



**Yamo v Kenya Rural Roads Authority (Cause E808 of 2021)
[2023] KEELRC 1870 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1870 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E808 OF 2021
NZIOKI WA MAKAU, J
JULY 31, 2023**

BETWEEN

JUDITH ADHIAMBO YAMO CLAIMANT

AND

KENYA RURAL ROADS AUTHORITY RESPONDENT

JUDGMENT

1. The claimant instituted this suit against the respondent for unfair termination of her employment services. In the amended statement of claim dated November 12, 2021, she prayed that this honourable court orders the respondent to withdraw their letter to the claimant dated September 13, 2021 and immediately reinstate the claimant to her position or in the alternative, that this honourable court grants the following orders:

- a. A declaration that the respondent board's decision to terminate the claimant's contract of employment dated September 13, 2021 is unfair, unprocedural and against the law governing labour practices;
- b. An order directing the respondent to pay the claimant three-month salary in lieu of notice as follows: Kshs 644,875/- x 3 months = 1,934,625/-
- c. Gratuity pay for the two three-year contracts between July 2021 to May 2027 when the claimant would have retired:

July, 2021 to June 2024 - Kshs 4,400,388/-

July 2024 to May 2027 - Kshs 4,335,102/-

Total gratuity pay Kshs 8,735,490/-



- d. 12-months gross salary as damages for unfair termination of the claimant: claimant's monthly salary; Kshs 644,875/- x 12 months= Kshs 7,738,500/-
- e. Salary and leave pay in respect of the claimant's legitimate expectation for renewal of contract for two, three-year contracts; six (6) years.

July 2021 to June 2022.....Kshs 8,116,800/-

July 2022 to June 2023.....Kshs 8,356,800/-

July 2023 to June 2024.....Kshs 8,644,800/-

July 2024 to June 2025.....Kshs 8,644,800/-

July 2025 to June 2026.....Kshs 8,644,800/-

July 2026 to May 2027.....Kshs 6,764,030/-

Total = Kshs 49,172,030/-

- f. An order directing the respondent to issue the claimant with certificate of service;
- g. Costs for this suit;
- h. Interest on prayers (b), (c), (d), (e) and (g) above at court rates.

2. The claimant averred that on May 25, 2009, the respondent appointed her as a Human Resource Manager *vide* a Letter of appointment dated the even date, for a period of three years renewable by request of either the respondent or the claimant six months prior to its expiry. She produced a letter dated May 30, 2018 from the respondent, re-appointing her as a Human Resource & Administration Manager. She further averred that her position was later reviewed to Deputy Director – Human Resource & Administration through the respondent's letter dated December 7, 2018. It was the claimant's averment that in compliance with her letter of appointment, on December 24, 2020 she wrote a letter to the respondent's Director General through the Director Corporate Services requesting for renewal of the contract that was coming to an end in June 2021. She then received a letter on December 31, 2020 acknowledging receipt of her request for contract renewal.
3. The claimant further averred that on June 30, 2021, she received a letter from the respondent's Board of Directors (hereinafter "the Board") stating that her contract had been extended for three (3) months and instructing her to present her performance appraisal for the year 2020/2021 for consideration by the board. That whereas she subsequently presented her performance appraisal in which she was rated 'very good', she received a letter from the board on September 13, 2021 declining the request for contract renewal and effectively terminating her contract effective September 30, 2021. Furthermore, the respondent had commended her exemplary work as a member of the Job Description Analysis Committee (JDAC) in its commendation letter dated February 23, 2021. It was the claimant's averment that the respondent terminating her employment contract with no reason whatsoever amounts to unfair, unlawful, unprocedural, and inhumane dismissal. The claimant's stance was that she was issued with neither a notice of the intended termination as indicated in her letter of appointment nor a notice to show cause; she had done nothing wrong to warrant termination of her contract; and she was never summoned to answer to any charges.
4. The respondent filed a response to claim dated January 6, 2022 admitting to have contracted the claimant and her submission of her performance appraisal reports. It however denied that the rating in the performance appraisal reports she submitted was as indicated by the claimant. It averred that the



commendation letter issued to the claimant was given to all members of the JDAC for work done on that particular exercise and was not based on the overall performance of the recipients.

5. The respondent averred that the claimant accepted her contract extension for three months from July 1, 2021 to September 30, 2021 without raising an issue and that a notice of intention not to renew her employment was issued to her through a letter dated September 13, 2021. It thus denied that the claimant was summarily dismissed due to disciplinary issue and contended that the matter before court related to her contract expiring through effluxion of time. its position was that it was the prerogative of the respondent's board of directors to decline or accept a request for renewal of contract.
6. It was the respondent's averment that the claimant was therefore not entitled to the reliefs sought. Moreover, the fact that the claimant had earlier expressed to extend her contract for a further period of three (3) years did not give rise to a legitimate expectation that the contract would be extended for such duration. It further averred that the claimant's gratuity for three months – July 2021 to September 2021 – had been processed and paid and that since her contract ended on September 30, 2021, she was not entitled to any gratuity for the period falling after the said date. That the claimant was also paid her salary and other benefits for the period she was employed by the respondent and would thus neither be entitled to salary for services not rendered nor to leave pay for the period she was not in employment. The respondent prayed for the suit to be dismissed with costs to it.
7. The respondent also filed a witness statement made by its Director Corporate Services, Mr Dan Manyasi. He stated that the review letter dated December 7, 2018 on the claimant's job position was part of a job re-categorization exercise of the authority that culminated into change of her title. He further stated that section 2.6.1 of the Human Resource Policies and Procedures Manual (hereinafter "the respondent's HR Manual") requires the Director General and the Board to 'confirm the renewal of contract or intention not to renew the contract, within three (3) months from the date of expiry of the contract for which renewal is being sought'. Mr Manyasi asserted that the board, in its meeting of September 10, 2021, deliberated on the claimant's request for renewal of contract and decided not to renew her contract because of unsatisfactory performance.
8. The claimant testified that the respondent was her employer for 12 years and 3 months and that she was Manager Human Resources from June 2009 until September 30, 2021, with a re-designation to Deputy Director HR & Administration with effect from July 2018. According to the claimant, the re-designation was a continuation of the contract and was not a promotion. She asserted that the respondent was supposed to communicate its decision three (3) months before expiry of contract. She further testified that contract renewal was subject to performance based on the respondent's HR Manual and that she never received a negative appraisal. She denied having deemed the non-renewal as a termination and asserted that she did not foresee the termination as her performance was very good. That according to the HR Manual, where staff does not have good performance, Performance Improved Programme (PIP) is offered but it was not offered to her. That in any event, she neither sought PIP nor appealed the appraisal because her performance was rated very good. The claimant's testimony was that she expected to work until May 2027 when she would attain 60 years.
9. The claimant stated on cross-examination that her understanding was that there was expectation and a guarantee that her contract would be renewed based on performance. She clarified that whilst her contract was expiring in June 2021, she got a response from the respondent on June 30, 2021 and not three months before expiry of contract. She confirmed receiving gratuity for the period ending June 2021 and for the period between July 2021 and September 2021. She also confirmed that she was, at the time of giving her testimony, working for gain elsewhere.



10. The respondent's witness, Mr Dan Manyasi Chamwama (RW1), confirmed on cross-examination that the claimant was given a performance rating of 'good' in her last three appraisals and that the same formed part of the basis for the contract renewal. He however noted that he did not have an express quantification of the weight placed on performance appraisal and that the letter of appointment stated that renewal would be subject to the decision of the Board of Directors. He again confirmed to have been the claimant's appraiser in 2021 and recalling that she achieved 90.18%.
11. The claimant submitted that the respondent had not proven that it had issued her with any termination notice or a three months' salary prior to her termination. That clause 4 of her letter of appointment provided that her contract would be for a period of three years and the respondent reserved the right to terminate depending on performance. She further submitted that she had proven in her case that her performance was good and that there was therefore no other available legitimate reason under the employment contract for the respondent to terminate her services. In addition, that it was right to conclude that the termination of her employment was unlawful and unprocedural.
12. It was the claimant's submission that the respondent's extension of her employment for a period of three months created legitimate expectation that her contract was to be extended. Her reasons were that: firstly, she applied for extension as required under her employment contract; secondly, her performance was good as per her performance appraisals; thirdly, the extension was sui generis being that it had not been provided to anyone before; and lastly, the extension was based on a review of her performance for which she had performed well. She relied on the observations of the Court of Appeal in *Keen Kleeners Limited v Kenya Plantation and Agricultural Workers' Union* (Civil Appeal 101 of 2019) [2021] KECA 352 (KLR) (17 December 2021) (Judgment) as follows:

“Regarding the considerations to be made when considering whether a legitimate expectation for renewal of a fixed term contract was created, the sentiments of Rika J. in *Teresa Carlo Omondi v Transparency International- Kenya* [2017] eKLR are particularly persuasive:

"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. ... 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. ... repeated 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. ..."
13. Further, the claimant submitted that the 12 years she invested and was involved with the respondent indeed created a legitimate expectation on her part and that she thus deserved the right to be given a termination notice prior to her termination. She contended that since the respondent had failed to prove the reason(s) for terminating her contract pursuant to section 43 of the *Employment Act*, it was right to conclude that the termination was unfair under section 45 of the *Employment Act*.
14. In her submissions, the claimant sought for withdrawal of the termination letter issued to her and for reinstatement of her employment for the reason that the letter was irregular and/or issued by an unqualified person. That the decision to terminate her having been made by an unqualified person, the same stood illegal null and void. She further submitted that since it had not been three years from when the respondent terminated her services, it was still within reasonable time for her to be brought back in her position held prior to the illegal and irregular termination. It was the claimant's further prayer that if this prayer for reinstatement is allowed, she be paid her salary from the date of termination



- to date. She relied on the court's observations in the case of *Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers v Timber Treatment International Limited* [2013] eKLR that in making its findings it considered that the employee is entitled to be paid for the period they are kept away from work due to unlawful and unfair suspension or termination and to at least partial reinstatement, and therefore to the total of the salaries due during that period.
15. In the alternative, the claimant submitted that as the termination of her employment was unfair, she should be paid her dues as prayed for in her amended statement of claim. The claimant submitted that for notice pay, clause 25 of her letter of appointment provided that the contract may be terminated by either giving three (3) months prior notice or on payment of an equivalent of three (3) months' basic salary and house allowance only in lieu of such notice. That she was entitled to three months' basic salary and house allowance *in lieu* of notice since the respondent none of the said provisions on termination notice. On the prayer for gratuity, the claimant submitted that having asserted that she had legitimate expectation that her employment would be extended until she attained her retirement age, she was entitled to gratuity pay for the time she would have worked until retirement.
 16. Further, the claimant submitted that the limited maximum compensation at 12 months' salary was adequate to mitigate the loss and damage she had undergone pursuant to the unlawful and unfair action of the respondent. She noted that she was part of the respondent's Senior Management in charge of HR and Administration and that for her to have been casually terminated was not only demeaning to her profession but also to her leadership. The claimant thus asked this court, in exercise of its discretion, to find that she is entitled to maximum compensation for unfair termination. She relied on the case of *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR in which the court in awarding 12 months' gross salary as compensation, considered the loss suffered by the respondent during the long criminal trial, the appellant's blatant disregard for fair labour practices and the impracticality of reinstatement. It was the claimant's submission that this court should also find that she is entitled salary for the remainder of the period of six years of service, on account of legitimate expectation created by the respondent. Equally, that the respondent should also issue her with a certificate of service.
 17. The respondent submitted that the letter dated September 13, 2021 informed the claimant of the decision not to renew her contract as requested by her and that it did not terminate any employment contract as the three months extension was expiring on September 30, 2021. That the claimant also testified in court that the respondent never served her with any dismissal letter, meaning it did not terminate her contract. It was the respondent's submission that the claimant's employment contract having been a fixed term contract, it was only binding for the three-years term stated in the agreement and did not carry rights, obligations or expectations beyond the date of expiry. That renewal of the fixed term contract was thus not automatic but at the discretion of the respondent, and the decision not to renew the contract should therefore not have come as a shock to the claimant.
 18. The respondent adopted the decision of the in *Samuel Chacha Mwita v Kenya Medical Research Institute* [2014] eKLR in submitting that a fixed term contract expires naturally on expiry date, and that termination thereof will not necessarily constitute dismissal. It further submitted that automatic renewal would undermine the very purpose of the fixed term contract and revert parties to indeterminate contract of employment, as stated in the case of *Margaret A Ochieng v National Water Conservation & Pipeline Corporation* [2014] eKLR. Furthermore, that a fixed term contract has its own in-built termination notice as the date when the contract expires is known to the parties from the very inception.
 19. It was the respondent's submission that contrary to the claimant's contention, no legitimate expectation would have arisen in the circumstances considering that the claimant knew her contract was expiring in June 2021. That the claimant's request for renewal dated December 24, 2020 had an



equal chance of approval or decline by the board and that the response letter dated June 30, 2021 clearly stated the contract was extended for 3 months to allow processing of renewal application. Moreover, the letter dated September 13, 2021 notified the claimant of the intention not to renew her employment contract. According to the respondent, the claimant did not establish grounds for legitimate expectation as was highlighted in the case of *George Onyango v The Board of Directors of Numerical Machining Limited & others* [2014] eKLR. It further relied on the decision in the case of *Teresa Carlo Omondi v Transparency International-Kenya* [2017] eKLR in which the court held that the burden of proof of legitimate expectation is on the employee and that the employee must demonstrate some rational and objective reason for her expectation.

20. The respondent submitted that having found that the claimant's contract ended by effluxion of time and was not terminated, the claim for unfair termination could not therefore be sustained. That the claim for three months' notice pay was also not sustainable as it was not provided for in the letter of appointment and there was no dismissal in this case to warrant issuance of notices. That the claimant is not entitled to gratuity pay having confirmed during hearing that she was paid all her gratuity up to the date her contract ended on September 30, 2021. That the claimant was not entitled to a salary for services not rendered and that neither was she entitled to gratuity and leave pay for a period she was not in the employ of the respondent. The respondent further submitted that the claimant had not demonstrated sufficient grounds to warrant a reinstatement. That in any case, the claimant testified during hearing that she was working elsewhere which means a reinstatement would not work even if the court found it as a viable award.
21. The claimant had received a contract renewal which was later rescinded by the board of the respondent without proper basis or reason in September 2021. This was despite the claimant having scored 'very good' in the performance appraisal upon which the renewal was to be premised. The claimant seeks *inter alia* for gratuity for the contracts she would have served as well as the salaries for the period. These are not capable of being granted as they are premised on service which has not and perhaps cannot be rendered to the respondent.
22. The evidence led before the court demonstrates clearly that the respondent's board fell into a trap that some state corporations are increasingly falling into where contract renewals are treated like a casual affair. There is scant regard to the requirements of the law and often renewals are cancelled wily nilly by people who have no clue about good governance or merit considerations. The claimant was by all means supposed to continued sitting at the respondent in her expanded role as Deputy Director – Human Resource & Administration. The claimant had expectations which were not only legitimate but which had crystallized vide the letter of June 30, 2021 extending her contract for 3 years. The claimant had obtained alternative engagement rendering the reinstatement sought inapplicable. She thus shall not be reinstated. the claimant is properly aggrieved as regards the execution of her contract termination and the following are what the court established are available as remedies for the breaches the respondent committed in breaking her contract without cause or reason:-
 - a. A declaration that the respondent board's decision to terminate the claimant's contract of employment on September 13, 2021 is unfair, unprocedural and against the law governing fair labour practices;
 - b. Three-month's salary *in lieu* of notice – Kshs 644,875/- x 3 months = 1,934,625/-
 - c. Twelve month's salary as compensation for the unfair and unprocedural termination of contract – Kshs 644,875/- x 12 months = Kshs 7,738,500/-



- d. Certificate of service within 24 hours of the judgment in compliance with section 51 of the *Employment Act* failing which the respondent will pay the claimant Kshs 10,000/- per day for the breach.
- e. Interest on the sums in (b), (c) above at court rates from the date of judgment till payment in full.
- f. Interest on the sum in (d) above at commercial rates of interest from the date of breach till compliance with the order of the court.
- g. Costs of the suit.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY 2023

NZIOKI WA MAKAU

JUDGE

