



**Muthee v Network of African National Human Rights Institutions (Cause 180 of 2018) [2023] KEELRC 270 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 270 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE 180 OF 2018**  
**AN MWAURE, J**  
**FEBRUARY 2, 2023**

**BETWEEN**

**MARGARET WAMUYU MUTHEE ..... CLAIMANT**

**AND**

**NETWORK OF AFRICAN NATIONAL HUMAN RIGHTS INSTITUTIONS ..... RESPONDENT**

**JUDGMENT**

1. The Claimant by the memorandum of claim dated 16<sup>th</sup> February 2018 and filed on the same date is seeking for the following orders:
  - a. A declaration that the Respondent's non-renewal of contract on account of pregnancy amounted to violation of the Claimant's rights under section 5 (3) of the *Employment Act* Number 11 of 2007.
  - b. A declaration that the Respondent's non- renewal of contract was in violation of the Claimant's constitutional rights in particular Articles 27 (5) and Article 41 (1) of *the Constitution* of Kenya.
  - c. A declaration that the Respondent's non-renewal of contract was in violation of sections 45 and 46 (a) of the *Employment Act* and was therefore unfair.
  - d. A declaration that the Respondent's actions are in contravention of ILO Maternity Protection Convention Number 183 (2000).
  - e. A declaration that the Claimant's is entitled to be compensated for violation of her constitutional rights as envisaged under Article 23 (3) and 41 (1) of *the Constitution*.



## **Claimant's Case**

2. The Claimant avers that she was employed by the Respondent on the 4<sup>th</sup> January, 2016 as a Programs Manager through a competitive and intensive interviewing process for one year contract renewable based on performance and availability of funds. The Claimant says that the contract was renewed for a period of one year subject to performance and availability of funds.
3. The Claimant states he was on the 23<sup>rd</sup> October, 2017 requested to attend a conference in Banjul by the Respondent but was not able to attend the said conference since she was already 6 months pregnant and had been advised by her doctor not to travel by air.
4. That on the 31<sup>st</sup> October, 2017 the Respondent issued the Claimant with a letter dated 25<sup>th</sup> October, 2017 notifying her of a decision unilaterally made by the Executive Director not to renew her contract without any just cause or due regard to the provisions of NANHRI's Human Resource Manual and the employment contract as stated under clause 12. Although a notice of two months was given prior to expiry of the contract, there were no justifiable reasons for non- renewal of the contract.
5. The Claimant avers that on the 20<sup>th</sup> November, 2017, there was a meeting between the Respondent's Executive Director and the Claimant whereby the Executive Director stated that he cannot be forced to renew a contract and explain his reasons not to renew the contract and did not see any reason for issuance of warning letters.
6. The Claimant states that on the 5<sup>th</sup> December, 2017 the Claimant issued a demand letter to the Respondent addressing the issues raised in the notice for non-renewal of the Claimant's contract stating that the Claimant possessed certain inherent traits which rendered her incapable of performing the functions of a programs Manager.
7. The Claimant says that the Respondent's actions of refusal to renew the Claimant's contract are unlawful, illegal and unfair and are directly discriminatory on the Claimant as the Respondent failed to undertake performance appraisal for the Claimant before issuing a notice for non-renewal of contract as indicated in clause 12 of the Human Resource Manual. The Respondent through the notice for non-renewal of contract stated that he believes that the Claimant has potentials and capacity to perform in other positions but not as programs manager which belief is incorrect as demonstrated through high performance indicators. The Claimant says that the Respondent's attitude towards the Claimant worsened upon the Claimant notifying him of certain inhibitions arising from her pregnancy and yet the Respondent did not bring any complaints of the Claimant's performance through the duly recognized performance management processes or in any written form. The claimant says the Respondent issued a few email correspondences to the Claimant pointing out some concerns about her work being the usual and ordinary reminders anyone in a supervisory position issues to employees from time. Claimant avers that the Respondent maliciously restructured the position previously held by the Claimant from Programs Manager to Operations Manager which was advertised shortly after notification of non-renewal of her contract.

## **Respondent's Case**

8. The Respondent filed a memorandum of response dated 3<sup>rd</sup> April 2018. The Respondent states that by contract of employment dated 1<sup>st</sup> December 2015, the Respondent offered the Claimant employment in the position of Programmes Manager at the Respondent's Secretariat Offices based in Nairobi. The contract would run for a period of 1 year commencing on the 4<sup>th</sup> January 2016 renewable subject to satisfactory performance and availability of funds. The Claimant was to be on probation for a period of



- 3 months from the commencement of contract and the employment was subject to the Respondent's Human Resource Manual. The Claimant's job description was attached to her contract.
9. The Respondent states that performance concerns relating to the Claimant were observed prior to the end of her probation period and were noted in her Probationary Performance Appraisal Form. There was need to have someone fulfil the role and it was decided to give her more time to perform the role.
  10. The Claimant states that the Claimant's tenure continued to be fraught with performance concerns which were communicated to her verbally by the Respondent's Executive Director, who was also her immediate supervisor.
  11. The Respondent avers that on or about the 4<sup>th</sup> January, 2017, the Claimant was formally appraised by her supervisor who noted that she was passive in certain situations which led her to miss certain opportunities and that there was need for her to be proactive and to show passion for her work. That it was also noted that there was need for her to improve her coordination and supervision skills as well as performance in planning, monitoring and evaluation.
  12. The Respondent says that vide the contract dated the 5<sup>th</sup> January 2017, the Respondent renewed the Claimant's contract for a period of 1 year commencing 5<sup>th</sup> January 2017. The contract was renewed on condition that the Claimant would improve her performance in the areas noted.
  13. During the course of 2017, the Respondent noted a number of performance concerns relating to the Claimant including that she was not responsive or sensitive of time which affected the Respondent's operations significantly. These concerns were communicated verbally by her supervisor but she did not improve.
  14. It is stated that the Claimant was informed of non-renewal of her contract vide the letter dated 25<sup>th</sup> October 2017 in which the performance concerns relating to her were once again highlighted. The Claimant's performance issues prejudiced not only the Respondent but also donors and other partners and stakeholders working with the Respondent. The Respondent avers that it gave the Claimant sufficient notice of non-renewal to facilitate a smooth handover and to enable her take steps to secure alternative employment.
  15. They say that the Claimant was paid in full up to the last day of employment.

### **Claimant's Evidence**

16. Claimant witness Margaret Wamuyu Muthee gave sworn testimony and adopted the witness statement dated the 16/2/2018 as part of her evidence in chief. She also adopted the documents contained in the list numbered 1-7 as exhibits.
17. She testified that she was not given a hearing to express herself on poor performance by her supervisor. She was given a hearing after she pressed for many days as to why a decision was taken to terminate her contrary to the human resource manual. She said that she was not given any warning letters prior to the termination of her contract and that an email was sent to her informing her that it was not necessary for the Respondent to follow the proceedings in the HR manual which had procedure for the appraisals.
18. She stated that in the year 2016 when she joined the organisation appraisal was made and she was confirmed as Programs Manager. At the end of the year 2016 a mid year appraisal was carried out and she was confirmed to be given a new contract of one year. The performance appraisal for 2017 was the basis to appraise her for the year 2017 but she was issued with a letter on the 31/10/2017 informing her that the contract would not be renewed. She avers that no appraisal was undertaken before issuance of letter to the effect that her contract would not be renewed.



19. The witness further testified that the HR Manual on performance stated that if the employee was not performing as expected, there would be issuance of warning letters and the employee would be assisted to improve performance. And if all this fails the employee was to be put on probation. She also said that she was pregnant when she received the letter and informed the Respondent 3 months to delivery as provided for by the manual.
20. On cross-examination she said that she was to undergo appraisals annually and her appraisal was done in January 2017. On being referred to the said appraisal she said that it was stated that she was not a go getter and remained passive. Upon being referred to the email communications she said that she communicated on the 2/11/2017 that she was not able to travel whilst the letter from doctor is dated October 2017 but which was handed in November 2017.
21. She further said that there was a biannual conference and was allocated duties she was to perform and did perform the same. She said she received the letter of non-renewal on the 25/10/2017 while communication on the pregnancy was done on 2/11/2017 to the Respondent. She also confirms that between 15<sup>th</sup> October 2017 to late October 2017 she did travel on official duties.
22. On re-examination she said there were several emails between her and the supervisor and was not issued with any letter on poor performance. She said that there was an appraisal after her probation and she was confirmed as Programs Manager. She said in the appraisal of January 2017 it was recommended there be a mid-year review but she was not informed of results of the mid-year review and no documents were supplied to her.

### **Respondent's Evidence**

23. Gilbert Sebihogo is the Respondent witness and he gave sworn testimony and said he works with the Respondent at the Secretariat as the Executive Director. He testified that he was the Director supervisor to the Claimant and that when he confirmed her he had noted some performance concerns which he informed her about. He says that it was also noted in the performance appraisals that claimant had performance issues. In 2016 he noted performance concerns were noted and communicated to her and before appraisals he sent her official emails and raised concerns.
24. He stated that he noted concerns but still confirmed her as he had hoped the Claimant would improve but she did not improve as seen in the emails in pgs 22. He also added that the Claimant was not responding on communications with the supervisor. On the 25/10/2017 the organisation decided to send her notice that her contract would not be renewed and gave notice to help her organise herself. The contract according to him was one year contract and the Respondent was not mandated to renew the contract. The Claimant did not respond to the issues of poor performance.
25. The witness further said that there was to be a conference which was major and the Claimant was to work with him in organising the conference but disorganised them by not communicating in advance that she would not travel so that they do not suffer any inconvenience. Respondent is emphatic that non-renewal of Claimant's contract was not because she was pregnant as they issued the letter before they got to know she was pregnant. The position of Programs Manager was removed after restructuring but it was not maliciously restructured but was a strategic decision.
26. In cross-examination the witness said that he did not perform appraisal in the year 2017. In 2016 there was performance appraisal and they sent emails raising concerns and Claimant did not respond. In mid-year 2017 there was no appraisal. Upon being referred to clause 12 of human resource manual he said that it provided for issuance of warning letters and probation of 6 months and according to him



termination was the only remedy available to the Claimant due to poor performance. He said that they do not issue warning letters for poor performance but only for gross misconduct.

27. On re-examination he said that the report of new structure was approved in March 2018 and the Claimant's contract expired naturally once the term expired.

### **Claimant's submissions**

28. The Claimant submits that it is trite law that the employer must subject employee to a disciplinary hearing pursuant to section 41 of the *Employment Act* on account of poor performance. The Respondent has relied heavily on the various correspondences between the Claimant and the Respondent's executive director to demonstrate that the Claimant was well aware of her poor performance which the Claimant says is not sound under section 41 (1) which requires explanation of the reason for termination and to have a representative present during the explanation. The Claimant urged that clause 12.6 of the Respondent's HR manual that requires probation of up to 6 months, suspension and termination was also not followed.

29. The Claimant relied on the case of *Jane Wairimu Machira versus Mugo Waweru and Associates 2012 eKLR* where Court held that:

“an appraisal of the performance of an employee must of necessity involve the active participation of the employee. Further in *Kenya Science Research International Technical and Allied Workers Union (KSRIWU) versus Stanley Kinyanjui and Magnate Ventures Ltd (Cause No. 273 of 2010)* the Court held that once poor performance of an employee is noted, the proper procedure is to point out the shortcomings and to allow them reasonable time to improve. It was not therefore open to the Respondent to sit in some boardroom and decide that the Claimant was a poor performer hence a candidate for redundancy. It was also not lost on the Court that the period during which the Claimant is said to have performed poorly coincided with her gestation period.”

30. The Claimant submitted that it is a condition precedent that before termination of employment, there must be performance evaluation process with proper evaluation tools.

31. The Claimant also relied on the case of *Mutua Mulonzya vs Fellowship of Christian Councils and Churches in the Great Lakes and Horn of Africa (2020) eKLR* where Court stated:

“Whereas as observed above there is no obligation for renewal of a fixed term contract, its termination upon expiry must align to the minimum requirements as set out in the *Employment Act*. That is to say parties must give notice as provided in the contract or in the absence as provided in the *Employment Act*. In the case of an employer, the reason for non-renewal should be stated and the employee called upon to make representation if necessary. The Court states so because it is not unusual to find several renewals with notice to employees on fixed term contracts. It would therefore be mischievous and unfair to hold that parties to a fixed term contract not being considered for renewal should sit tight and wait to disappear from each other upon the tail end of contract without bidding each other a decent goodbye. This could not have been the intention of the law on fixed term contracts.”

32. The Claimant relying on the above authority argues that an employer is not entitled to give reasons for non-renewal of a contract, however when the employer gives explicit reasons to that effect the employee should be afforded an opportunity to make representations essentially restating the provisions under section 41 of the Act.



33. The claimant also states that under Article 4 of the ILO an employee is entitled to a period of maternity leave of not less than 14 weeks. The Claimant urged that under Article 8 of the ILO Maternity Protection Convention Number 183 (2000), it is unlawful for an employer to terminate the employment of a woman during her pregnancy or absence on leave referred to in Articles 4 or 5 during a period following her return to work to be prescribed by national laws or regulations except on grounds unrelated to the pregnancy or birth of the child and its consequence or nursing shall rest on the employer.

### **Respondent's submissions**

34. The Respondent argues that fixed term contracts are for fixed period of time, they expire automatically on expiry of the contract term and the Respondent was under no obligation, legal or otherwise, to renew it.
35. The Respondent relied on the case of Samuel Chacha Mwita versus Kenya Medical Research Institute 2014 eKLR where the Court observed that ‘the fixed term employment will naturally terminate on such expiry date. There is definite start and a definite end.’
36. The Respondent also relied, inter alia, on the case of Teresa Carlo Omondi versus Transparency International- Kenya Ltd where the Court held that:

“The burden of proof, in legitimate expectation claims, is always on the Employee. It must be shown that the Employer, through regular practice, or through an express promise, leads the Employee to legitimately expect there would be renewal. The expectation becomes legally protected, and ought not to be ignored by the Employer, when managerial prerogative on the subject is exercised. Legitimate expectation is not the same thing as anticipation, desire or hope. It is a principle based on a right, grounded on the larger principles of reasonableness and fair dealing between Employers and Employees. The Employee must demonstrate some rational and objective reason, for her expectation. The representation underlying the expectation must be clear and unambiguous. The expectation must be induced by the decision maker. The decision maker must have the authority to renew. Renewals, extended service beyond the period provided for in the fixed term contract, and promise of renewal, are some of the elements that would amount to objective reasons underlying expectation of renewal. The presence of these elements however, is not to be taken as conclusive proof of legitimate expectation.”

37. The Respondent further relied on the case of Bernard Wanjohi Muriuki versus Kirinyaga Water & Sanitation Company Limited and Another 2012 eKLR for the proposition that there is no obligation on the part of an employer to give reasons to an employee why a fixed term contract of employment should not be renewed... the only reason that should be given is that the term has come to an end, and no more.”
38. On the allegation that the Claimant was discriminated on account of her pregnancy, the Respondent submitted that the Claimant’s contract automatically expired and she was not terminated. That she failed to show the nexus between her pregnancy and the separation from employment. The Respondent urged that the claim be dismissed.

### **Determination**

39. The issues for determination is:



- a. Whether the Claimant was terminated from employment or did her term expire by effluxion of time.
  - b. Is he entitled to any remedies therefore?
40. The Claimant was employed by the Respondent on 4<sup>th</sup> January 2016 for a term of one year renewable subject to performance and availability of funds. The contract was renewed on 5<sup>th</sup> January 2017 for another one year once against subject to performance and availability of funds. In her second contract the Respondent failed to renew and gave Claimant two months' notice of non-renewal by their letter dated 25<sup>th</sup> October 2017.
  41. The Claimant's employment term was a fixed term contract. In her submissions she avers that she had legitimate expectation that she would continue working for the Respondent. The contract of the Claimant reads that it is a one year contract renewable subject to performance and availability of funds. It is not a contract which has been renewed automatically for several years. It was only renewed once.
  42. There is myriad of email communication to demonstrate that the Claimant's performance was wanting. She was even to attend an international conference but she failed to go citing advise from her doctor not to travel. It is understood that one can be in medical considerations but considering this was pregnancy not sickness she should have informed her supervisors in good time in order for them to make proper arrangements.
  43. The Court finds no indication that the respondent gave the claimant legitimate expectation that they would renew her contract. They however gave a reason for non-renewal of her contract which was poor performance. This was one of the grounds provided in her contract for non-renewal. But clearly the Respondent did not give the Claimant expectation that they would keep renewing her contract. Indeed as held in the case of Samuel Chacha Mwita vs Kenya Medical Research Institute 2014 eKLR "a fixed term employment contract naturally terminate at the expiry date. There is a definite start and a definite end."
  44. The Court is also persuaded by the case of Minnie Mbue vs Jamii Bora Bank Limited (2017) eKLR and where it was held by the Court that "renewal of a contract was subject to mutual consent of the Respondent as the employee and the appellant's as the employer. To hold otherwise would be tantamount to holding at servitude a party who wishes to exercise his or her right of termination in terms of the contract as observed by this Court."
  45. Also in Kenneth Karise Kasemo vs Kenya Bureau of Standards 2013 eKLR the Court held: "the law on employment does not normally envisage a situation where an employee is forced upon an employer (or vice versa) and case law is rife on this subject and indeed this Court has time without number honoured the contract existing between the parties.
  46. In other words there is a contract executed between the respective parties for a one year engagement. Once the year is over the parties have no other engagement with each other unless they specifically agree to renew the same before the expiration of the existing one. The Courts cannot interfere with duly executed contracts between respective parties.



47. Finally in the Civil Appeal case of the Registered Trustees of Presbyterian Church of East Africa & Another vs Ruth Gathoni Nguthi Cause No 509 of 2010 the Court held:

“It is trite that the function of the Court is to enforce a contract as agreed by the parties. It should not make additions to such contract by implying a term merely because it would be reasonable to do so.”

48. The Court holds that the claimant in this case had a one year contract which expired by effluxion of time and there is no other finding that can be otherwise reached.

49. The Claimant also alleges that she was terminated because she was pregnant. Indeed there is no evidence adduced that the termination had anything to do with the Claimant’s pregnancy. In fact her notice that the contract would not be renewed was issued to her on 25<sup>th</sup> November 2017. The Respondent said he found a letter on his desk dated 2<sup>nd</sup> November 2017 at 3.00p.m informing him that Claimant would not be able to travel as she was expecting a baby. The letter was from the Claimant’s doctor. The trip to Rwanda was to take place on 7<sup>th</sup> to 9<sup>th</sup> November 2017.

50. The Claimant has not shown to this honourable Court any correlation between her being pregnant and the expiration of her contract which she had appended to and so consented to its terms including the duration of the contract. The Court still holds that the parties had a binding document that provided the terms of employment. The role of the Court is not to rewrite a contract document between the parties but is merely to enforce what the parties have already agreed. The Court finds that the Respondent did not violate any rights of the Claimant under section 5 (3) of the *employment act* or articles 27(5) and 41(1) of *the constitution* of Kenya or section 45 and 46(a) of the *employment act* but rather the contract expired by effluxion of time.

51. Therefore the court holds there is no case made for unfair or wrongful termination of Claimant’s employment. The case filed by the Claimant is dismissed and Court will order each party to meet their costs.

52 Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 2<sup>ND</sup> DAY OF FEBRUARY 2023.**

**ANNA N. MWAURE**

**JUDGE**

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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 has 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.

