



**Mbataru v Plan International Inc (Cause 509 of 2019)
[2023] KEELRC 2163 (KLR) (19 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2163 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 509 OF 2019
NZIOKI WA MAKAU, J
SEPTEMBER 19, 2023**

BETWEEN

CATHERINE KARIMI MBATARU CLAIMANT

AND

PLAN INTERNATIONAL INC RESPONDENT

JUDGMENT

1. The Claimant instituted this claim against the Respondent, seeking damages for discrimination and compensation for loss of employment. It was the Claimant's averment that the Respondent employed her as a Typist on 9th September 1996, on a fixed term for a ten-month contract until 30th June 1997. That upon evaluation of her performance on 1st July 1997, the Respondent confirmed her as a permanent employee and she was retained at Grade C4 and Level I. She stated that she worked as a Typist until the year 2000 when her job description changed to the title of a Data Entry Clerk. That she got several promotions and salary increments and was promoted to a Sponsorship Facilitator in July 2005. That she thereafter rose through the ranks to become a Community Development Facilitator and that on 1st March 2011, she was re-designated in the same capacity to Machakos still as a permanent employee.
2. The Claimant averred that without any explanation whatsoever, she received a letter of appointment from the Respondent on 21st July 2015, indicating that she was to be on fixed-term contract as the Respondent's Community Development Facilitator in Machakos. That the said fixed-term contract was to run from 1st August 2015 to 31st July 2018. The Claimant questioned the reason for the fixed-term contract because she was a permanent employee and was informed that the job description for her position was not permanent but that she would be retained after the end of the contract. That with this confirmation, she went on with her work and despite her disability, the Respondent did not give her a motor vehicle to enable her travel to the field and she had to use a motorcycle at her own expense. She further averred that on 20th June 2018, she received an email on the subject of realigning of



the Sponsorship Department advising her to reapply for the position of Sponsorship Officer through an internal advertisement. According to the Claimant, the said position was basically the same as the one she had at the time. She thereafter received a Contract Addendum on 5th July 2018, to extend her contract to 30th September 2018 and on 13th August 2018 was invited to an interview, which she attended on 23rd August 2018. Shockingly, she received a call on 11th September 2018 informing her that she had not qualified for the job and that she would not be retained after the end of 30th September 2018. That she was also later surprised to see an advertisement on a local daily newspaper for the said position that she had held prior to the termination. It was the Claimant's averment that on 20th September 2018, she received a letter from the Respondent's HR indicating that the Respondent was ending her contract and was informed that she would not be re-designated as was the norm for a permanent employee. She contended that the Respondent ended her permanent employment without any notice and that her request for a written explanation was never replied to.

3. The Claimant's position was that she never relinquished her permanent employment status and that once she had been confirmed in permanent employment, the Respondent had no right to unilaterally terminate her employment to her prejudice. She averred that she was subjected to contractual terms without her knowledge and consent and that there were no allegations of her inability to discharge her duties. That being a person of visual disability, the Respondent subjected her to harsh employment conditions throughout the period of her employment without any reimbursement and that such acts of discrimination are a gross violation of Article 54 of *the Constitution* of Kenya. She further averred that at no time during her employment with the Respondent was she subjected to disciplinary proceedings and/or been served with a warning letter regarding her performance. That the Respondent subjected her to unfair labour practice and discrimination by unfairly ending her contract and hiring another person for the same services she performed. That as a result, she has suffered unfair loss of employment and her professional career greatly damaged and diminished and she thus seeks compensation, costs of the suit and interest at commercial rates of 20% from 1st October 2018.
4. The Respondent filed its Reply to the Memorandum of Claim dated 22nd October 2019 admitting to have initially employed the Claimant as a permanent employee. It averred that it incorporated a new Human Resource Policy that required all employees of a permanent nature to convert to contract employees. That the same was effected pursuant to extensive consultation and consent obtained from the employees without undue influence. That before the said changes were effected, the Claimant's dues were fully settled in the sum of Kshs. 2,012,177.08. It was the Respondent's averment that the Claimant willingly accepted the new policies on 7th August 2015 together with her fixed term contract of employment. It asserted that the Claimant and all other Sponsorship Officers were invited to apply for the role following the re-alignment of the role and because their contracts were ending. That the Claimant failed to rank upon the recommended personnel upon being interviewed and was thus informed that her contract would neither be renewed nor extended. The Respondent also denied any allegations of discrimination and stated that the Claimant's loss of employment was as a consequence of expiry of her contract and not as a result of direct termination. That any claim for compensation is thus unfounded and that the Claimant's claim should be dismissed with costs.

Evidence

5. The Claimant testified that she worked for the Respondent for 22 years and had a clean record. She notified the Court that she had resigned in 2015 out of frustration in the course of her work as she had been required to move around the community over 30 km and had used her own means, with her salary having a lag of Kshs. 15,000/- but that her Program Manager however asked her to revoke the resignation. In cross-examination, the Claimant confirmed that the issue leading to her previous resignation was not documented and that the Respondent had accepted to reinstate her after she



rescinded the resignation. She also confirmed that she signed receipt of the Respondent's new HR Manual after withdrawing her resignation and asserted that in 2014 she received Kshs. 798,000/- as gratuity. Further, that she never wrote any letter objecting to the fixed-term contract. She stated that she was registered as PWD on 1st September 2014 and was exempted from paying taxes from that time, even though she had not filed the exemption certificate in court. She also had not brought before court any claim forms for travel expenses she alleged she incurred while working in the field and asserted that the Respondent had all these documents. According to the Claimant, her inability to ride a motorcycle is what led to her being laid off.

6. The Respondent's witness, Mrs. Grace Lintari, testified that all the Respondent's employees were converted to contract because of reduction in funding and that all staff including the Claimant were made aware. She stated under cross-examination that the employees would be provided with a vehicle from the office to the place they were meant to work and that the Claimant had intimated her inability to drive a motor vehicle. She clarified that the qualification for the interview that the Claimant attended was not only based on having a degree and that it included answering the questions properly. She further stated that it is not possible to discriminate in the Respondent organisation and denied that they declined to engage her on account to her failing to ride a motorcycle, clarifying that it was on account of her performance.

Claimant's Submission

7. The Claimant submitted that the issues for determination are whether she is a person living with disability (PWD); whether she was discriminated against by the Respondent; whether she was wrongfully and unlawfully terminated; and whether she is entitled to the reliefs sought. It was the Claimant's submission that the Respondent deliberately withheld her pay slips because it knew that the same proved she was exempted to pay taxes on her income salary based on her disability. That she had testified in court that the final dues issued to her were subject to taxation as the only thing that she was exempted to pay tax from was her income salary, as provided under sections 35 and 36 of the *Persons with Disabilities Act* No. 14 of 2003. That the Respondent could not therefore claim to be unaware of her disability that is not only evident from her physical appearance, but was also effectively communicated to them by the Claimant.
8. The Claimant submitted that the purported results of the interview (page 92 of the Respondent's Bundle) raise eyebrows as to the criteria followed when selecting successful candidates for the interview since the same on the face of it is not clear. That the only constant thing regarding the unsuccessful candidates on the list, including the Claimant, was that the four of them could not ride a motorcycle. That having been familiar with the duties required of her and performed them well even without being able to ride a motorcycle, the Respondent terminating her employment was thus intended to discriminate her. She further submitted that to demonstrate that the Respondent discriminated against her, it did not facilitate her transportation to work unlike other employees who were issued with motorcycles, or had designated drivers. That whereas the Respondent's witness contended in her testimony that the Claimant's expenses were reimbursed, they did not produce any documentary evidence to support the same and in any event, she could not document her transportation expenses because it is public knowledge that the drivers of the motorcycles that she used do not issue payment receipts.
9. It was the Claimant's further submission that the actions of the Respondent are a gross violation of Articles 27 and 54 of *the Constitution* of Kenya as read with sections 12 to 15 of *Persons with Disabilities Act* No. 14 of 2003 and section 5 of the *Employment Act*, 2007 on non-discrimination of an employee by the employer and inclusivity of PWD in employment. She relied on the case of Lucy Chepkemoi



v Sotik Tea Company Limited [2022] eKLR in which the Court found that the respondent had discriminated against the petitioner and had terminated her employment contract because of her visual impairment. Further, that it was a term of the employment and a requirement in law that the Respondent would maintain a conducive work environment free from discriminatory practices and prejudices against the Claimant. That she was once forced to resign from work as demonstrated at page 85 of the Respondent's Bundle of Documents, and the Respondent assuring her that they would look into her challenges by improving her working conditions especially regarding her transportation when discharging her duties. It was the Claimant's submission that based on the foregoing, the Respondent discriminated directly against her by terminating her employment without any valid and/or lawful justification.

10. As regards whether she was wrongfully and unlawfully terminated from her employment, the Claimant relied on the case of Walter Ogal Anuro v Teachers Service Commission [2013] eKLR where the Court held that substantive justification is the establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination. That under section 47(5) of the *Employment Act*, the burden of proving unfair termination lies with the employee and is discharged once a prima facie case is established that, the termination did not fall within the four corners of the legal threshold set out by section 45 of the Act. She cited the case of Josephine M. Ndungu & others v Plan International Inc [2019] eKLR). The Claimant submitted that sections 43(1) and 47(5) of the Act places the burden upon the employer to prove the alleged reasons for termination of the grievants' employment, and justify the grounds for the termination of the employment respectively. It was the Claimant's submission that the Respondent had not provided any substantive justification nor was there procedural fairness for termination of her employment and that this Court ought to find as such. That it was evident that the Respondent wrongfully, unlawfully and unfairly terminated her employment without any valid reason. Further, that the Respondent failed in its statutory duty to protect her from hostile work environment and unfair labour practices.
11. The Claimant submitted that she had suffered loss and damages because of termination of her employment and her professional career greatly damaged and diminished having served the Respondent for 22 years. She relied on the Lucy Chepkemoi v Sotik Tea Company Limited case (supra) where after the Court found the petitioner to have been discriminated, it awarded her as follows:

“Reliefs

56. In view of the finding that the termination of the petitioner's employment on medical grounds was for no valid and fair reason, I make declaration that the termination was unfair and discriminatory. I further declare that the termination contravened Article 27, 41 and 47 of *the Constitution* and also section 5 of the *Employment Act* and section 15 of the PWD Act.
57. In view of the foregoing matters, I also find that the petitioner is entitled to two months' salary in lieu of notice and 10 months gross salary as compensation for the unfair termination. In making the above award, I have considered that 3 years have lapsed since the termination and therefore under section 12 of the *Employment and Labour relations Court Act*, the court cannot reinstate an employee after 3 years from the date of separation. I have also considered that the petitioner worked for the respondent for over ten years and she did not cause her termination by misconduct.



58. The petitioner did not plead the salary she was drawing at the time of the termination nor was it mentioned in the evidence or submissions. The petitioner only pleaded the starting salary being Kshs. 13000 which I will use to assess the damages awarded above.
59. I further award the petitioner Kshs 2,000,000 as general damages for discrimination guided by the Supreme Court decision in Simon Gitau Gichuru case supra, where the court reduced an award of Kshs 5,000,000 to Kshs 2,000,000 in a Judgment delivered on 22/10/2021.”
12. She further cited the case of Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR in which the Court held that in determining whether to make an award of compensation, the court is to consider the 13 factors set out under section 49(4) of the *Employment Act*. That in the case of Alfred Muthomi & 2 others v National Bank of Kenya Limited [2018] eKLR, the Court held that in granting 12 months' salary compensation for unfair termination, it considered the claimants' long service. The Claimant submitted that she thus claims damages arising from the discriminatory practices meted against her by the Respondent and that she was as such entitled to the reliefs sought in her Memorandum of Claim dated 6th August 2019.

Respondent's Submissions

13. According to the Respondent, the issues for determination are whether the Claimant has established a case for discrimination by the Respondent; whether the Claimant was unfairly and unlawfully terminated; and whether the Claimant is entitled to the reliefs sought.
- On the issue of discrimination, the Respondent submitted that the Supreme Court in the case of Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] eKLR had an occasion to lay emphasis on the burden of proof in cases of discrimination; applying section 108 of the *Evidence Act* in requiring the claimant to prove his claim in a matter involving discrimination, "as the person who would fail if no evidence at all were given on either side". The Respondent acknowledged having denied that the Claimant is a PWD, noting that her card was issued post-employment and it also paid taxes on her salary during her tenure of employment. It submitted that the Claimant did not disclose to it such status at the time of her employment and that if indeed she was exempted from payment of income taxes, her final dues would have been exempted from taxes but which was not the case. The Respondent referred to Respondent's Exh. 3, 4 and 10. The Respondent submitted that the Claimant having admitted that she does have any documentary evidence such as the Tax Exemption Certificate, a certificate that is still accessible from the KRA or any other document, she had failed to discharge the burden of proof that she was a PWD and cannot shift this burden to the Respondent.
14. The Respondent further averred that the Claimant had also failed to table any evidence by way of a medical report from a medical practitioner indicating that due to her status as a PWD (if any), she cannot ride a motorcycle and is prohibited from learning how to ride one. That had such a report been provided to the Respondent prior to the interview, this question would not have been necessary as a qualifier to renew the Claimant's contract. It asked this Court to find and conclude that there was no discrimination as six (6) contenders including the Claimant failed the interview and she was thus not singled out for termination vis-à-vis another employee who could not ride a motorcycle. In addition, the Claimant had failed to qualify the sums she alleged were never refunded to her for expenses incurred in the execution of her official duties. It was the Respondent's submission that the Claimant bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden



to establish the Respondent's discriminatory treatment and since she had not met this threshold, the same had not been established.

15. The Respondent submitted that the Claimant raised no objection when she was invited to exercise the option of changing the terms of her employment contract vide the letter dated 21st July 2015 and the letter of acknowledgement dated 7th August 2015. That nothing stopped her from invoking her right under section 10(5) of the Employment Act and as such, there was no unilateral conversion of the contract as alleged. In addition, the Claimant had neither adduced any evidence that the Respondent misrepresented to her that her employment was still permanent nor did she produce any evidence to show that she was coerced to execute the agreement. That the Claimant in fact enjoyed the better perks offered in the contract for three years and thereafter voluntarily accepted an offer to an extension of the contract until it expired in September 2018. That she is thus estopped from claiming that the conversion of her employment terms was unfair and or unlawful and that this Court ought to find that the conversion of the Claimant's terms of service was regular and she voluntarily accepted the same.
16. The Respondent relied on the case of Fedelix Mwendwa Muli v Bamburi Cement Limited [2018] eKLR in which the Court held that the consent of the employee is signified under section 9(3) of the Employment Act by the employee signing their names or imprinting an impression of their thumb in the presence of a person other than their employer. It was the Respondent's further submission that page 9 of the HR Manual provided that,

“ All Plan International Kenya contracts are offered as Fixed Term Contracts. The contracts of an individual may be renewed subject to performance and funding considerations and solely at the discretion of Plain International Kenya.”
17. It submitted that from the above, there was no indication that the Claimant's contract would be renewed automatically and it all depended on the Respondent's discretion to renew the contract as per clause 12.11.2 of the HR Manual exhibited at page 77 of the Respondent's bundle. That therefore, the Claimant's expectation that the contract would be renewed automatically has no basis as there was no express, clear and unambiguous promise given by the Respondent. It cited the case of Margaret A. Ochieng v National Water Conservation & Pipeline Corporation [2014] eKLR. The Respondent submitted that the Claimant also knew that termination of her contract would be upon the lapse of the three years in 2018 per the case of Samuel Owiti Obage v Kenya Revenue Authority [2020] eKLR. Lastly, the Respondent submitted that having demonstrated that the Claimant was not terminated from employment but that her contract lapsed, she is not entitled to any compensation for loss of employment or any sum thereof as claimed. That Claimant is also not entitled to any damages for discrimination and unfair labour practices as the Respondent had demonstrated it did not discriminate her and her rights were not infringed as alleged. It submitted that since costs follow the event, the Claim herein fails with costs to the Respondent.
18. The Claimant asserts discrimination and cites the provisions of Articles 27 and 54 of the Constitution of Kenya as read with sections 12 to 15 of Persons with Disabilities Act No. 14 of 2003 and section 5 of the Employment Act, 2007 on non-discrimination of an employee by the employer and inclusivity of PWD in employment. The provision on non-discrimination required demonstration by the Claimant of different treatment by the employer. The Claimant was among 6 other persons who did not get a contract renewal. She claims discrimination and did not show how she was singled out among the staff of the Respondent. The evidence she adduced in support of her position that she was a person living with disabilities was a card issued after she left employment. She did not produce any card indicating she was a person living with disability during the tenure of her employment. The card produced in evidence was issued in May 2019, the year after she left the Respondent's employment. Her salary was



paid less statutory deductions including income tax. People living with disabilities are exempt from the tax and the Claimant would have been excluded had she been registered with the Ministry as such. She received her terminal dues which also had taxes imposed. This in my considered opinion showed that during her service with the Respondent, the Claimant did not reveal she was a person to whom the provisions of sections 12 to 15 of the *Persons with Disabilities Act*, 2003 applies.

19. Having failed to prove discrimination, the rest of her claim hinged on unfair termination. Though the lynch pin of the claim was discrimination, should the court find in her favour on unfair termination, she would be entitled to compensation.
20. The Claimant served her contract to the end, was paid after the conclusion of the contract which was not renewed. The terms of the contract were finite and having not been singled out for termination did not prove any of the elements of unfair dismissal. It was ably demonstrated that the Claimant was not terminated from employment but rather, her contract lapsed. As such, the principles laid out in the case of *Walter Ogal Anuro v Teachers Service Commission* (supra) were thus not triggered. Clearly, the Claimant did not get dismissed and therefore had no claim to unfair dismissal whatsoever. It would follow therefore that she is not entitled to any compensation for loss of employment or any sum thereof at all. The Claimant is also not entitled to any damages for discrimination and unfair labour practices as the Respondent had demonstrated in its pleadings and testimony that it did not discriminate against her and her rights were not infringed as alleged. It was shown that the Claimant was among many officers of the Respondent who had placed their applications for consideration. Evidence tendered showed that six (6) contenders including the Claimant failed the interview. She therefore was not singled out. The claim having failed, the Court ought to have awarded costs against the Claimant. However, when awarding costs, the Court has to balance the interests of the parties and their relative muscle. Having taken into account the circumstances the Claimant faces as a result of the effluxion of her contract, the appropriate order would be to order that each party bears their own costs for the suit. Suit is dismissed accordingly with an order that each party bears their own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF SEPTEMBER 2023.

NZIOKI WA MAKAU

JUDGE

