



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 890 OF 2017**

*(Before Hon. Justice Dr. Jacob Gakeri)*

**FRANCIS NJERU KARIUKI**

**CLAIMANT**

**VERSUS**

**CROWN PAINTS KENYA LIMITED**

**RESPONDENT**

**JUDGMENT**

1. The Claimant initiated this claim by a memorandum of claim dated 11<sup>th</sup> May 2017 and filed on 12<sup>th</sup> May 2017 alleging wrongful and unfair termination of services and discrimination in work place promotion. The Claimant prays for –

(a) A declaration that the Respondent's dismissal of the Claimant from employment was unprocedural and improper and the Claimant is entitled to payment of his terminal dues compensatory damages as pleaded.

(b) An order for payment of the Claimant's terminal dues totalling Kshs.3,075,923

(c) That the Respondent do compensate the Claimant for damages on ground of discrimination at Kshs.10,000,000

(d) An order for the Respondent to pay costs of this suit plus interest thereon.

(e) Any other relief as the Court may deem just.

2. The Respondent filed its response to the memorandum of claim on 19<sup>th</sup> June 2017 praying for dismissal of the suit with costs.

**Claimant's Case**

3. The Claimant avers that the Respondent engaged him under a contract of employment dated 18<sup>th</sup> January 2012 for a fixed 5 years term at a salary of Kshs.74,000/- car allowance of Kshs.20,000/- and airtime allowance of Kshs.6,000/-. The salary was reviewed to Kshs.100,000/- on 30<sup>th</sup> April 2012 and subsequently to Kshs.141,000 per month. That the contract provided for a house allowance of Kshs.60,000 per month.

4. It is averred that before the contract lapsed, the Respondent invited applications from internal staff for the position of Business Development Manager and the Claimant applied, was shortlisted and interviewed on 19<sup>th</sup> January 2017. That when his contract expired on 31<sup>st</sup> January 2017, the Respondent retained his services and continued paying him.

5. It is further averred that by a letter dated 16<sup>th</sup> February 2017 the Respondent purported to renew his contract by offering him the position of Business Development Manager with conditions that it would be for a period for one year while the advertisement had no duration. That the offer was for a lesser position at CP6 reporting to the Area Sales Manager as opposed to the Head of Sales and finally the Claimant was to retain the salary he had under the expired contract. That the latter as more prestigious.

6. The Claimant also avers that the offer was not a renewal since the terms were different from the existing contract and different for the position, he was interviewed for. It is averred that the Claimant prepared a memorandum highlighting the anomalies and sought clarification which was not forthcoming.

7. That on 23<sup>rd</sup> February 2017, the Payroll Accountant notified the Claimant that his salary for February 2017 would be held up until he signed the contract document as provided. That on inquiry about the salary, the Group Human Resource Manager (GHRM) assured the Claimant that the salary for February 2017 would be released and he should continue working as usual and would not be terminated but the

GHRM did not explain the anomalies in the two contracts.

8. It is further averred that on 1<sup>st</sup> March 2017 the Claimant met

the Group Human Resource Manager for clarification but was informed that the one-year contract of the position of Business Development Manager was final and was free to resign if he felt aggrieved.

9. That on 3<sup>rd</sup> March 2017 the Claimant wrote to the Directors of the company appealing that the promotion to the position of Business Development Manager be upheld. No response was forthcoming.

10. That on 16<sup>th</sup> March 2017, the Respondent offered the Claimant the position Business Development Executive for one year, the offer had to be accepted within seven days failing which the Claimant would be deemed to have resigned from the company. The Claimant avers that he did not sign the contract since he was still serving under the expired contract which had been renewed constructively.

11. That the Respondent terminated the Claimant's services on 29<sup>th</sup> March 2017 requiring him to hand over all company property through the normal clearing process prior to collection of terminal dues.

12. The Claimant also posits that the dismissal violated the principles of labour practices and natural justice in that no hearing took place before termination and was discriminated on matters promotion to the position of Business Development Manager and due process was not followed.

13. That arising from the unlawful termination, the Claimant suffered loss including: -

(i) Pay in lieu of notice Kshs.201,000

(ii) 31 leave days Kshs.239,654

(iii) Illegally deducted leave days 24<sup>th</sup>, 28<sup>th</sup>, 29<sup>th</sup>, 30<sup>th</sup> and 31<sup>st</sup> for five years when the Company closes on 23<sup>rd</sup> for Christmas holidays they are not public holidays Kshs.193,269

(iv) Reduced airtime Kshs.60,000

(v) Compensation for unfair termination Kshs.2,412,000

14. It is contended that the position of Business Development Manager was given to one Mr. George Opundo who had not been shortlisted for the interview and not for one year as was the case with the Claimant. That Mr. George Opundo was the Area Sales Manager.

15. Finally, it is averred that the Respondent discriminated against the Claimant.

### **Respondent's Case**

16. The Respondent denies all the averments by the Claimant save those expressly admitted.

17. It avers that its turnover for the year ending 31<sup>st</sup> December 2015 was Kshs.6,385,000,000/-.

18. That the Claimant's remuneration was consolidated and thus inclusive of house allowance.

19. It denies that the position of Business Development Manager was more prestigious than the Business Development Executive as alleged by the Claimant and that the two positions fell within the same job grade like other managerial roles within the company and did not hold any particular distinction from other managerial roles.

20. The Respondent denies that it continued paying the Claimant after 31<sup>st</sup> January 2017 since it was negotiating a new contract terms with the Claimant.

21. That the position of Business Development Manager reported to the Head of Sales but the Claimant rejected it. That the Claimant rejected the position of Business Development Executive he held earlier despite scoring poorly in sales on the balance score card in 2016. That the Claimant introduced counter offers not acceptable to the Respondent.

22. It is averred that the Claimant declined the offer for the position of Business Development Manager even after applying for it was the an offer for renewal of the previous contract. That the Claimant's salary for February 2017 was paid on 23<sup>rd</sup> February 2017.

23. The Respondent avers that its GHRM responded to all issues raised by the Claimant, that the Claimant willingly turned down the two job offers by the Respondent. The Respondent denies having terminated the Claimant's contract of employment at all. That he declined to accept the offers made to him.

24. The Respondent further that the cause herein is mistaken and legally embarrassing since the Claimant has no cause of action against the Respondent and is based on distortion of facts nondisclosure, assumptions and falsehoods and is made in bad faith.

25. Finally, is averred that the Claimant actively negotiated, approved and was subsequently paid a final settlement of Kshs.936,114.65 inclusive of pension lumpsum Kshs.767,999.65 and final dues Kshs.168,115/-.

#### **Evidence**

26. The Claimant adopted the written statement and was cross examined.

27. On cross examination, the Claimant confirmed that he was engaged at grade CP7 in January 2012 but the grade was corrected in April 2012 though he had no evidence on record. That he was promoted in April 2012 but had no evidence to support the assertion.

28. The Claimant confirmed that the five-year contract dated 18<sup>th</sup> January 2012 was not renewable thereafter and lapsed on 31<sup>st</sup> January 2017 and had no letter to continue working thereafter. That he was given an assignment in February and airtime but had no evidence to prove the same. That the email communication from Nicholas dated 23<sup>rd</sup> February 2017 informed him to continue working.

29. The Claimant confirmed that he applied for the position of Business Development Manager because it was a higher position and would have been a promotion to him and it was a new position being introduced with a wider spectrum of duties and a higher reporting.

30. The witness testified that he was not offered the position though successful because the offer dated 16<sup>th</sup> February 2017 was a renewal of contract although it referred to the position he had applied for. That he did not accept the offer since the terms offered and the previous contract were different. That his request for clarification was not responded to.

31. The Claimant confirmed that the duration of the contract was one year and reporting was to the Area Sales Manager not the Head of Sales as advertised. That he returned the offer for correction for his acceptance.

32. The Claimant further confirmed that he was given another offer on 16<sup>th</sup> March 2017. That he did not accept the offer and wrote to the Directors on the issue since he had assumed that the expired contract had been renewed.

33. On the alleged discrimination, the Claimant stated that he was discriminated because he was offered a different contract as opposed to the one he had applied and had been interviewed for, that another person was given the job in April 2017.

34. **RW1, NICHOLAS WANAMBI** adopted the witness statement and testified that the Claimant did not appreciate the terms of the position offered in February 2017 (CP6) and rejected the offer. That in an endeavour to retain the Claimant, the Respondent gave him another offer in March 2017 but rejected it as well.

35. That the Claimant ignored invitations to the office to discuss the issues he had raised preferring to write emails. That when he finally appeared for a meeting, his expectations were higher though the position was higher than the previous one but in the same job group.

36. That the Respondent gave the Claimant sufficient time to make a decision on the last offer but he rejected it as well.

37. In the circumstances, the Respondent had no choice but to let him go and his terminal dues were paid. That the Claimant was not terminated on disciplinary grounds nor was he summarily dismissed.

38. On cross examination, RW1 confirmed that the holiday part was not part of the contract and airtime reflected on the payslip and leave balance were for the last year of service.

39. RW1 also confirmed that the Claimant remained on the payroll because the respondent was aware of the negotiations between the parties.

40. On re-examination, RW1 testified that paragraph 12(1) of the witness statement meant that the parties were negotiating and his email dated 23<sup>rd</sup> February 2017 was written in the context of the ongoing negotiations with the Claimant since the document had not been signed to seal the deal.

#### **Claimant's Submissions**

41. The Claimant identifies three issues for determination, namely legitimate expectation of renewal of contract, effect of failure to renew and reliefs sight.

42. On the doctrine of legitimate expectations, the Claimant relies on the Supreme Court of Kenya decision in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** where the Court stated that –

*“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. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation.”*

43. Further reliance is made on the South African decision in **National Director of Public Prosecutions v Philip (2002) (4) SA 60(W)** on the requirements of legitimate expectation.

44. It is submitted that paragraph 12 of RW1's statement clearly showed intention on the part of the Respondent to renew the contract on similar terms. That the Respondent's email dated 23<sup>rd</sup> February 2017 informed the Claimant that *"No one has the intention of terminating your contract at all"*. That the GHRM of the Respondent unambiguously created the impression that the Claimant's contract would be renewed.

45. The decision in **Teresa Carlo Omondi v Transparency International- Kenya [2017] eKLR** is cited for the proposition that –

*"The discretion of an Employer to renew or not renew a fixed term contract can however be challenged on limited grounds."*

46. It is submitted that the Respondent's action and words renewed the Claimant's contract and made him believe that it would be renewed. The conduct created a legitimate expectation that the contract would be renewed.

47. As to whether failing to renew the contract for five years amounted to an unfair termination, it is submitted that allowing the Claimant to continue working despite expiry of the contract created a new regime of employment which if terminated implicated the provisions of the Employment Act.

48. It is submitted that Section 41 and 43 of the Employment Act, 2007 would apply to the termination. The decisions in **Simon Muguku Gachigi v Taifa Sacco Society Limited [2017] eKLR** and **Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR** are relied upon to reinforce the submission.

49. On reliefs it is submitted that the Claimant was discriminated because the specifications advertised were changed when the job was offered to the Claimant and the position was later offered to Mr. George Opundo as advertised.

50. That the evidence was not denied. That the Claimant was entitled to the one month payment in lieu of notice.

#### **Respondent's Submissions**

51. The Respondent identifies two issues for determination namely; whether the Claimant's contract was renewed to infer unfair termination of the contract and whether the Claimant is entitled to the remedies sought.

52. As regards renewal and inference of termination, it is submitted that there is firm jurisprudence on the circumstances in which an employee and employer relationship can be brought to an end. Sections 45(2)(a) and 44 are relied upon. That in the instant case, the Claimant was terminated for misconduct, poor performance physical incapacity. That the parties separated on 31<sup>st</sup> January 2017 when the five-year term contract lapsed.

53. It is further submitted that the fixed term contract lapsed by effluxion of time as opposed to the Respondent's action. Reliance is made on the decision in **Samuel Chacha Mwita v Kenya Medical Research Institute [2015] eKLR** where the Court noted that: -

*"... a fixed term contract automatically expires once its term has lapsed. Without the mutual agreement of the parties, there can be no claim that a party had an expectation for renewal."*

54. The words of Brassey in **Employment and Labour Law Vol 3 A8:9** are also relied upon to buttress the principle on termination of fixed term contracts.

55. It is contended that the proximate cause of the termination in this case was not an act of the employer. Moreover, the contract had no provision for renewal. It is submitted that although the Claimant testified that he was aware that his contract had lapsed, he contends that since he was retained and assigned work, he had a legitimate expectation to work for the Respondent. The decision in **Teresa Carlo Omondi v Transparency International-Kenya (supra)** is relied upon to demonstrate the applicability of the doctrine of legitimate expectation.

56. That in the instant case the Claimant's contract lapsed on 31<sup>st</sup> January 2017 and there was not express communication that the same would be renewed and parties were in the meantime negotiating the possibility of a new contract which never materialised.

57. The decision in **Rajab Barasa and 4 Others v Kenya Meat Commission [2021] eKLR** is also relied upon.

58. It is submitted that the fact that the Claimant continued rendering services after 31<sup>st</sup> January 2017 did not amount to a renewal of the contract and subsequent offers were rejected.

59. That the contract between the parties after expiration of the written contract is implied in that the parties were engaged in negotiations for a new contract and payment would continue until the new contract was signed or the parties could not agree.

60. It is submitted that based on the exchanges between the parties, the Claimant understood that his contract had expired and parties were working towards a new contract and the circumstances changed when the parties could not agree and the previous contract could not have

ben constructively renewed.

61. On remedies, it is submitted that the Respondent treated all its employees equally. The new position of Business Development Manager was advertised to all internal staff and those shortlisted were interviewed and since the Claimant rejected the offer, it was offered the position to another person which is not discriminatory. On the one month's notice, it is contended that the Respondent did not terminate the Claimant. It is the Claimant who declined a new offer.

62. That airtime was an allowance subject to the Respondent's regulations as explained by the memo to staff dated 26<sup>th</sup> May 2016.

63. On compensation, it submitted that this was not a termination by the Respondent but by operation of law and **no compensation is awardable.**

#### **Analysis and Determination**

64. From the pleadings, evidence, submissions by Counsel and Counsel and the law, the issues for determination are: -

- a) Whether the Claimant's contract of employment was renewed;
- b) Whether the Claimant's employment was terminated by the Respondent;
- c) Whether the Claimant was discriminated;
- d) Whether the Claimant is entitled to the reliefs sought.

65. As regards renewal of the contract of employment, the Claimant relies on the doctrine of legitimate expectations to urge that the Claimant had an expectation that the contract would be renewed and several persuasive decisions are relied upon. The Respondent on the other hand argues that the continued working of the Claimant and payment of the salary for February 2017 did not amount to a renewal of the contract.

#### **Did the Claimant have a legitimate expectancy that the contract would be renewed?**

66. As submitted by the Claimant, the Supreme Court of Kenya explained the doctrine of legitimate expectations in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (supra)** cited above.

67. Relatedly, the South African decision in **National Directors of Public Prosecution v Philip (2002) (4) SA 60(W)** laid down the tenets of legitimate expectation as follows: -

- (i) *The representation underlying the expectation must be clear, unambiguous and devoid of relevant qualification;*
- (ii) *The expectation must be reasonable;*
- (iii) *The representation must have been induced by the decision-maker;*
- (iv) *The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate."*

68. In **Dierks v University of South Africa [1991] 4 BLLR [LC]** the Court laid down the criteria for establishing reasonable expectation for renewal of a fixed term contract:

- a. *Evaluation of all surrounding circumstances;*
- b. *Significance of contractual stipulations;*
- c. *Past practice or custom;*
- d. *Availability of the position;*
- e. *The purpose or reason for the concluded fixed term;*
- f. *Inconsistent conduct;*
- g. *Failure to give reasonable notice;*
- h. *The nature of the employer's business.*

69. Finally, in **Eunice Mwikali Munyao v Elys Chemical Industries Limited [2017] eKLR**, Ndolo J. stated as follows: -

*“As held by Rika J in **Margaret A. Ochieng v National Water Conservation and Pipeline Corporation [2014] eKLR**, an employee on fixed term contract should not expect an automatic renewal. The flip side is that a fixed term contract is not inimical to renewal. Ultimately, the Court will consider the legitimacy of the employee’s expectation based on the unique circumstances of each case.”*

70. In the instant case, it is common ground that the Claimant was employed under a five-year non-renewable fixed term contract with an expiry date of 31<sup>st</sup> January 2017. Clause 3 of the appointment letter dated 18<sup>th</sup> January 2012 stated as follows: -

*“This contract shall run for a period of five (5) years from the commencement date that is up to and including 31<sup>st</sup> January 2017 and shall terminate at the expiry of the said period.”*

71. It is not in dispute that on 5<sup>th</sup> January 2017 the Respondent advertised the position of Business Development Manager to all internal staff. The position was new and not graded in the Respondent’s structure, no salary expectation and had no commencement date. The holder would report to the Head of Sales. The duties and responsibilities were also listed. Deadline for application was 10<sup>th</sup> January 2017.

72. The Claimant applied for the position, was invited for interview and emerged as the best candidate.

73. The Claimant’s five (5) year term contract with the Respondent lapsed on 31<sup>st</sup> January 2017.

74. The jurisprudence on termination of fixed term contracts and renewability is clear. See **Amatsi Water Services Company Limited v Francis Shire Chachi [2018] eKLR**.

75. In **Rajab Barasa & 4 others v Kenya Meat Commission [2021] eKLR**, Mbaru J. stated that –

*“Once the event agreed to between an employer and its employee takes place or materializes, there would ordinarily be no dismissal. The law is that the expiry of the fixed term contract of employment does not constitute termination of the contract by any of the parties. There is an automatic termination of the contract by operation of law and not a dismissal or unfair termination of employment.”*

76. Similar words were expressed in **Apex Steel Limited v Dominic Mutua Muendo [2020] eKLR**.

77. Finally, in **Registered Trustees of the Presbyterian Church of East Africa & another v Ruth Gathoni Ngotho-Kariuki [2017] eKLR**, the Court of Appeal was categorical that: -

*“Bearing the foregoing in mind, we note that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry. Accordingly, any claim based after the expiry of the respondent’s contract ought not to have been maintained. This is in relation to the salary for the months of April up to 5<sup>th</sup> May, 2010. Similarly, since the respondent’s contract came to an end by effluxion of time any claim for wrongful termination could not be maintained.”*

78. This case turns on whether or not the Claimant had a legitimate expectation.

79. It is not in dispute that after the Claimant’s contract of employment expired, the Claimant remained in the employment of the Respondent. He was not removed from the payroll or informed about clearance. This may have been informed by the fact that the Claimant was awaiting the new position of Business Development Manager.

80. It is unclear what transpired between 1<sup>st</sup> February 2017 and 15<sup>th</sup> February 2017. On 16<sup>th</sup> February 2017 the Respondent offered the Claimant the position of Business Development Manager referenced as a *“Renewal of Contract”* with commencement date of 1<sup>st</sup> February 2017 salary at Kshs.141,000/- per month, for one (1) year, non-renewable and reporting to the Area Sales Manager. The position was graded as CP6.

81. On 19<sup>th</sup> February 2017, the Claimant submitted a response highlighting the *“anomalies”* he wanted corrected for acceptance of the offer. The anomalies included commencement date of the contract, grading at CP6, reporting, reference to renewal as opposed to appointment among others.

82. However, the Claimant’s email dated 19<sup>th</sup> February 2017 at 222 pm to the GHRM on return of the contract to the Respondent states in part, *“Finally I have attached the first page of the defective contract document. My prayers are that the anomalies will be corrected and the correct document drawn to renew my contract. Finally, I also pray that my promotion with the right reporting the and remuneration be upheld and communicated in due course.”*

83. Intriguingly, the Claimant made no effort to meet the head of Human Resource to discuss the issue and resolve it amicably. The Respondent did not respond to the memorandum on the anomalies in the contractual document. The Claimant met the GHRM on 1<sup>st</sup> March 2017. The next communication by the Claimant was to the Directors of the Respondent dated 3<sup>rd</sup> March 2017. The letter was reconciliatory since the management had stood its ground on the offer dated 16<sup>th</sup> February 2017. Part of the letter reads as follows: -

*“I explained my understanding and pointed to the Human Resource the issues I had raised but stood his ground. I explained to him that it I am the one out of contract and to my understanding unless otherwise explained to me, I am out of employment. Since I came to work on February, despite my contract ending in 31<sup>st</sup> January 2017, it is the duty of the management to issue me a letter explaining that my contract is over and having not signed the one year contract on the table, I have ceased to be a bonafide employee of Crown Paints. Accompanying the letter, I argued should have a detailed analysis of my final dues, a certificate of service and the exit/clearing form ... My only mistake which I humbly accept is that my contract is over... I cannot resign for I have done nothing meriting resignation but if management decides that my days working at Crown paints ended when my contract ended on 31<sup>st</sup> January 2017, then with open hands I will accept that verdict with a clean heart and in humility.”*

84. It would appear that the Claimant was apparently aware that his contract had lapsed and had no other contract since he had declined the one on the table.

85. But the Respondent was still desirous of retaining the Claimant for some time and on 16<sup>th</sup> March 2017, it gave the Claimant an offer of employment similar to the position he held under the expired contract effective 1<sup>st</sup> February 2017 but for one (1) year at Kshs.141,000/- per month reporting to the Area Sales Manager and at CP6.

86. The Claimant was given seven days to imitate his acceptance or rejection. He did not accept the offer. By an email dated 19<sup>th</sup> March 2017 the Claimant indicated that the issues concerning his promotion and renewal had not been addressed and returned the offer unaccepted.

#### **Was the Claimant’s case one of renewal of contract of employment or promotion?**

87. From the evidence on record, since the contract dated 18<sup>th</sup> January 2012 terminated by operation of law on 31<sup>st</sup> January 2017 on account of lapse of time and was not renewable and the Claimant had already applied for another position, there was no contract to renew. The parties could only enter into a new contractual relationship whose term they had to negotiate and agree or disagree. It appears to the Court that neither of the parties was willing to cede ground.

88. The fact that GHRM intimated that the company had no intention to terminate his contract, his salary for February 2017 would be released and that he was supposed to be working on 23<sup>rd</sup> February 2017 at 10.46, 11.00 and 11.34 respectively, is in the Court’s view not a representation that the expired contract would be renewed. It is important to state that during that time, the parties had a pending contractual document for the position of Business Development Manager which was not a renewal. On the contrary, it was a representation that the contract on the table would come through.

89. RW1 testified that after expiry of the contract, it was understood that the Claimant would continue serving in the previous capacity pending the signing of the new contract and would be paid for the services as per the old contract until the parties concluded an agreement or disagreed.

90. A similar scenario arose in **Kenya Airways Limited v Satwant Singh Flora [2013] eKLR** where the Court expressed itself as follows –

*“On the question whether there was a valid contract of employment between the parties after 14th January, 1997 and whether one can be implied, it is not in dispute that the respondent’s contract was terminated on 14th January, 1997. However, the respondent continued working up to the end of June, 1997, despite there being no written contract.*

**Halsbury’s Laws of England (4<sup>th</sup> Edition), Volume 16 (1A) page 11, paragraph 15 states that:**

*“In general a contract of employment need not be in any particular form. A contract of employment may thus be inferred from conduct which shows that such a contract was intended although never expressed, as where there has in fact been service of the kind usually performed by employees.”*

91. In the instant case, the Claimant’s contract lapsed on 31<sup>st</sup> January 2017 but he continued rendering services since he was in the middle of negotiating a new contract with the company and the company wished to retain him.

92. Instructively, the offers dated 16<sup>th</sup> February 2017 and 16<sup>th</sup> March 2017 which the Claimant had issues with had a commencement date of 1<sup>st</sup> February 2017 an acknowledgment of the fact that the Claimant was presumed to have been working under the new contract.

93. It is inexplicable why the Respondent would impliedly renew an expired contract that had no renewal clause in the middle of negotiating a new contract with the Claimant. For these reasons, it is the finding of the Court that the contract of employment between the parties from 1<sup>st</sup> February 2017 to 29<sup>th</sup> March 2017 was impliedly intended to facilitate the conclusion and operationalization of a new contract between the parties and would either be subsumed by the new contract or lapse if the parties did not agree. This is decipherable from the Claimant’s email dated 23<sup>rd</sup> February 2017 at 11.31 pm stating as follows:

*“That is fine but I am supposed to report to work on 1<sup>st</sup> March 2017.”*

94. This question would not have arisen if the Claimant believed or understood that his contract of employment had been renewed. Relatedly paragraph 6 of the Claimant’s letter dated 3<sup>rd</sup> March 2017 adverts to this fact.

95. As to whether this was a promotion for the Claimant, evidence on record demonstrates that this was a new position in the Respondent's structure and although the advertisement had no grading, the offer letter dated 16<sup>th</sup> February 2017 placed it at CP 6 one step above the Claimant's position under the expired contract.

96. In addition, the advertisement had neither a duration for the position nor the expected salary. Impliedly as a new a position being introduced the Respondent would negotiate with the successful candidate in light of the deliverables and expectations. The Claimant confirmed as much on cross examination.

97. For these reasons, the Court finds that the position of Business Development Manager advertised on 5<sup>th</sup> January 2017 was neither a promotion nor a renewal of contract

98. I now turn to the related question of whether the Claimant had a legitimate expectation of a new contract of employment with the Respondent.

99. As stated elsewhere in this judgment, the Claimant applied for the new position of Business Development Manager, was interviewed and emerged as the best candidate for the position. It is important to indicate that the interviews were conducted while the Claimant was still serving under the first contract of employment and when it lapsed on 31<sup>st</sup> January 2017, the Respondent retained the Claimant as the formalities of the new contract were being concluded, which culminated with the offer dated 16<sup>th</sup> February 2017.

100. The Claimant on cross examination confirmed that he had applied for the position because it was a higher position as evidenced by the reporting line to the Head of Sales and a wider spectrum of duties compared to the position of Business Development Executive.

101. However, the offer dated 16<sup>th</sup> February 2017 referenced Renewal of Contract – Business Development Manager (CP6) was confusing to the Claimant. He confirmed on cross examination that the offer letter was a renewal of contract for the position he had been interviewed for which was contradictory.

102. In a similar vein, the renewal was for one (1) year reporting the Area Sales Manager as opposed to the Head of Sales as advertised and the expected salary was the Claimant's last salary on 31<sup>st</sup> January 2017. If the offer was a renewal as indicated, it should have been of the expired contract and the Claimant expected a five (5) term contract since the salary did not change.

103. Consequent to the offer, the Claimant raised some genuine concerns about the letter and sought clarification before signing the contract.

104. Regrettably, the Respondent did not respond in writing to the eight issues raised by the Claimant to assuage his fears or indicate that the proposed terms were unalterable.

105. Having been successful at the interview stage, the offer letter and the response emboldened the Claimant's expectations of a new contract with the Respondent. The Claimant was upbeat with expectations of holding a prestigious position at the Respondent company.

106. The Claimant's letter to the Directors of the Respondent appear to have been actuated by a discussion with the GRHM on the issues raised by the Claimant but there is no indication that the Claimant was requested to stop working.

107. Finally, the offer of employment dated 16<sup>th</sup> March 2017 was an anti-climax for the Claimant since the Respondent appears to have appreciated more confusion in its earlier offer but still perpetrated the confusion in relation to grading of the position of Business Development Executive. The letter dated 16<sup>th</sup> March 2017 indicates that the position is graded at CP6 similar to the position of Business Development Manager advertised on 5<sup>th</sup> January 2017 which appeared to be much higher. It is unclear why the Respondent could not get it right as regards the Claimant's employment contract after 31<sup>st</sup> January 2017.

108. Consequently, it is the finding of the Court that the Claimant had a legitimate expectation of a new employment contract with the Respondent for the position of Business Development Manager which the Respondent bungled and the Claimant suffered loss.

109. As regards termination of the Claimant's employment with the Respondent, there is no evidence on record of any termination of employment.

110. Although the memorandum of claim alleges that the Claimant was terminated on 29<sup>th</sup> March 2017, the Claimant led no evidence on the actual termination and how it was conducted but alluded to the fact of being called upon to clear and was paid terminal dues amounting to Kshs.936,114.65.

111. Having found that the contract of employment between the parties from 1<sup>st</sup> February 2017 was impliedly for purposes of concluding and cementing a new contract which did not materialise the contract lapsed when the negotiations or engagement fell through.

112. As to whether the Claimant was discriminated the Claimant testified that he felt discriminated because the position of Business Development Manager was given to another person in April 2017, one Mr. George Opundo who had not been shortlisted for the position.

However, the Claimant provided no evidence of the shortlist or the terms and conditions under which Mr. George Opundo was employed. The Respondent's witness testified that Mr. George Opundo took up the job of Business Development Manager on terms agreed upon between him and the Respondent and there had been no preference or discrimination

113. In **Law Society of Kenya v Attorney General & another [2019] eKLR**, the Supreme Court of Kenya cited with approval the explanation of discrimination in **Willis v The United Kingdom (2002) 34 EHRR 547 the European Court of Human Rights** as follows:

*"... a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available members of society".*

114. According to the Court of Appeal in **Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others [2018] eKLR** –

*"... Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions ... whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description ..."*

115. In the instant case, apart from stating that position of Business Development Manager was given to another person, the Claimant provided no factual basis for the allegation.

116. It is the finding of the Court that the Claimant has not on a balance of probabilities established that he was discriminated.

## **Reliefs**

### **(a) Prayer on declaration that the Claimant's dismissal was unprocedural and improper**

117. On the prayer for a declaration that the Claimant's dismissal by the Respondent was unprocedural and improper, a declaration is not available because it has not been established that the Claimant was in fact dismissed by the Respondent.

### **(b) One month's salary in lieu of notice**

118. Having found that the Claimant was not dismissed as alleged, payment in lieu of notice is not payable by the Respondent. The claim is **disallowed**.

### **(c) 31 days leave not taken**

119. The Claimant led no evidence of when these days accrued. Relatedly, the Respondent's testified that the 31 days were paid for at Kshs.168,115/-. The claim is **disallowed**.

### **(d) Airtime of Kshs.30,000/-**

120. The Claimant led no evidence that the amount claimed was payable in cash as an allowance or that following the migration to the Safaricom Closed User Group (CUG) on 26<sup>th</sup> May 2016 where the service provider would top up employees' airtime, he spent personal airtime for purposes of the Respondent's business.

121. Similarly, RW1 testified that the Claimant's airtime allowance of Kshs.6,000/- per month was part of his salary and not an allowance payable in cash. The claim is **disallowed**.

### **(e) Illegally deducted leave days**

122. On illegally deducted leave days of 24<sup>th</sup>, 28<sup>th</sup>, 29<sup>th</sup>, 30<sup>th</sup> and 31<sup>st</sup> for five years, the Claimant led no evidence that he indeed worked on these days for the five years he was employed by the Respondent. More significantly, RW1 testified that the Respondent had a tradition of closing the Company's operations on 23<sup>rd</sup> December of every year until the next working day after the new year holiday and the working days would be recovered from staff since they were in fact not working and the Claimant had enjoyed the leave day for the five years he was an employee. The claim is **disallowed**.

### **(f) Compensation for unfair termination**

123. Having found that the Claimant was not terminated by the Respondent, compensation for unfair termination is unavailable. However, having found that the Respondent breached the Claimant's legitimate expectations for the position of Business Development Manager, the Claimant is entitled to compensation.

124. Having regard to the circumstances in which the separation took place, and in particular the unwillingness of both parties to cede ground, the Respondent's alteration of the contents of the advisement dated 5<sup>th</sup> January 2017 and purportedly downgrading of the position, coupled with the Claimant's penchant for communicating in writing as opposed to engaging the Respondent in a face to face, discussions for an expeditious resolution of the impasse, the equivalent of three months' salary is fair, **Kshs.603,000/-**.

**Conclusion**

125. **Judgment is entered for the Claimant against the Respondent for the sum of Kshs.603,000/- with costs.**

126. Interest at Court rates from the date of judgment till payment in full.

127. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 3<sup>RD</sup> DAY OF FEBRUARY 2022**

**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 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 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**