



**Makworo v Oshwal Academy Nairobi (Cause E331 of 2023)
[2023] KEELRC 3342 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3342 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E331 OF 2023
SC RUTTO, J
DECEMBER 20, 2023**

BETWEEN

GEORGE WESLEY ONGAGA MAKWORO CLAIMANT

AND

OSHWAL ACADEMY NAIROBI RESPONDENT

JUDGMENT

1. The Claimant avers that he joined the Respondent's employment on or about 26th August 2019 on probation terms. He was confirmed after three months with effect from 26th November 2019 and was issued with a two year renewable contract. He further avers that vide an email dated 9th September 2021, the Respondent invited him to apply for contract renewal and he responded in the affirmative. According to the Claimant, he had legitimate expectation that the Respondent would renew his contract but it failed to do so vide a letter dated 15th October 2021. Consequently, the Claimant cites the Respondent for constructive dismissal and prays for the following orders:
 - a. A declaration that the Claimant was constructively dismissed.
 - b. 12 months' compensation for unfair/unlawful/wrongful termination @ Ksh150,000 per month 1,800,000.00
 - c. Three months' salary in lieu of a Proper Notice of non-renewal/ inconvenience to our client 450,000.00
 - d. Unpaid Salary for April 2020, December 2020 and January 2021 @ Ksh6,250 per month X 3 months 18,750.00
 - e. Unpaid/unremitted Provident Fund Employer contributions for April 2020, December 2020 and January 2021 @ Ksh312 per month X 3 months 936.00
 - f. Unpaid salary for November 2021 @ Ksh150,000 per month 150,000.00



- g. Unremitted Provident Fund Employer contributions for November 2021 @ Ksh7,500 per month 7,500.00
 - h. Unpaid salary for Teaching Computer Science in addition to ICT subject for July 2021, August 2021, September 2021, October 2021 and November 2021 @ Ksh150,000 per month X 5 months 750,000.00
 - i. Leave Allowance for the remaining 11 days @ Ksh6,250 per day X 11 days 68,750.00
 - j. Cost of the cause.
 - k. Interest on b, c, d, e, f, g, h and i above from the time of filing this cause.
 - l. Any other relief deemed reasonable in the circumstances of this Honorable Court deem fit.
2. The Claim is opposed through the Respondent's Response dated 1st May 2023, in which it avers that the Claimant was employed as an ICT teacher on a fixed-term contract that commenced from 26th August 2019 to 25th November 2021. The Respondent further states that it had no obligation to automatically renew the Claimant's contract and that the decision was wholly dependent on the management's decision. As a result, the Respondent has asked the Court to dismiss the Claim with costs.
 3. The matter proceeded for hearing on 4th October 2023, during which both parties called oral evidence.

Claimant's case

4. The Claimant testified in support of his case and to start with, he adopted his Statement of Claim, witness statement, Verifying Affidavit together with his bundle of documents to constitute his evidence in chief.
5. It was the Claimant's evidence that the Respondent deducted his salary in the months of April 2020, December 2020 and January 2021 without any justifiable cause and failed to pay his salary for November 2021.
6. He further stated that on or about July 2021, the Respondent assigned him to teach Computer Science, an additional subject contrary to the employment contract without remuneration.
7. It was his case that vide an email dated 9th September 2021, the Respondent invited him to apply for contract renewal. He responded in the affirmative vide a letter dated 15th September 2021, requesting the Respondent to include the additional Computer Science subject in the contract renewal.
8. The Respondent again wrote to him a letter dated 23rd September 2021 for a clarification and he responded in the affirmative vide a letter dated 27th September 2021.
9. The Claimant contended that he had legitimate expectation that the Respondent would renew his contract but failed to do so despite his diligent service, hence he suffered constructive dismissal.
10. He averred that he was terminated without notice and explanation on the reason for which the Respondent was considering termination.
11. That further, he was terminated without being given an opportunity to make his representations, to rebut, explain or render exculpatory response and to have another employee or a union representative of his choice present during such explanation.



12. The Claimant termed the Respondent's action callous, arbitrary, high handed, wrongful, unfair, unjustified, unlawful and illegal. As a result, he has suffered opportunity cost, mental stress, anxiety and perilous loss of livelihood.

Respondent's case

13. The Respondent called oral evidence through Mr. Brian Odhiambo Ojiem who testified as RW1. Similarly, he adopted his witness statement and the Respondent's bundle of documents to constitute his evidence in chief.
14. It was RW1's evidence that the Claimant was engaged as an ICT teacher by the Respondent on a two (2) year fixed-term contract of service commencing 26th November 2019 to 25th November 2021.
15. RW1 further testified that the Claimant was expected to diligently perform the duties of an ICT teacher and such other duties as may be required of him.
16. In the course of the Claimant's employment, he exhibited slackness and complacency in his duty as a teacher. He would abruptly abscond and neglect his duties by reporting to school late and absenting himself from school without authorization from the Respondent.
17. RW1 further testified that the Claimant's attitude and complacent conduct towards his duties as a teacher got the attention of the Respondent who continuously made several inquiries on his conduct. However, the Claimant had no tangible reasons for his continuous absenteeism and reporting to school late.
18. On persistent conduct of the Claimant, the Respondent issued several warnings but he remained incorrigible. The Respondent had to incur additional expenses by hiring a substitute tutor to cover for the lessons missed by the Claimant.
19. The general performance of the ICT subject drastically dropped and as a result, most students dropped the subject. This negatively affected the Respondent's business. The Respondent wrote to the Claimant a letter to show cause on 18th May 2021 to address this issue.
20. The Respondent's policy on salary payment is that an employee who is absent from work without express authority is not paid for the days or hours he or she is absent from duty. The absent days and the hours an employee is late from school are accumulated and deducted from the employee's salary. This is what was applied to the Claimant's salaries for the months of April 2020, December 2020 and January 2021.
21. The Respondent invited the Claimant for a disciplinary hearing on 24th May 2021, where among other things, the Respondent explained to him all concerns and inquiries about his salary deductions for the months of April 2020, December 2020 and January 2021.
22. The Respondent in its letter to the Claimant dated 10th June 2021, reiterated and further explained to him the reasons for his salary deductions for the months of April 2020, December 2020 and January 2021 which were because of absenteeism from work without leave and lateness to report to work.
23. RW1 further stated that the provident funds payable to the Claimant are calculated from his basic salary each month. Therefore, the provident funds of the Claimant for the months of April 2020, December 2020 and January 2021 were affected since his basic salary for the months of April 2020, December 2020 and January 2021 were deducted.



24. According to RW1, the Respondent has paid to the Claimant all his provident funds for the months of April 2020, December 2020 and January 2021 as calculated from his basic salaries for the months of April 2020, December 2020 and January 2021.
25. RW1 further averred that the Claimant did not report to work or perform his contractual duties for the whole month of November 2021 hence, he is not entitled to any salary or benefits for November 2021.
26. He further contended that the Respondent provided the Claimant with a good working environment and always provided him with all the necessary tools he required in his services as a teacher. At no point did the Claimant complain of any unreasonableness on the part of the Respondent in as far as his work was concerned.
27. When the contract of the Claimant was about to mature, as a school policy of the Respondent, he was invited to apply for a contract renewal via email dated 9th September 2021 for the Respondent's management consideration on whether to renew his contract or not. All employees whose contracts are about to end must be prompted and be notified of the same for them to apply for renewal on those who wish to renew their contract with the Respondent.
28. Renewal of contracts takes the same process as applying for a new contract and the Respondent must deliberate on the show of interest to renew the employee's contract. The decision to renew or not to renew an employee's contract exclusively remains with the Respondent's Management.
29. That the Claimant's response on his invitation to renew his contract via his letter dated 15th September 2021 was not clear as to whether he was applying for renewal of his contract, the same was brought to his attention through the Respondent's letter dated 23rd September 2021.
30. Upon receiving the Claimant's letter of intention to renew his contract dated 27th September 2021, the Respondent's management exercised their right through a deliberation to decline the renewal of his contract.
31. The Claimant was notified of the Respondent's Management decision on non-renewal of his contract in a letter dated 15th October 2021, one (1) month before the effluxion and maturity of his then contract.
32. From the date of non-renewal of the Claimant's contract, he unilaterally and blatantly neglected his duty by not reporting to his duties, hence breaching the contractual term with the Respondent.
33. The Respondent out of good practice has gone ahead and issued a certificate of service to the Claimant dated 8th February 2022 despite all the anguish it had made the Respondent suffer due to the neglect and absconding duties.
34. According to RW1, the Claimant has not bothered to clear with the Respondent up to date for no good reason on his end.
35. Further, the Claimant had been rude, unprofessional, uncouth and indisciplined causing the Respondent to incur additional expenses.

Submissions

36. The Claimant submitted that the Respondent invited him to apply for contract renewal to which he responded in the affirmative. He argues that the Respondent's actions created a legitimate expectation that it would renew his contract. On this issue, the Claimant invited the Court to consider the case of



Mwangi v The Trustees of Premier Academy Charitable Trust T/A Premier Academy KEELRC 1390 (Judgement).

37. On its part, the Respondent submitted that no representation was made to the Claimant that a renewal was certain for him to have a legitimate expectation.
38. The Respondent further argued that there was nothing in the expired contract to suggest that the Claimant would in any event continue working as an ICT teacher after the 25th November 2021. In support of this position, the Respondent relied on the case of *George Onyango v The Board of Directors of Numerical Machining Limited & Others* (2014) eKLR.
39. In further submission, the Respondent stated that it clearly informed the Claimant of the non-renewal of his employment as laid out in the *George Onyango v The Board of Directors of Numerical Machining Limited & Others* (supra). It was the Respondent's further submission that he was aware of the expiry of his fixed-term contract and because of his complacent behavior, there was a reasonable chance he would not have a second term.
40. The Respondent further posited that fixed-term contracts carry no rights, obligations or expectations beyond the date of expiry and that it had therefore no obligation to renew the contract. As such, its failure to renew the Claimant's contract did not amount to unlawful termination. On this score, it referenced the case of *Amatsi Water Services Company Limited v Francis Shire Chachi* (2018) eKLR.
41. The Respondent further submitted that fixed term contracts end by effluxion of time and that there is no scope for a court to rewrite the parties' contracts. The Respondent further posited that the issue of unfair termination therefore does not arise since fixed term contracts are self-terminating and do not require any intervention by either party.

Analysis and Determination

42. Flowing from the pleadings, the evidentiary material placed before me, as well as the submissions on record, it is evident that the issues falling for the Court's determination are:
 - a. Whether non-renewal of the Claimant's contract amounted to unfair termination.
 - b. Is the Claimant entitled to the reliefs sought?

Whether non-renewal of the Claimant's contract amounted to unfair termination.

43. At the heart of this dispute is the non-renewal of the Claimant's contract of employment. It is common ground that the Claimant was appointed on a fixed-term contract from 26th November 2019 up to 25th November 2021. From the record, the Claimant was notified of the Respondent's decision not to renew his contract of employment through a letter dated 15th October 2021, which is couched as follows:

“RE: NON-RENEWAL OF YOUR EMPLOYMENT CONTRACT

Your employment contract dated 7th December 2019 terminates on 25th November 2021.

Further to our letter dated 23rd September 2021 and your response dated 27th September 2021, the management has taken a decision not to renew your contract. Your last day of work will therefore be 25th November 2021.

Upon the lapse of your contract, you will be required to hand in all items belonging to Oshwal Academy Nairobi that may have been issued to you by virtue of your employment



before any final dues can be paid to you less any amount that may be owed to Oshwal Academy Nairobi.

Please note that you will be expected to utilize your accrued leave days before 24th November 2021. You will plan for your leave in consultation with the Head of Station.

We take this opportunity to thank you for the services you have rendered to the school and wish you all the best in your future endeavours.”

44. As stated herein, it is the non-renewal of the Claimant’s contract of employment that has triggered the instant dispute.
45. It is trite that fixed-term contracts carry no obligation or expectation of renewal. In this case, the Claimant’s contract of employment was very explicit that it was for two years. Therefore, it followed that upon expiry of the two-year period, the contract of employment could be renewed or not renewed. In this case, the Respondent elected not to renew the Claimant’s contract of employment hence notified him as much.
46. On this issue, I will follow the determination by the Court of Appeal in the case of Registered Trustees of the Presbyterian Church of East Africa & another vs Ruth Gathoni Ngotho- Kariuki [2017] eKLR, thus:

“ [29]. Bearing the foregoing in mind, we note that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry.”
47. Further, in the case of Trocaire vs Catherine Wambui Karuno [2018] eKLR, the Court of Appeal held as follows: -

“ 16. It is clear from the evidence on record that the respondent’s employment was governed by fixed term contracts. As aptly observed by Lord Denning MR in British Broadcasting Corporation vs Ioannou [1975] 2 All ER 999 such a contract binds parties for the term stated in the agreement. In our view, the duration for the third contract was expressly stipulated therein, that is, for a period of four months running from 1st March, 2014 up to 30th June, 2014..... [19]It follows that the contract in question automatically lapsed on 30th June, 2014 by effluxion of time...”
48. Applying the above determinations to the instant case, it is evident that the lifespan of the Claimant’s contract of employment was already predetermined for two years. Therefore, at the end of two years, the Claimant’s contract of employment terminated by effluxion of time.
49. Accordingly, it is my finding that non-renewal of the Claimant’s contract of employment did not amount to unfair termination as the same ran its course and terminated by effluxion of time.
50. It is also notable that the Claimant’s contract of employment did not have a renewal clause hence the parties’ options were open. Therefore, the Claimant was bound to expect any outcome at the end of his contract period. Indeed, the absence of a renewal clause from the contract of employment took away any legitimate expectation on the part of the Claimant.
51. The Claimant has further termed the Respondent’s invitation for him to apply for renewal of his contract as creating a legitimate expectation on his part. With tremendous respect, I disagree with the Claimant’s position.



52. In my considered view, there was nothing in the email of 15th March 2021 to infer that the Claimant's contract would be renewed upon his application for renewal. The fact that he was being asked to apply for renewal, implied that his application could go either way and such a decision was at the direction of the Respondent. Indeed, the fact that the Claimant declared his intention to have his contract renewed did not impose an obligation on the Respondent to renew the same.
53. On this score, I wish to echo the sentiments of the Court of Appeal in the case of *Transparency International Kenya v Teresa Carlo Omondi* (2023) where it was held that: -
- “We dare say that an automatically renewable fixed-term contract is a contradiction in terms, as it would subject the parties to an indeterminate employment contract. The respondent was under fixed-term contract with a definite commencement date and termination date. There was no ambiguity created to create an expectation of contract renewal by the appellant's issuance of a fixed-term contract. The contract terminated automatically when the termination date arrived. Whether a contract with a renewal clause will be extended or not, is an issue that is at the discretion of the employer and it cannot create a legal right under the doctrine of legitimate expectation...In the instant case, there was no promise of any sort that was given to the respondent to justify a claim based on legitimate expectation.”
Underlined for emphasis
54. The total sum of my consideration is that I have not discerned any factor in the Claimant's contract of employment and circumstances attendant to this case that can be construed as conferring legitimate expectation on his part that his contract would be renewed.
55. Against this background, the Claimant cannot allege to have been unfairly terminated from employment through constructive dismissal.

Reliefs

56. As the Court has found that the Claimant was not unfairly terminated from employment, the claim for compensatory damages and notice pay fail. This finding resonates with the determination of the Court of Appeal in the case of *Registered Trustees of the Presbyterian Church of East Africa & another vs Ruth Gathoni Ngotho- Kariuki* [supra], thus:
- “Accordingly, any claim based after the expiry of the respondent's contract ought not to have been maintained... Similarly, since the respondent's contract came to an end by effluxion of time any claim for wrongful termination could not be maintained.”
57. The Claimant has further sought to recover salary deductions made from his salary in the months of April 2020, December 2020 and January 2021. He further seeks payment of his salary for the month of November 2021.
58. In its defence, the Respondent averred that the Claimant would abruptly abscond and neglect his duties by reporting to school late and absenting himself from school without authorization hence the deduction from his salary.
59. In support of its position, the Respondent exhibited email communication exchanged with the Claimant in this regard. In an email dated 17th March 2020, the Claimant was notified of his absence and the fact that he did not have permission to be away. The Claimant in his response of even date admitted to his absence from work and promised to report on “Wednesday”.



60. Further in an email dated 1st December 2020, the Claimant was notified of his absence from school and the fact that he had been marked absent. He was advised to resume duty on 2nd December 2020. In his response of even date, the Claimant apologized for his absence and promised to report to work the following day.
61. In yet another email dated 29th December 2020, the Claimant was notified of his absence from duty on 23rd December 2020. The Claimant in his email of 2nd January 2021, admitted being absent on account that he was away from the city and that he forgot to inform the Respondent as a matter of courtesy. On this account, he asked the Respondent to recover the hours he was absent from his January salary.
62. From the foregoing analysis, it is evident that the Claimant was absent from duty on several occasions without authorization hence the salary deductions. On this account, his claim with respect to refund of the salary deductions cannot be sustained.
63. This ties to the claim for unremitted employer contributions to the Provident Fund for April 2020, December 2020 and January 2021.
64. Turning to the claim for unpaid salary for November 2021, the Respondent averred that the Claimant did not report to work or perform his contractual duties for the entire month. Be that as it may, the Respondent did not exhibit any evidence for instance, the relevant attendance register to confirm the Claimant's absence from duty during the said month.
65. In light of the above, the Claimant is entitled to salary upto 25th November 2021, which was identified as his last date of duty. This will go hand in hand with the employer contributions to the Provident Fund in respect of November 2021.
66. The Court further allows the Claimant's claim for leave pay for 10 days. As per the leave record exhibited by the Respondent, the Claimant had 10 days pending leave as of 8th September 2021. He is therefore entitled to be compensated accordingly.
67. With regards to the claim for unpaid salary for teaching computer science from July to November 2021, the same is declined for want of proof.

Orders

68. In the end, the Claim substantially collapses and only succeeds to the following extent:
 - a. Unpaid salary upto 25th November 2021 being the sum of Kshs 125,000.00
 - b. Leave pay for 10 days being the sum of Kshs 68,750.00
 - c. The total award is Kshs 193,750.00
69. Interest shall apply on the total award at court rates from the date of Judgment until payment in full.
70. The employer's unremitted contribution in the sum of Kshs 7,500.00 shall be remitted to the Provident Fund within 30 days from the date of this judgment.
71. As the claim has substantially collapsed, it is only prudent that each party bears their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2023.

.....

STELLA RUTTO

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 had 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.

Stella Rutto

Judge

