



REPUBLIC OF KENYA



KENYA LAW
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**Nyauntu v Council of Governors (Cause 2146 of 2017)
[2023] KEELRC 3113 (KLR) (27 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3113 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2146 OF 2017
JK GAKERI, J
NOVEMBER 27, 2023**

BETWEEN

ALBERT NYAUNTU CLAIMANT

AND

COUNCIL OF GOVERNORS RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim filed on 24th October, 2017 alleging unlawful and unfair termination of employment, payment for unexpired contract and terminal dues.
2. The claim was subsequently amended on 28th September, 2018 and filed on even date to replace the Chief Executive Officer as the Respondent with Council of Governors.
3. The Claimant prays for Judgement against the Respondent for;
 - i. Unexpired contract 2 years.
 - ii. 9 leave days.
 - iii. 3 days salary in 1st – 3rd July, 2017.
 - iv. Gratuity for 2 years.
 - v. Leave allowance.
 - vi. 12 months compensation.
 - vii. Damages for breach of contract.
 - viii. Costs of the suit.
 - ix. Certificate of service.



- x. Any other remedy the court may deem fit to grant.
4. It is the Claimant's case that he was employed by the Respondent as Head of Human Resource on 16th March, 2016 for a term of 2 months but was extended on 17th May, 2016 for one month and subsequently on 17th June, 2016 for one year.
5. Finally, on 1st July, 2016, the Claimant signed a 3 year contract expiring on 30th June, 2019.
6. That his gross salary was Kshs.292,500/= per month.
7. The Claimant avers that on 16th January, 2017, he was issued with a notice to show cause and responded on 17th January, 2017 and another on 20th January, 2017 and responded on 24th January, 2017.
8. That he proceeded on annual leave on 19th May, 2017 due to end on 9th June, 2017 but was recalled on 31st May, 2017 for performance appraisal and reported back on 13th June, 2017 when he was issued with a termination letter dated 2nd June, 2017 on the ground that the Respondent had no funds.
9. It is his case that the termination was unprocedural and the Respondent recruited staff for various positions.
10. That the Respondent subsequently advertised the position of Head of Human Resource and another 2 positions and applications were to be made online by 31st July, 2017 and the Claimant submitted but was not invited for interview and an appointment was made.

Respondent's case

11. The Respondent admits that the Claimant was its employee as claimed at the salary mentioned and the contract of employment was renewable subject to availability of funds and performance.
12. That the notices to show cause were necessitated by the manner in which the Claimant was dispensing his duties and the Claimant was aware of the importance of performance review.
13. It is the Respondent's case that the contract of employment was for a fixed period and was not renewable.
14. That the contractual term was for 3 years and the claim for the unexpired term was untenable and he forfeited leave days.
15. That the first 2 days of July 2017 fell on a weekend and gratuity was paid as was leave allowance.
16. The Respondent prays for dismissal of the claimant's suit.

Claimant's evidence

17. On cross-examination, the Claimant testified that his terms of appointment provided that the contract was renewable annually subject to performance and availability of funds.
18. The witness confirmed that he was aware of comments by the supervisors that he had integrity issues which he did not contest.
19. That according to him, since he had a 3-year contract renewable annually, the non-renewal was a termination of employment and the letter was given to him when he reported from leave though he had left his contact.
20. That he was aware that the Respondent's financial year ends on 30th June.



21. The witness confirmed his position was advertised sometime in July 2017.
22. It was also his testimony that he had 9 days of leave pending and was paid gratuity and the last month of employment.
23. On re-examination, the witness confirmed that the Respondent had not attached any evidence of unavailability of funds.

Respondent's evidence

24. RWI, Caroline Awuor confirmed, on cross-examination that she joined the Respondent in October 2017 after the Claimant had left and confirmed that the Respondent advertised the Claimant's position in July 2017 and applications had to be submitted by 31st July, 2017 and the letters of appointment dated 1st July, 2016 were from the Respondent.
25. The witness further confirmed that while one contract provided that the annual renewal was subject to performance only, the other provided that it was subject to performance and availability of funds and the Claimant was appraised on 31st May, 2017.
26. RWI further confirmed that the Respondent received funds from the Exchequer for staff emoluments and she had no evidence to show that the Respondent had no funds.
27. The witness was unaware of how many employees were affected by the unavailability of funds. That the documents showed 4 were affected and she was the one who took over from the Claimant.
28. RWI also confirmed that the notice of non-renewal was dated 2nd June, 2017 while the date of receipt of applications was 31st July, 2017.
29. On re-examination, the witness testified that she joined in a different financial year and funds were received per year.
30. The witness was unable to explain why a 3 year contract was renewable annually but confirmed that the Respondent still offered one (1) year contracts or shorter.
31. Strangely, the witness testified that she did not see the Letter of Appointment on page 20 of the Claimant's bundle in the office, having already confirmed that it came from the Respondent.

Submissions

32. The witness confirmed that the Claimant's dues were paid in full including gratuity and leave allowance and a certificate of service was issued.
33. The Claimant's counsel submitted that based on the evidence, the Claimant had proved his case on a balance of probabilities for the following reasons;
 - i. The Respondent had failed to provide a valid reason(s) for terminating the Claimant's employment as it had no evidence of unavailability of funds.
 - ii. The Respondent's action show a well orchestrated scheme to replace the Claimant and led no evidence as to when funds were sourced.
 - iii. The Respondent failed to discharge its burden under Section 45 of the *Employment Act*, 2007.
34. Counsel urged that court to follow the decision in *Onesmus Kinyua Magoiya V Prudential Life Insurance Kenya* (2022) eKLR.



35. The Respondent's counsel isolated three issues for determination, namely;
 - i. Whether termination of the Claimant's employment was unfair.
 - ii. Whether the Claimant was discriminated.
 - iii. Whether the Claimant is entitled to the reliefs sought.
36. On the 1st issue, counsel submitted that the termination was not unfair as the Claimant had failed to discharge the burden imposed by Section 45(2) of the Employment Act, 2007.
37. According to counsel, the employment contract was renewable subject to performance and availability of resources.
38. Regrettably, counsel relied on only one of the letters produced by the Claimant.
39. It was submitted that the Claimant adduced no evidence of the scheme to remove him from office and the position was filled almost 4 months later in the new financial year.
40. On discrimination, counsel submitted that the Claimant did not avail the particulars of discrimination.
41. Counsel argued that due to limited resources, the Respondent gave its employees short term contracts, that one Joseph Kung'u was to be disengaged in 2023, yet the document cited was prepared in 2017.
42. As regards the reliefs sought, counsel submitted that the Claimant was paid Kshs.866,113/= as gratuity and leave allowance at Kshs.6,000/=.
43. Counsel further submitted that compensation for the unexpired period was unsustainable as the termination was not pre-mature and relied on the sentiments of the court in Margaret A. Ochieng V National Water Conservation & Pipeline Corporation to buttress his submission.

Determination

44. The issues for determination are;
 - i. Whether the Claimant's contract of employment lapsed or it was unfairly terminated by the Respondent.
 - ii. Whether the Claimant is entitled to the reliefs sought.
45. As regards the 1st issue, counsels adopted opposing positions with the Respondent effectively urging that the contract lapsed as it was not renewed. The Claimant's counsel insists that this was an unfair termination of employment by the Respondent.
46. It is common ground that by two similar Letters of Appointment dated 1st July, 2016, the Respondent offered and the Claimant accepted employment as the Respondent's Head of Human Resource effective 1st July, 2016 under a 3 year contract, "renewable annually subject to performance and availability of funds".
47. The second letter of Appointment had a similar clause worded as follows "renewable annually subject to performance."
48. It is unclear to the court why the Respondent issued two Letters of Appointment as both were duly signed by the Chief Executive Officer and the Claimant on the same day.
49. RWI confirmed on cross-examination that both originated from the Respondent but could not explain the differences on renewal.



50. Both contracts provided for a 6 months probationary period and were thereafter terminable by one (1) calendar month's notice by either party or pay in lieu of notice.
51. It is also common ground that the Respondent's Letter of non-renewal dated 2nd June, 2016 relied on the letter which subjected renewal to "performance and availability of funds" thereby ignoring the other of its letters. While applying one of the letters favours the Claimant as his performance was not wanting, the other was disadvantageous to him as the Respondent had an additional ground of non-renewal availability of funds and which the Respondent relied on. RWI adduced no evidence as to why one letter was preferred over the other.
52. Since the Respondent authored both letters, the court is persuaded that the most appropriate letter to use is the one least unfavourable to the employee.
53. As the Claimant's contract of employment was renewable subject to performance and the performance appraisal rated the Claimant as good, he had a reasonable expectation that it would be renewed since he met the only condition for renewal.
54. Significantly, there is sufficient judicial authority for the proposition that fixed term contracts of employment carry no rights or obligations upon expiry as the contracts terminates by effluxion of time and not even a notice is necessary.
55. The prescribed duration determines the employment relationship as held by the Court of Appeal in Registered Trustees of the *Presbyterian Church of East Africa & another V Ruth Gathoni Ngotbo* (2017) eKLR.
56. Other cases include *Trocaire V Catherine Wambui Karuno* (2018) eKLR, *Amatsi Water Services Co. Ltd V Francis Shire Chachi* (2018) eKLR, *Oshwal Academy (Nairobi) & another V Indu Vishwanath* (2015) eKLR where the Court of Appeal quoted with approval the holding of Rika J. in *Bernard Wanjobi Muriuki V Kirinyaga Water & Sanitation Co. Ltd & another* (2012) eKLR.
57. (See also *Keen Kleeners Ltd V Kenya Plantation and Agricultural Workers Union* (2021) KECA 352.)
58. In the instant case, although the 3 year contract was renewable annually, the Claimant had had previous short-term contracts renewed and his performance was not wanting. He had no reason not to anticipate a renewal.
59. For the foregoing reasons, the court is satisfied and finds that the Claimant's employment contract dated 1st July, 2017 did not terminate by effluxion of time.
60. Having found as above, was the contract of employment unfairly terminated by the Respondent?
61. The Claimant maintains that the Respondent had hatched an orchestrated scheme to terminate his employment for no reason.
62. From the records, it is evident that the Claimant had been issued with at least three (3) notices to show cause dated 16th and 17th and 20th January, 2017 and responded, but no further proceedings appear to have been taken.
63. From the records, and as confirmed by the Claimant and RWI, the Claimant was evaluated by his two supervisors on 31st May, 2017 having been recalled from leave.
64. Contrary to the Claimant's counsel submission, it was conducted too early, the court is not persuaded it was to the Claimant's disadvantage.



65. In any case, the Respondent required the information for purposes of renewal of the contract. It signified deliberate planning.
66. The immediate supervisor characterised the Claimant's performance as average which would generally pass as good.
67. The Respondent, however, did not rely on performance as the ground of non-renewal but relied on "unavailability of resources".
68. The letters provides no background to the challenge of resources likely to be experienced in the new financial year or the inadequate resource the Respondent had been grappling with.
69. RWI confirmed on cross-examination that she had no evidence to show that the Respondent had inadequate resources.
70. Documentary evidence of the Respondent's budget for the year 2016/2017 and that of 2017/2018 would have effortlessly shown that the Respondent had less to spend on personal emoluments in 2017/2018 financial year.
71. Similarly, evidence of the list of persons affected by the unavailability of funds in the financial year 2017/2018 would have rendered credence to the Respondent's assertion that it had no funds to retain the entire work force it had.
72. Puzzlingly, RWI could not even tell how many employees the Respondent had and how many were affected by the alleged unavailability of funds.
73. More intriguing is the fact that the Respondent advertised the Claimant's position in July 2017, less than 1¹/₂ months after the non-renewal of the Claimant's contract of employment and RWI was recruited and reported in October 2017, a fact the Respondent's counsel used to submit that by then funds may have been obtained.
74. The retort cannot avail the Respondent as the position was advertised in July 2017 and in fact the Claimant applied on 31st July, 2017 but was not shortlisted and only learnt of the recruitment after it had taken place.
75. The Respondent's counsel's submission that the advertisement and employment was done in a new financial year cannot avail the Respondent for the simple reason that resources available to bodies funded by the Exchequer are determined early in the previous financial year for purposes of planning and compliance with the law.
76. Government budgeting process is very well structured and no budgeting takes place in May or June. The Budge Statement for the Fiscal Year 2017/2018 was read on 30th March, 2017 under the theme "Creating Jobs, Delivering a Better Life for All Kenyans" by the then Cabinet Secretary for the National Treasury, Mr. Henry K. Rotich. This was necessitated by the impending General Election in August 2017. By this date, the Respondent was aware of the amount it would receive from the Exchequer for the financial year 2017/2018.
77. As adverted to elsewhere in this judgment, the absence of the Respondent's budget for 2016/2017 and 2017/2018 or any changes introduced by a supplementary budget, the Respondent failed to prove the alleged unavailability of resources.
78. Equally, the Respondent adduced no evidence to demonstrate how and when it secured resources between 2nd June and Mid-July 2017 to necessitate the filling of the position left by the Claimant.



79. The proximity of the non-renewal of the Claimant's contract and the advertisement of the position coupled with the non-availability of evidence of the Respondent's financial position would appear to suggest that the Respondent was looking for an opportunity to terminate the Claimant's employment.
80. Section 43(2) of the *Employment Act*, 2007 provides;
- “The reason or reasons for termination of a contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.”
81. As held in *Galgalo Jarso Jillo V Agricultural Finance Corporation* (2019) eKLR, the employer must demonstrate that it had a reasonable basis for the genuine believe that the ground exists to terminate the employee's employment.
82. And as held in *Kenya Revenue Authority V Reuwel Waitbaka Gitahi & 2 others* (2019) eKLR, the standard of proof is on a preponderance of probabilities, not beyond reasonable doubt.
83. Has the Respondent demonstrated that it had a reasonable ground not to renew the Claimant's contract of employment?
84. Based on the evidence on record, the court is satisfied and finds that the Respondent has failed to establish that it had a valid ground not to renew the Claimant's contract of employment and was thus an unfair termination within the meaning of Section 45 of the *Employment Act*, 2007.
85. For the foregoing reasons, it is the finding of this court that the Respondent has failed to prove on a balance of probabilities that it had a valid and fair reason to terminate the Claimant's employment and conducted the same in accordance with a fair procedure.

Reliefs

a. Payment of unexpired period of 2 years

86. The Claimant laid neither the factual nor the legal basis of this claim.
87. The Claimant did not serve and there was no guarantee that he would remain in employment for the 2 years.
88. This is a claim for anticipatory earnings which the Court of Appeal rejected in *Elizabeth Wakanyi Kibe V Telkom Kenya* (2014) eKLR and *D.K. Njagi Marete V Teachers Service Commission* (2020) eKLR.
- The prayer is dismissed.

b. 9 days leave

89. Evidence on record reveal that the Claimant proceeded on leave on 19th May, 2017 and resumed on 13th June, 2017 and had a balance of 9 days as the Leave Application Form shows.
90. The Respondent tendered no controverting evidence.
- The prayer is awarded.

c. Payment of 3 days salary for July 2017

91. Although the Respondent's counsel submitted that the days fell on a weekend, the Claimant was still an employee of the Respondent upto 2nd July, 2017 and is awarded salary for 2 days.



d. Gratuity for 2 years

92. The Claimant adduced no evidence of entitlement to gratuity and admitted on cross-examination that the same was paid by the Respondent, a fact confirmed by RWI.

The prayer is dismissed.

e. Leave allowance

93. The Claimant admitted on cross-examination that leave allowance was paid, a fact RWI confirmed.

94. More significantly, the Partial Mediation Settlement Agreement dated 17th September, 2019 show that leave allowance was paid.

The prayer is dismissed.

f. Maximum compensation

95. Having found that the non-renewal of the Claimant's contract of employment amounted to unfair termination of employment, the Claimant is entitled to the remedy under Section 49(1)(c) of the [Employment Act, 2007](#).

96. In determining the quantum of compensation, the court has taken into consideration the following;

- i. The Claimant had been an employee of the Respondent for about 1 year and 2 months, a fairly short time.
- ii. The Claimant did not appeal the Respondent's decision or indicate his wish to remain in the Respondent's employment other than the late application he made when the position of Head of Human Resource was advertised.
- iii. Although the Claimant's performance was rated average, the supervisor indicated that the Claimant had integrity issues raised by KASNEB, an allegation the Claimant did not controvert or even deny in court.

It is on this basis that the Chief Executive Officer declined to approve the appraisal and opted to terminate the Claimant's employment.

The Claimant thus substantially contributed to the termination of employment.

- iv. Relatedly, the Claimant had been issued with notices to show cause and responded but no further action appear to have been taken by the Respondent.

97. In the circumstances, the court is satisfied that the equivalent of two (2) months salary is fair.

g. Damages for breach of contract

98. The Claimant adduced no evidence of entitlement to this remedy.

99. Relatedly, the remedy is unavailable in contracts of employment.

The prayer is dismissed.

h. Certificate of service

100. The Claimant admitted that the Respondent issued the certificate of service pursuant to the partial mediation settlement.



The prayer is dismissed.

101. In the upshot, judgment is entered in favour of the Claimant against the Respondent in the following terms;
- a. 9 days leave.
 - b. Salary for 2 days in July 2017.
 - c. Equivalent of 2 months' salary.
 - d. Costs of this suit.
 - e. Interest at court rates from date of judgement till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27TH DAY OF NOVEMBER 2023

DR. JACOB GAKERI

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 15th March 2020 and subsequent directions of 21st 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.

DR. JACOB GAKERI

JUDGE

