line with the HR Manual while still an employee of the respondent and which should only be construed as barely a benefit accrued and extended to him by virtue of being an employee of the respondent at the time.
 - viii. The petitioner has not raised any novel issue of law that requires the interpretation of *the Constitution* and the main issue of dispute is of a contractual nature. He has always been sufficiently compensated for work done.
4. The parties filed their respective written submissions. The Court has considered the material on record. The Court returns as follows.
 5. To answer the 1st issue the Court upholds the case as pleaded and established for the respondent that the contract was express that it was renewable at the discretion of the DG upon the petitioner applying for renewal and renewal would be upon such terms and conditions as would mutually agreed upon by the parties. The Court finds for the respondent that the job card's expiry date of 30.09.2024 and approval to travel on a date after expiry of the term contract did not vary the agreed and express term that renewal was at the discretion of the DG. The contract lapsed on 31.03.2024 by effluxion of agreed time or tenure.
 6. To answer the 2nd issue the Court returns that the petitioner has not shown violation of Article 27 of *the Constitution* on equality before the law and freedom from discrimination. The evidence was that the petitioner was paid all the due and agreed compensation by way of salary, allowances and other benefits. The claimant has not established the basis of discriminatory treatment.
 7. To answer the 3rd issue, the Court considers that the respondent has violated the petitioner's right to fair labour practices under Article 41 of *the Constitution*. The petitioner's supervisor endorsed on the petitioner's application letter for renewal recommending the renewal. The same was an internal communication but the petitioner was obviously an insider and in service. He had a legitimate access to the information and which is filed. The respondent has then advertised the same positions as those held by the petitioner in the lapsed contract. What then would deny him the renewal? He is qualified and wishes to continue in the service of the respondent. The Court considers that on that account, despite the discretionary power to renew, the circumstances of the case evolve a legitimate expectation that the petitioner's contract is renewed. The finding is more so in view that the petitioner had been appraised as meeting the performance expectations.
 8. To answer the 4th issue the Court returns that the petitioner is entitled to the contractual terminal dues of the contract lapsing on 31.03.2024.
 9. The Court has considered that the petitioner has significantly succeeded respondent to pay costs of the petition.

In conclusion, judgment is entered for the petitioner against the respondent for reliefs as follows:

1. The declaration the failure to renew the lapsing contract amounted to violation of the right to fair labour practices and the petitioner's right to work by continuing in employment as protected in Article 41 of *the Constitution*.
2. An order of certiorari hereby issued quashing the letter dated 04.04.2024 delivered to the petitioner on 26.04.2024 declining renewal of the petitioner's term contract.



3. The declaration that the petitioner is entitled to renewal of the lapsed contract in the circumstance that his supervisor recommended the renewal, there exist vacancies, and the petitioner is a performer willing to continue in public service.
4. The declaration that the respondent to pay the petitioner contractual terminal benefits flowing from the petitioner's contract that lapsed on 31.03.2024.
5. The respondent to pay the petitioner's costs of the petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS WEDNESDAY 27TH NOVEMBER 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

