



Ngari v Nairobi City County (Employment and Labour Relations Cause 402 of 2017) [2023] KEELRC 2792 (KLR) (3 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2792 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 402 OF 2017
AN MWAURE, J
NOVEMBER 3, 2023**

BETWEEN

MICHAEL GICHUHI NGARI CLAIMANT

AND

NAIROBI CITY COUNTY RESPONDENT

JUDGMENT

1. The Claimant filed an amended memorandum of claim dated 6th December 2021.

Claimant's Case

2. The Claimant avers that vide a letter of employment dated 17/03/2014, he was appointed by the Respondent as a Chief Officer in charge of Water, Energy and Natural Resources for a period of 3 years to take effect from 01/03/2014.
3. The Claimant avers that in January 2016, the Governor reorganised the Nairobi City County Government and as a result he was transferred to Transport, Roads and Public Works.
4. The Claimant avers that for over 3 years he performed his duties effectively and efficiently and as a result he was appointed to several committees and given oral and written commendations acknowledging his exemplary performance.
5. The Claimant avers that on 11/11/2016 he recommended to the County Secretary the termination of contract of construction of the missing link road between five-star access road through Memon Road and Muhoho Extension Road and construction of Riara Lane and Uthiru Gardens Road.
6. The Claimant avers that he noticed the two contracts were awarded to the same person using different company names through collusive bidding and manipulation of the procurement process.



7. The Claimant further avers that in December 2016 he noticed irregularities in the restricted tender for supply of quarry chips in that the goods were supplied before the tender was awarded and the price was exorbitant and the claimant suspected there was no competitive bidding and raised these concerns with the county secretary and other relevant offices.
8. The Claimant avers that while conducting an exit meeting for technical and financial audit of the Kenya Roads Board Fund for road maintenance on 10/02/2017, he was aware of misappropriation of the respondent's conditional grant and this was raised with the county secretary.
9. The Claimant avers that while reviewing a tender awarded for supply of asphalt plant he discovered a conspiracy to defraud the Respondent Kshs 100,000,000 by fraudulently altering the tender schedules and prices from Kshs 50,303,027 to Kshs 150,303,027.
10. The Claimant avers that on 13/02/2017, he made a confidential written report to the County Secretary informing him of the irregularities and recommended the tender be cancelled.
11. The Claimant avers that on 20/02/2017 he received a notice of expiry of his employment contract dated 15/02/2017.
12. The Claimant avers that the decision not to renew his contract was malicious and arbitrary and the intention was to punish him for failing to abet the conspiracy to defraud the Respondent.

Respondent's Case

13. In opposition of the claim, the Respondent filed its response dated 14th February denying all averments in the amended memorandum of claim.
14. The Respondent avers that the Claimant was contracted for a fixed term of 3 years with an option of renewal, which option was to be exercised at the discretion of the Respondent.
15. The Respondent avers that the contract of service was not one of servitude and the Respondent reserved the right to terminate it by serving a notice which was done vide the letter dated 15th February 2017 notifying the Claimant of expiry of his contract and its intention not to renew it.
16. The Respondent avers that it has the discretion to determine what amounts to exemplary performance and the claimant's alleged evidence of exemplary performance is a commendation for a specific event he took part and not the entire period of his contract.
17. The Respondent denies the claim of discrimination and states the decision to renew the other contracts had no connection to the Claimant's circumstances and the claimant is only manipulating the Respondent into reversing its decision.

Evidence in Court

18. The Claimant testified and adopted his witness statement and list of documents dated 16/12/2021 as his evidence in chief and exhibits.
19. During cross examination, the Claimant testified that he had a fixed 3-year renewable contract subject to exemplary performance which meant if he met the conditions his contract will be renewed.
20. The Claimant testified that he was reporting to his CEC member and it was inferred from the office of the County Secretary that the contract will be renewed and there was no timeline for notice of renewal except that they would consider basic fairness.



21. The Claimant testified that his exemplary performance was to be inferred by the County Secretary and his employer and if it was in doubt it contradicts the letter of commendation and the exemplary performance was not on 100 resilience city event and that was a shallow interpretation of the letter.
22. The Claimant testified that the other 13 chief officers' contracts were renewed and the merits of the other 13 should apply to him as well if he fulfilled his part.
23. The Claimant testified that his advice on the procurement contracts have a relationship with his contract as he performed his duty diligently and so there is a clean nexus.
24. The Claimant testified his confidential letter dated 13/2/2017 affected the expiry of his contract, if he had not done the letter he believes his contract should have been renewed.
25. The Respondent vide an affidavit dated 23rd March 2023 adopted the witness statement of Dr Jarius Musumba and the documents attached therein as its evidence in chief.

Claimant's Submissions

26. The Claimant submitted that through general jurisprudence from Kenyan courts there is no legitimate expectation of renewal of contracts for a specified period but there are exceptions. In the case of *John Nduba v Africa Medical and Research Foundation (AMREF)* [2020] eKLR, Onesmus Makau J observed that the exceptions to the general rule include the practice of the employer previous renewal, promise by the employer in a contract that the contract will be renewed upon fulfilment of certain conditions by the employer and employee fulfils the conditions, and the conduct of the employer that leads the employee to expect renewal.
27. The Claimant submitted that in the instant case the contract of employment has set a condition for renewal for the Claimant to perform his duties in an exemplary manner and he met this condition.
28. The Claimant submitted that employment contract was not for a fixed term as there was provision for renewal subject to exemplary performance. Where a contract is intended to be fixed period of time, the contract so by providing for a commencement date and expiry date and fixed term contracts are not terminated by parties but self-executing and lapses by operation of the law as observed in the case of *Samuel Chacha Mwita v Kenya Medical Research Institute* [2014] eKLR.
29. The Claimant submitted that the termination of the subject contract was governed by parameters applicable to the non-fixed contracts and it was not grounded on valid notice contrary to section 35(1) and 44(2) of the *Employment Act* and did not explain the reasons for non-renewal contrary to section 41(1) and unfair termination contrary to section 45(1) of the *Employment Act*.
30. The Claimant submitted that the Respondent has failed to give valid reasons that led to the termination of the Claimant. The Respondent has no discretionary powers to renew or not to renew the contract, this power was taken away by the provision of the exemplary performance.
31. The Claimant further submitted that he has adduced sufficient evidence to demonstrate that this contract was renewable by demonstrating exemplary performance through commendation and acknowledgment of the same by the Respondent and has therefore proved the Respondent breached the contract and that the notice of non-renewal was unfair and discriminatory.
32. The Claimant submitted the notice of non-renewal was issued immediately after the submissions of the confidential report by the Claimant demonstrating serious irregularities in the tendering process in the Respondent.



33. The Claimant therefore submits the failure to renew was an afterthought and mere reaction to the irregularities exposed in the tendering process by the Respondent highlighted by the Claimant and this is evidenced by the fact that the Respondent gave no reason for the intention not to renew the contract and in so doing failed the accountability and transparency test required under Article 232(e) of the Constitution.

Respondents Evidence

34. The respondent did not call any witness to testify but his counsel professor Tom Ojienda swore an affidavit dated 23rd March 2023 to support the respondent's response.

Respondent's Submissions

35. The Respondent submitted that the courts have upheld the principle that fixed term contracts carry no expectancy of renewal in a catena of judicial authorities as seen in the Industrial Court at Nairobi Petition No. 35 of 2012 George S Onyango OGW v Board of Directors of Numerical Machining Complex Limited Minister for Industrialization, Attorney- General and Bernard Wanjohi Muriuki v Kirinyaga Water And Sanitation Company Limited & another [2012] eKLR.
36. The Respondent submitted that this general rule was limited as discussed by Justice Byram Ongaya in Ruth Gathoni Ngotho-Kariuki v Presbyterian Church of East Africa and Presbyterian Foundation [2012] eKLR in which the employer was obliged to give the employee notice 3 months before expiry of her fixed term contract indicating whether her contract would be renewed or not. It was the employer, unlike the present dispute, who would express the intention on the renewal. The employer failed to do so, and the Court found that the employee was justified in legitimately expecting there would be renewal.
37. The Respondent submitted that the Claimant's employment was at all material times to this suit on fixed term contract with an inbuilt termination notice and without any expectancy of renewal.
38. The Respondent submitted it is not disputed that the Claimant's contract had a provision for renewal subject to exemplary performance. The Claimant deponed in his affidavit that he was of the view that his performance was exemplary hence was entitled to a renewal of contract. The Respondent reiterates that the Claimant cannot impose its will or views on what is purely a management discretion.
39. The Respondent submitted it can choose not to renew the contract and it could have been wrong or influenced by improper motives but there are matters for full trial and the court can award compensation but the reasons do not compel the Respondent to keep alive a contract which has expired.
40. The Respondent submitted that the Claimant did not show the Respondent was driven by ill motive in refusing to grant the Claimant renewal as there were no countervailing circumstances, and the Respondent did not terminate any contract; it only declined to grant the claimant automatic renewal.
41. The Respondent submitted on the case that the Claimant was discriminated against when the other employees' contracts were renewed by the Respondent states that each contract was distinct and separate and it was at liberty to employ according to its needs and availability of employment within the enterprise. Such cannot be held to be discriminatory against the Claimant.
42. The Respondent submitted the fixed term contract had its own in-built termination, in that the date of termination was advised to the Claimant on execution of the 3-year contract in 1st March 2014 and the Claimant knew termination would be upon the lapse of the 3 years in 1st March 2017.



Analysis and Determination

43. The issues for determination are:

1. Whether the Claimant had a legitimate expectation of renewal of his contract of employment.
2. Whether the failure to renew the Claimant's contract was unfair and a violation of his right to fair treatment.
3. Whether the Claimant is entitled to the reliefs sought.
Whether the Claimant had a legitimate expectation of renewal of his contract of employment.

44. In the Court of Appeal case, *Keen Kleeners Limited v Kenya Plantation and Agricultural workers' Union* (Civil Appeal 101 of 2019) [2021] KECA 352 (KLR) the court held:

“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. The expectation becomes legally protected, and ought not to be ignored by the Employer, when managerial prerogative on the subject is exercised. Legitimate expectation is not the same thing as anticipation, desire or hope. 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. The representation underlying the expectation must be clear and unambiguous. The expectation must be induced by the decision maker. The decision maker must have the authority to renew. 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. The presence of these elements however, is not to be taken as conclusive proof of legitimate expectation.”

45. For the sake of comparative jurisprudence, a number of South African cases explore the element of “reasonable expectation” as provided in Section 186 (b) of South Africa's *Labour Relations Act* that provides one definition of dismissal as being where an employee reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms, but the employer offered to renew it on less favourable terms, or did not renew it at all.

“Some of the factors that are taken into account to determine the presence or absence of this reasonable expectation were, in *Dierks v University of South Africa* (J399/98) [1998] ZALC 126 para 133, held to include:

“... all the surrounding circumstances, the significance or otherwise of the contractual stipulation, agreements, undertakings by the employer, or practice or custom in regard to renewal or re-employment, the availability of the post,



the purpose of or reason for concluding the fixed term contract, inconsistent conduct, failure to give reasonable notice, and nature of the employer's business.”

46. In *Mediterranean Woollen Mills (Pty) Ltd. v South African Clothing and Textile Workers' Union* (143/96) [1998] ZASCA 11, the Supreme Court of Appeal of South Africa held that despite a clause of a fixed term contract stipulating that no reasonable expectation for renewal of the contract could arise from the contract, a reasonable expectation could arise where assurances made by the employer and other conduct by the employer led the employees that they could entertain such an expectation. In *South African Clothing and Textile Workers Union and Another v CADEMA Industries (Pty) Ltd* (C 277/05) [2008] ZALC 5, a worker was similarly employed on several fixed term contracts on a continuous and unbroken period of 4 ½ years. The court held that the several renewals or extensions over this period without any discussions as to why they were renewed, in addition to the fact that the last renewal was done after a plea from the worker and the worker was permitted to continue working for another 7 days after expiry of the contract created a reasonable expectation that the contract would be renewed.
47. In the present case, the trial Court was convinced that the grievants genuinely and legitimately expected renewal on the basis that the parties had a relationship running from 2007 whereby the grievants contracts had been renewed without fail. Despite the appellant's assertion that only a few of the grievants were in this position, no evidence was led to properly demonstrate this. The schedule of unpaid leave dues produced by the appellant indicates that by 2008 at least half of the grievants had been engaged; and a majority of the grievants were already engaged at Lafarge Diani as far back as May 2009.

The trial Court had a sound basis for reaching his conclusion that a legitimate expectation for renewal was created. The long standing, uninterrupted and consistent practice of renewing or extending the grievants' contracts would have surely led the grievants to believe that their last contracts would be renewed, more so in the absence of any reasonable notice to the contrary given to them by the appellant.

48. The Supreme Court of Kenya in the case of *Communication Commission of Kenya & 4 others -v-Royal Media Services Ltd & 4 other* [2014] eKLR observed as follows concerning legitimate expectation: -

“Legitimate expectation applies the principles of fairness and reasonableness to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise. An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil”.

49. In the instant case, the Claimant submitted that his legitimate expectation was premised on:
- a. His appointment by the Respondent to at least seven committees in the Respondent's government in a period of 7 months.
 - b. Receiving a commendation letter on 26th May 2016 from the Respondent acknowledging that he had performed his duties in an exemplary manner.
 - c. The Respondent declining to approve leave applied suggesting it could be taken later. That if indeed the Respondent had not intended to renew the contract, it would have allowed the Claimant to take all his leave days' or pay for them in lieu of notice.



- d. The Respondent nominated the Claimant to attend a workshop in New Delhi, India to acquire skills to share with other employees. That the Respondent would not be expected to spend huge sums of money training a staff it did not intend to retain.
50. The Respondent maintained that it did not implicitly or expressly show the Claimant that it had intention to renew the contract. The commendation, appointment to several committees and the trip to New Delhi were all part of the Claimant's usual course of employment. Further, it did not contemplate that giving the Claimant an opportunity to improve his career would turn to be a claim of absolute right to have his contract renewed.
51. Further, the Claimant himself testified the workshop in New Delhi was funded partly by the Respondent and by Science and Research and it was not in writing that he would come back and train other employees.
52. In view of the foregoing, the Claimant did not prove to this court that the Respondent through regular practice, or through an express promise, led him to legitimately expect renewal of his contract.
53. The authorities cited by the claimant in his submissions can be differentiated from the current case. The case of *Caroline Muthoni Njoroge v LUCT Health* (2019) eKLR the claimant had a legitimate expectation of renewal of the contract and the court had this to say.

“the claimant therefore had no reason to even suspect that her contract would not be renewed following the assurance by the executive director that no staff was going to be released. I therefore find that there was reasonable expectation for renewal of the contract based on the conduct of the respondent and previous practice of the respondent. If the respondent had no intention of renewing the contract it could have issued the notice of non-renewal or termination of service 3 months prior to the due date”

54. This current case there was no conduct by the respondent or any assurances that there would be a renewal of the contract. Regrettably the claimant presumed from the fact that he was sent for a training in New Delhi a few months to the expiry of his contract and was also sent for a training in Mombasa that the respondents intended to renew his contract.
55. There was also no provision for notice and it was out of courtesy that the respondent informed him on 15th February 2017 that his contract would be expiring.
56. The appointment letter stated: -

“Appointment to this post is on a contract term of 3 years renewable subject to exemplary performance.”

The exemplary performance is very ambiguous and one cannot denote what amounts to exemplary performance and therefore cannot be strong basis on the Claimant's legitimate expectation. The court rules the obvious position is that parties are bound by their contract and where there is a fixed contract the parties are bound by the same except in very exceptional circumstances.

Whether the failure to renew the Claimant's contract was unfair and a violation of his right to fair treatment.

57. The Claimant submitted that the Respondent's failure to renew his contract was an afterthought and mere reaction to the irregularities exposed in the tendering process by the Respondent highlighted by the Claimant and this is evidenced by the fact that the Respondent gave no reason for the intention not



to renew the contract and in so doing failed the accountability and transparency test required under Article 232(e) of the *Constitution*.

58. However, the Claimant himself testified that his contract was to expire on 28/2/2017. His appointment letter clearly stated his appointment was on a contract term of 3 years from 1st March 2014 and the Respondent issued him with the notice of expiry of contract period vide that letter dated 15th February 2017.
59. This court reads no mischief in the Respondent's actions and hold the Respondent did not violate the Claimant's right to fair treatment as the same was done well within the context of his contract. The court is satisfied the contract of the claimant terminated by effluxion of time as per his contract.
60. Having been satisfied that the Claimant's contract was not terminated unfairly and unlawfully and that the same expired within the meaning of the contract, the Claimant is not entitled to the reliefs sought and the claim is hereby dismissed.
61. The court orders each party to bear their respective costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3RD 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 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 *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

