



**Banking, Insurance and Finance Union (Kenya) v Access Bank (Kenya)  
PLC (Employment and Labour Relations Cause E763 of 2021)  
[2023] KEELRC 2981 (KLR) (15 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2981 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E763 OF 2021  
AN MWAURE, J  
NOVEMBER 15, 2023**

**BETWEEN**  
**BANKING, INSURANCE AND FINANCE UNION (KENYA) ..... CLAIMANT**  
**AND**  
**ACCESS BANK (KENYA) PLC ..... RESPONDENT**

**JUDGMENT**

1. The claimant and the respondent had a recognition agreement which was signed on 4<sup>th</sup> October 2001. They filed an amended memorandum of claim dated 21<sup>st</sup> December 2020 the latest one was on 18<sup>th</sup> August 2021.
2. The aggrieved employees were all unionisable employees.
3. The claimants aver that the grievant could not join the union for a long time as they had very short-term contracts and further they were not paid salaries and allowances as per the CBA agreement.
4. That claimant had to report a trade dispute and that is when grievants were allowed to join the union in April 2021.
5. There was an agreement that respondent increase their salaries to catch up with scales in the CBA.
6. They aver their termination was because of the agreement of enhancing their salary. The claimant says it is unfair labour practice to victimise an employee for joining union.
7. The grievants says their salaries should be renewed unless there is a very good reason not to do so. The said contracts had been renewed over the years.
8. The claimants makes prayers as in the amended memorandum of claim dated 6<sup>th</sup> December 2021 including compensation for unfair loss of employment and underemployment and costs.



### **Respondent's Case**

9. Memorandum of response was filed and was dated 13<sup>th</sup> June 2022.
10. He denies the averments by the claimant and states they never restrained respondents from forming the union.
11. They state the said claimants were employed on contracts and the terms of contract were fair and reasonable.
12. The respondent admits the claimants reported a trade dispute and the same were settled by consent dated 16<sup>th</sup> March 2021. They claim they did abide by the terms of the aforesaid consent.
13. Respondent avers the claimants expired by effluxion of time and not by termination. He says they never gave the claimant termination notices.
14. The respondent's prayers are that the claimants suit be dismissed with costs.

### **Claimant's Evidence In Court**

15. The claimant gave his testimony on 10<sup>th</sup> May 2023 and testified how she rose over the ranks as the respondent's employee from 2010 and was on 30<sup>th</sup> September 2021 given notices of termination.
16. She says there was a consent between the claimant union and the bank dated 16<sup>th</sup> March 2021 for salary increment and she admits she received increment for March 2021 but no more increment. She states she was entitled to two more increments.
17. The witness Caroline Jerono says her contracts were for one year. She says she raised a complaint with the manager about the one year contract and manager advised Human Resource office to confirm her on permanent basis. The witness says she was a member of the union for only five months.

### **Respondent's Evidence.**

18. The respondent witness was Jane Silamoi the respondent's human resource and business partner. The witness states that there was a letter that the claimants would be confirmed as permanent staff once their probationary period expired. She says the witness was given one-year contracts that were reviewed time and again. The witness says the claimant's contracts expired and they were not terminated.

### **Submissions**

19. Claimants submissions dated 26<sup>th</sup> May 2023 were considered by the court. The respondent's submissions dated 17<sup>th</sup> July 2023 were equally considered by the honourable court.

### **Analysis and Determination**

20. The issues for determination are twofold.
  - a. Were claimants underpaid their salaries as opposed to their colleagues who were union members and are they entitled to their prayers?
21. The claimants state they were underpaid their salaries compared to their counterparts. The court finds no payslips were produced to compare the different cadre of the employees of the respondent in order to make realistic comparables. The bundle of documents produced by the claimants to demonstrate the variance in payment of salary of the various scale as is per the collective bargaining agreement (CBA) signed between the claimant union and the respondent are not quite comparable across board. The



claimants in their evidence and witness statement state they only joined the union on 16<sup>th</sup> April 2021 and so received a salary increment on 28<sup>th</sup> June 2021. All the seven claimants were only union members for a few months from April 2021.

22. For that reason they were not unionisable members until then and their dues were as contained in their contracts which they accepted and worked under the same for between 4 years and above. They were all on short term contracts and their duration was stipulated in the contract and their salaries were also contained in their respective contracts.
23. It is trite law that parties are bound by their contracts. In the case of [\*Rahab Barasa & 4 Others vs Kenya Meat Commission\*](#) 2021 eKLR the court stated:

“ A fixed term contract is a lawful and legitimate mode of employment pursuant to section 12(3)(c) of [\*employment act\*](#) 2007 where the employment is not intended to be for an indefinite period”.
24. Unfortunately, the claimants were at all material times aware they were on fixed terms contracts unlike their colleagues. They were not coerced to work for the respondent on such terms and so the court would be hard put to find they were discriminated as against other employees.
25. Section 109 of the [\*Evidence Act\*](#) provide that “he who pleads a fact must prove.” The claimants did not prove they compared themselves with others on their category and found they were unfairly treated. If their comparables were permanent unionisable members their comparable were with the wrong people. The court does not find there is proof of discrimination.
26. As for the issue of the consent signed with the respondent and the union that was applicable when they joined the Union. It was also right that the respondent enhances their salaries as per that consent dated 16<sup>th</sup> March 2021. Then by April 2021 the seven claimants became members of the union.
27. The court therefore has found that the claimants salaries were enhanced and were to be paid in three instalments if they continued in their employment. They were paid the just enhanced instalment in 2021 and then their contracts expired by September 2021 and so could not be entitled to the enhanced increment for the other two years when they were not in employment.
28. The claimants demand to be paid the other two instalments as per the referred consent. The same would not be justified to be paid to employees whose contracts had already expired. The claim for the payment of the increment was to be based on the salary and since the grievant’s contracts expired then the same is not justified and is not awardable.
29. In conclusion the court finds the following claimants did not prove their claim of underpayment and unlawful termination for the reason given hereinbefore.
  1. Mercy Jeruto,
  2. Vane Omweri,
  3. Edwin Rono,
  4. Michael Kibet,
  5. Kiven Kipyegon and
  6. Lydia Jerimo Kiptanui.



30. As for Caroline Jerono even though she was on fixed contracts like the other six the respondent had given her legitimate expectation that she would be employed on permanent basis. To give example to the above averment on 3<sup>rd</sup> September 2010 she got a letter stating she had performed her probation satisfactory and was confirmed on contractual basis for the staff of the bank with effect from 4<sup>th</sup> September 2010.
31. On November 2011 her line manager Mr Patrick Muturi recommended she be employed on permanent term. On 30<sup>th</sup> June 2021 she received a letter purporting to offer her fresh terms but the court is not privy to those fresh terms.
32. Then on 3<sup>rd</sup> September 2021 she received a letter informing her that her contract would expire by 30<sup>th</sup> September 2021. Of all the claimants Caroline Cherono had legitimate expectation that she would be employed on permanent terms. In the court of appeal decision *Keen Kleener Limited vs Kenya Plantation and Agricultural Workers Union* (20210 eKLR 352 the court stated:

there is legitimate expectation where the employer by representation or past practice has aroused an expectation in the employee that an expiring contract would be renewed”.
33. Normally as in the case Civil Appeal 18 of 2018 *Transparency International Kenya vs Teresa Carlo Omondi* (2023) it was held that a fixed term contract does not create a legitimate expectation. Further the non renewal for a fixed contract of employment does not amount to unfair termination of employment warranting compensation.”
34. This court is always very conscious in applying the doctrine of legitimate expectation in fixed term contracts. The court is clear the other listed claimants had closed fixed term contracts and cannot be said to have been unfairly terminated.
35. But with due respect the respondent treated Caroline Cherono differently and literally promised her a job on permanent terms. It was unfair labour practice to only give her a letter of non-renewal a few weeks before expiration of the contract despite the promises.
36. On that I will order that Caroline Cherono should be compensated for unfair termination.
37. She is awarded six months equivalent of her salary at termination which amounts to kshs 38,258.83x6= Kshs 229,552.98/- this amount will attract interest from date of judgment till full payment.
38. Claimant Caroline Cherono will receive costs of the suit.
39. Each of the other claimants will meet their costs of the case and respondent will also meet costs of his suit.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 15<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**ANNA NGIBUINI 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 [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.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

