



**Ng'ang'a v Energy Regulatory Commission (Petition 8 of 2018)
[2023] KEELRC 656 (KLR) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 656 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 8 OF 2018**

J RIKA, J

MARCH 10, 2023

**IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT OF THE RIGHTS
AND
FUNDAMENTAL FREEDONS IN ARTICLES 2,3, 10, 19, 20, 21, 22, 23, 25, 27, 28, 29 [30],
33, 41, 47, 48, 50, 73, 75, 251, 258, 259, & 260 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: ALLEGED VIOLATION OF THE EMPLOYMENT ACT
AND**

**IN THE MATTER OF: ALLEGED VIOLATION OF THE ENERGY ACT, 2006
AND**

**IN THE MATTER OF: ALLEGED VIOLATION OF THE LEADERSHIP
AND INTEGRITY ACT, CAP 182 THE LAWS OF KENYA
AND**

**IN THE MATTER OF: ALLEGED VIOLATION OF THE
DISCIPLINE MANUAL FOR THE PUBLIC SERVICE, 2016
AND**

**IN THE MATTER OF: ALLEGED VIOLATION OF THE MWONGOZO
CODE OF GOVERNANCE FOR STATE CORPORATIONS, JANUARY 2015
AND**

IN THE MATTER OF: THE INDUSTRIAL COURT ACT, SECTION 12

BETWEEN

JOSEPH NG'ANG'A PETITIONER

AND



JUDGMENT

1. The Petitioner filed his Petition on January 30, 2018.
2. He was employed by the Respondent State Corporation as a Director of Electricity, on February 1, 2010.
3. He had worked previously for Kenya Power and Lighting Company Limited and Kenya Electricity Generating Company Limited, rising to the position of Deputy Managing Director, in the latter.
4. He worked for the Respondent as Director of Electricity for 3 years.
5. On September 1, 2014, he applied for, and was appointed to, the position of Director-General of the Respondent for a period of 3 years.
6. He was to apply for renewal if he so wished, for another term of 3 years. Such an application would be made at least 6 months before the expiry of the existing 3-year contract.
7. On January 26, 2017, the Respondent's Board Chairman wrote to the Petitioner, advising him that he had attained the mandatory retirement age for Public Servants, of 60 years, and that his contract would therefore, not be renewed upon expiry on August 31, 2017.
8. The Petitioner was directed to proceed on terminal leave of 8 months, from January 2017 to August 31, 2017.
9. The Petitioner submits that termination was contrary to Section 11 of the Energy Act, which allows termination of the Chairperson's or a Commissioner's appointment, by the President or the Minister, where the Chairperson or the Commissioner is declared bankrupt; is convicted of a criminal offence involving dishonesty, fraud or moral turpitude; is absent from 3 consecutive meetings of the Commission without reasonable cause to the satisfaction of the Commission in consultation with the Minister; or in any particular case fails to comply with the provisions of paragraph 6 of the 1st Schedule.
10. The Petitioner submits further, that under Section 51 of the *Interpretation and General Provisions Act*, the Cabinet Secretary would be deemed to be the appointing authority of the Director-General, and therefore, the only one who could have terminated the Petitioner's contract. The contract itself stated at clause 4, that only the Cabinet Secretary could terminate the Petitioner's contract. The Cabinet Secretary could terminate the Petitioner's contract prematurely on account of poor performance, and not on account of age. The Respondent had awarded the Petitioner Leader of the Year Award for 3 consecutive years, which clearly indicated that the Petitioner's performance was exemplary.
11. The Petitioner was not able to apply for renewal, owing to the premature and unlawful termination. He would not be able to apply for renewal 6 months before expiry, because he was placed on terminal leave and advised on nonrenewal, 8 months before expiry of his contract.
12. The contract provided for termination notice of 3 months, or payment of 3 months' consolidated salary, in lieu of such notice. Neither the Act, nor the contract, contemplated a notice period of 8 months. The Petitioner submits that age was a diversionary issue. He relies on a newspaper article in the Business Daily of May 29, 2017 by Mr Neville Otuki, titled 'State Retains Workers Above 60 years,' which stated that there are 1,707 Public Servants over the age of 60 years still working in the Public Service. Age was peripheral to terminal leave.



13. The Petitioner states that the decision to send him home was actuated by malice, due to the strong position he took on certain issues, including, generation tariff in respect of the Power Purchase Agreement for the 50 MW Solar Project; a claim of USD 7,324,470 submitted by M/S Gulf Energy Limited; and explosion on a lorry ferrying flammable products. The Petitioner states that he resisted external pressure on these items. His contract was terminated because he went out of his way, to guard the image of the Respondent. He invokes Mwongozo Policy, Article 1.3 [k], which stipulates that Commissioners, individually and collectively, owe their duty to the Organization and not the nominating or appointing authority.
14. The Petitioner further invokes Articles 27 of the Constitution on the right of equality before the law; Article 28 on the right of inherent dignity; Article 41 on fair labour practices; and, Article 47 on fair administrative action.
15. He prays for the following orders: -
 - a. Declaration that purported termination of the Petitioner's contract by the Respondent constituted a violation of the Petitioner's rights under Articles 27, 28, 41 and 47 of the Constitution.
 - b. The Petitioner is compensated by the Respondent, at a total of Kshs 10 million, or any other amount that the Court deems sufficient and/or appropriate, for the violation of the Petitioner's rights and fundamental freedoms under Articles 27, 28, 41 and 47 of the Constitution.
 - c. Declaration that purported termination of the Petitioner by the Chairman of the Respondent, was unlawful and/or wrongful for violation of Section 11 of the Energy Act 2011 and Section 51 of the Interpretation and General Provisions Act and Clauses 4, 5, and 26 of the Petitioner's contract dated August 30, 2014.
 - d. Damages for unlawful and/or wrongful termination equivalent to the gross salary of 3 years [36 months], amounting to Kshs 23,742,600, after tax.
 - e. Outstanding arrears of basic salary from September 2015 to September 2016, at Kshs 1,008,000 after tax.
 - f. Outstanding gratuity based on approved basic salary of Kshs 312,480, after tax.
 - g. Accrued annual leave balance of Kshs 1,491,000 after tax.
 - h. Mileage variance for use of personal vehicle on official duties from January 13, 2016 to January 26, 2017 for a vehicle of 2694 cc [92 Kshs/ km] as approved by SCAC at Kshs 221, 470.
 - i. Interest on the above items at commercial rate of 18% from the date they arose till payment in full.
 - j. Costs.
 - k. Any other suitable relief.
16. The Respondent relies on the Witness Statement of Commissioner Engineer Samuel Maugo, dated November 15, 2018. He confirms that the Petitioner joined the Respondent Corporation on February 1, 2010 as Director of Electricity. He was later appointed Director- General.
17. On January 6, 2017, Respondent's Chairman Joshua Oigara wrote to the Petitioner, advising him that his contract would not be renewed, upon expiry on August 31, 2017, because the Petitioner had



reached the mandatory retirement age of 60 years. He would not qualify to continue holding the position because of age.

18. The Petitioner was sent on 8 months of terminal leave. This was partly inclusive of accumulated leave. He was paid his salary for the 8 months, with absolutely no loss of benefits.
19. The Petitioner freely went on terminal leave. He did not object to the Respondent, the Cabinet Secretary or any other authority. He did not apply to be reappointed, at least 6 months, before expiry of his contract.
20. The Director-General is not a Commissioner, and Section 11 of the [Energy Act](#) does not apply to him. It applies to the Chairperson and to Commissioners. The Petitioner was the Director-General, governed by Section 12 of the [Energy Act](#). His termination is not carried out by the Cabinet Secretary.
21. Clause 25 of the Petitioner's contract stipulated that he was subject to the Respondent's Staff Rules and Regulations. These included the Human Resources Policy Procedure Manual. Clause 9[2] of the Manual sets the normal retirement age of all Employees at 60 years. This is complemented by the Public Service Human Resources Manual D21, which sets mandatory retirement age for Public Servants at 60 years, and for Persons with Disabilities at 65 years.
22. The perceived reasons for termination advanced by the Petitioner are farfetched. They would not affect contractual obligations. The certificates showing awards made did not originate from the Commission, but from Management and are self-serving. Salary increment could only be done with the approval of the appointing authority. The request for approval made on December 24, 2015 was declined. He was paid all dues at the end of his contract. He is not owed any salary, leave days, mileage of other benefits. The Respondent prays for dismissal of the Petition with costs.
23. The Court directed on September 21, 2022 that the Petition is argued on the strength of the Pleadings, Affidavits, Documents and Submission. The latter were confirmed to have been filed and exchanged at the last mention, on November 29, 2022. The Petitioner's Submissions are dated October 21, 2022, while those by the Respondent are dated November 25, 2022.
24. The issues are whether the Petitioner's contract was terminated unfair or at all, by the Respondent; whether termination was unfair; whether the Petitioner's fundamental rights and freedoms were violated; and whether he merits the remedies pleaded.

The Court Finds: -

25. The Petitioner was employed by the Respondent initially on February 1, 2010, as Director, Electricity.
26. He applied for the position of Director-General, emerging second among the interviewees. The best candidate Laurencia Njagi did not take up the position, and it was therefore offered to the Petitioner.
27. He was appointed in writing, for a period of 3 years commencing September 1, 2014. The contract was to expire on August 31, 2017.
28. The Petitioner was issued a letter dated January 26, 2017, by the Respondent's Board Chairman Joshua Oigara, advising him that his contract would expire on August 31, 2017, and would not be renewed. He was told that he had already attained the age of retirement of 60 years, and therefore not eligible for renewal.
29. He was placed on gardening leave for the 8 months leading to the date of expiry of the contract.
30. The Court does not think that the Petitioner's contract was terminated by the Respondent, unfairly or at all.



31. Clause 4 of the contract was clear on its duration. It commenced on September 1, 2014, expiring on August 31, 2017.
32. It expired on the date agreed by the Parties, August 31, 2014 and was not renewed.
33. The Petitioner faults the Respondents for placing him on 8 months' gardening leave, submitting that it affected his contractual right, under clause 5, to make a written request if he wished to be reappointed, at least 6 months before the expiry.
34. The Court does not think this complaint is well-founded. The clause states that the Petitioner was free to express his interest at least 6 months before expiry. It was open to him to express his interest even one year, before the expiry, which he did not do.
35. He did not express any interest. He would even have expressed his interest, while on terminal leave. Without expression of interest, the Petitioner would not reasonably and legitimately expect renewal. He was aware that he was already past the mandatory retirement age for Public Servants, of 60 years.
36. Section 80 of the *Public Service Commission Act* requires Public Officers to retire with effect from the date of attaining the mandatory retirement age. The Commission or other appointing authority shall not extend the service of such a retired Public Officer, beyond the mandatory retirement age.
37. Clause 25 of the Petitioner's contract incorporated the Respondent's Human Resources and Policies Procedure Manual, which provides under clause 9[2], that all Employees would retire at the age of 60 years. The Public Service Human Resources Manual clause D21 sets a mandatory retirement age of 60 years, and 65 years for Officers with disabilities.
38. The Petitioner was already 61 years old, at the time he was issued the notice of nonrenewal. He was allowed to complete his 3 year- contract, which took him beyond the retirement age, under the above laws and policies.
39. He did not dispute the notice of nonrenewal at the time it was issued. He accepted the notice, and proceeded on terminal leave. He continued to receive his salary and benefits under the contract to the last shilling.
40. The Petitioner executed a contract whose creation originated from the will of the contracting Parties. It was for a limited duration. He served the limited duration. There was no promise, reasonable or legitimate expectation of renewal. There were legal limitations to renewal of the contract, the Petitioner having already been past the age of retirement.
41. Section 80 [2] of the *Public Service Commission Act* allows the Commission or other appointing authorities to engage Public Officers who have attained retirement age on contract, if-
 - a. The Public Officer possess rare knowledge, skills and competencies for the time being required in the service.
 - b. The retired Officer is willing to be engaged on contract.
 - c. The retired Officer shall not in any way be impaired by age.
42. Although Section 80 of the *Public Service Commission Act* does not prohibit re-employment after retirement, it discourages it.
43. The Petitioner did not write to the Respondent, expressing his desire to continue serving on contract, and establishing that it was necessary to retain him, because he had rare knowledge, skills and competencies, for the time being required by the Respondent. Retired Officers seeking employment



on contract, beyond their retirement age, must meet the necessity test, that public interest can be served only by the appointment of a particular retired Officer to a particular position. In other words, the retired Officer must show, or be shown, to be indispensable to the position. Renewal of the Petitioner's contract would have had the effect of blocking younger and deserving Kenyans, from occupying the Director- General's position, which is not conducive to good governance.

44. The submission by the Petitioner that his contract ought to have been terminated by the Cabinet Secretary, and not by the Commission Chairman, pursuant to Section 11 of the [Energy Act](#), 2006 and Section 51 of the [Interpretation and General Provisions Act](#), has no weight.
45. The Petitioner was the Director-General, who under Section 12 [4] of the [Energy Act](#), is an ex officio member of the Commission. He has no voting rights. He serves under contract, with specific terms and conditions of service. He heads the Management Team, and his removal would not be regulated by Section 11 of the [Energy Act](#), applicable to other Commissioners. The expiry of a fixed-term contract in any event, is not among the matters listed under Section 11 of the [Energy Act](#), to constitute grounds for termination by the President or the Cabinet Secretary.
46. The Commission Chairman did not terminate the Petitioner's contract; he merely advised that the contract, expiring on August 31, 2017, would not be renewed. This communication was within the mandate of the Commission, under Section 5 [3] of the [State Corporations Act](#) and clause 1.2 [k] of Mwongozo, The Code of Governance for State Corporations. The [State Corporations Act](#) empowers State Corporations to hire their Staff including the CEO, while the Code defines the role and functions of the State Corporation Boards, to include inter alia, the hiring of the CEO on such terms and conditions of service, as may be approved by the relevant government organs. There was nothing wrong with the Commission, through its chair, communicating to the Petitioner that it would not renew his contract.
47. The incidents from paragraph 11 to paragraph 21 of the Petitioner's witness statement, alleged to have been the underlying reasons for nonrenewal of his contract are not relevant. An Employer has no obligation to give reasons for nonrenewal of fixed-term contract, unless such obligation is in the contract. The Petitioner's contract expired, and other reasons, real, or perceived by the Petitioner as underlying nonrenewal of his contract, are irrelevant.
48. The remedies claimed are without foundation. The contract was not terminated by the Respondent. It expired, and there was no violation of the Petitioner's rights under Articles 27, 28, 41 and 47 of the [Constitution](#). The prayer for compensation in the sum of Kshs 10 million is without merit. There was no contravention of the [Energy Act](#), The [Interpretation and General Provisions Act](#), or clauses 4, 5 and 26 of the Petitioner's contract. There is no justification in the prayer for 3 years' gross salary, over a contractual period that never was. The Petitioner did not articulate and establish the prayers for salary arrears at Kshs 1,008,000, gratuity at Kshs 312,480, accrued annual leave at Kshs 1,491,000, and mileage variance.
49. The Petition on the whole is without foundation. There were no violations of a constitutional or statutory nature, committed against the Petitioner. The bottom line is that the Petitioner served under a fixed-term contract, which expired, without legitimate or reasonable expectation of renewal. The Petitioner was well past the mandatory age of retirement of 60 years, and did not in any event, express his interest to renew the contract. He was paid his contractual dues.

It Is Ordered: -

- a. The Petition is declined.
- b. No order on the costs.



**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI,
UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 10TH
DAY OF MARCH 2023.**

JAMES RIKA

JUDGE

Prof. Tom Ojienda & Associates, Advocates for the Petitioner

Ogeto, Otachi & Company Advocates for the Respondent

