



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. E029 OF 2021

(Before Hon. Lady Justice Maureen Onyango)

**IN THE MATTER OF ARTICLES 10, 22, 23, 28, 41, 47, 48, 73,
159 AND 232 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 10, 22, 23,
28, 41, 47, 48 232, AND 236 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS, ACT, NO. 4 OF 2015

BETWEEN

ENID NKIROTE MUKIRE.....PETITIONER

VERSUS

KENYA YEARBOOK EDITORIAL BOARD.....RESPONDENT

JUDGMENT

1. The Respondent is a state corporation established under the Kenya Yearbook Order, 2007 as a body corporate.
2. The Petitioner herein was, at the time of filing this petition, an employee of the Respondent in the position of Associate Editor.

Petitioner's Case

3. The Petitioner was first appointed by the Respondent as a sub-editor/writer on 24th October 2011 on a 3 year contract commencing 1st November 2011. The contract stipulated that the terms of service shall apply to the exclusion of all other terms and conditions of service applicable to the staff in the permanent establishment of the organisation.
4. The Petitioner applied for renewal of the contract on 17th April 2014 and on 6th October 2014 the contract was extended from a period of one (1) year.
5. The Petitioner's contract was further extended for 3 years on 11th August 2015 with effect from 1st November 2014.

6. On 1st November 2016 the Petitioner was appointed to act in the office of Associate Editor, a position she held for 12 months.

7. On 1st October 2017, the Petitioner wrote to the Respondent seeking renewal of her contract and confirmation to the position of Associate Editor as her contract was nearing expiry.

8. The Petitioner's contract expired on 1st November 2017 and she handed over the responsibilities of her office to the Editorial Manager. On 18th January 2018, after a break of 3 months, the Petitioner was offered the position of Associate Editor on a fixed term contract of 3 years. She was placed under probation of 6 months "or such extended period as may be deemed necessary by the Board." The contract further stated "Your confirmation will depend on your satisfactory performance during the probationary periods."

9. The Petitioner's appointment was confirmed on 12th September 2018.

10. On 1st September 2020, the Petitioner wrote to the Respondent requesting renewal of her contract of employment which was due to expire on 28th February 2021.

11. On 2nd November 2020, the Respondents CEO wrote a memo to all staff informing them that the Respondent as an organization was going to merge with other government entities to form a new entity called Promotion Kenya and that "all staff of the merging entities will transit to Promotion Kenya".

12. It is the Petitioner's case that despite the communication to all staff that they would be transitioning to Promotion Kenya, on 13th November 2020, the Respondent replied to the Petitioner's request for renewal of contract thus: -

"After careful consideration by the Board, we regret to inform you that we shall not be renewing your employment contract dated 30th January 2018 as requested. Accordingly, your term of employment shall come to end on 28th February 2021..."

13. It is the Petitioner's averment that she was constructively dismissed for reasons that:

i. Despite a communication and assurance to all staff that they will transition to the new Promotion Kenya, the Respondent chose to discriminate against and terminate the Petitioner's contract without valid reasons.

ii. She was appointed to the position of Associate Editor in the employment grade KYEB 4 Scale C5 (Lower) which is a position in the permanent and pensionable establishment of the Respondent;

iii. Article 2.4.2 of the Respondent's Human resource policies stipulates that only senior Employees in grades KYEB 1 to KYEB 3 SHALL be appointed on contract for a period of 3 years renewable once, subject to performance.

iv. Consequently, the appointment of the Petitioner on contract terms was contrary to the Respondents own HR policy, is discriminative on the Petitioner and thus void ab initio;

v. Despite having been hired purportedly on contract terms, the Petitioner served a 6 months probationary period after which she was CONFIRMED in her appointment;

vi. Article 2.12.1 of the Respondent's Human resource policies provides that an employee appointed to a pensionable post will be CONFIRMED in appointment and ADMITTED INTO THE PERMANENT AND PENSIONABLE ESTABLISHMENT ON COMPLETION OF PROBATIONARY PERIOD OF 6 MONTHS' SATISFACTORY SERVICE.

vii. Consequently, the Petitioner contends that she has been serving within the permanent and pensionable establishment of the Respondent and NOT on contract terms;

viii. The Petitioner was not given an opportunity to be heard or make representations before the gravely prejudicial and adverse decision not to renew her contract was made;

ix. No reasons were given to the Petitioner for the adverse decision not to renew her contract of employment effectively dismissing her from employment;

14. The Petitioner was aggrieved by the non-renewal of her contract and filed this petition in which she contends that the Respondent has infringed on her constitutional right to fair labour practices by:

i. By retaining the Petitioner in employment on contract terms for over 9 years contrary to its own Human resource Policy, the Respondent infringed on the Petitioner's constitutional right to Fair Labour Practices;

ii. By hiring the Petitioner on contract under employment grade KYEB 4 Scale C5 (Lower) yet other employees in the same grade were under permanent and pensionable terms, the Respondent infringed on the Petitioner's constitutional right to equal protection and benefit under the law and freedom from discrimination;

iii. By purporting to hire the Petitioner as Associate Editor on contract terms but subject to an inapplicable probation period, the

Respondent infringed on the Petitioner's constitutional right to Fair Labour Practices;

iv. By Confirming the Petitioner in her appointment as Associate Editor and then purporting to refuse renewal of her contract, the Respondent's actions are contradictory and infringe on the Petitioner's constitutional right to Fair Labour Practices;

v. By refusing to admit the Petitioner to the permanent and pensionable establishment following her satisfactory probation period, the Respondent acted contrary to its own HR policy and infringed on the Petitioner's constitutional right to equal protection and benefit under the law and freedom from discrimination;

vi. By refusing to renew the Petitioner's contract or absorb her to permanent employment even after assuring all staff that they will be transitioning to Promotion Kenya, the Respondent infringed on the Petitioner's constitutional right to equal protection and benefit under the law and freedom from discrimination;

vii. By failing to give the Petitioner an opportunity to be heard prior to the adverse decision not to renew her contract of employment, the Respondent infringed on the Petitioner's constitutional right to Fair Administrative Action;

viii. By failing to give any reason for its adverse decision not to renew the Petitioner's employment contract, the Respondent infringed on the Petitioner's constitutional right to Fair Administrative Action;

ix. The Respondent has reneged and acted contrary to the Petitioner's legitimate expectation that after serving for 9 years on contract in positions under the Respondent's permanent and pensionable establishment, she would be absorbed into this establishment as provided for in the Respondents HR manual;

x. The totality of the Respondent's actions infringes upon the Petitioner's constitutional right under Article 236 of the Constitution of Kenya, 2010 on protection from being dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.

15. The Petitioner prays for the following remedies:-

a. A Declaration that the Petitioner's employment and remuneration as Associate Editor in the employment grade KYEB 4 Scale C5 (Lower) is within the Respondent's permanent and pensionable establishment;

b. A Declaration that the Petitioner's employment as Associate Editor in the employment grade KYEB 4 Scale C5 (Lower) on contract terms contravenes the Respondent's own Human resource policy and infringes on the Petitioner's right to fair labour practices and therefore void;

c. A declaration that the hiring of the Petitioner on contract under employment grade KYEB 4 Scale C5 (Lower) yet other employees in the same grade are under permanent and pensionable terms, the Respondent infringed on the Petitioner's constitutional right to equal protection and benefit under the law and freedom from discrimination;

d. A declaration that the refusal to renew the Petitioner's contract or absorb her to permanent employment even after assuring all staff that they will be transitioning to Promotion Kenya, the Respondent infringed on the Petitioner's legitimate expectation and constitutional right to equal protection and benefit under the law and freedom from discrimination;

e. A declaration that by purporting to hire the Petitioner Associate Editor on contract terms but subject to an inapplicable probation period, the Respondent infringed on the Petitioner's constitutional right to Fair Labour Practices;

f. A declaration that by Confirming the Petitioner in her appointment as Associate Editor and then purporting to refuse renewal of her contract, the Respondent's actions are contradictory and infringe on the Petitioner's constitutional right to Fair Labour Practices;

g. A declaration that by refusing to admit the Petitioner to the permanent and pensionable establishment following her satisfactory probation period, the Respondent acted contrary to its own HR policy and infringed on the Petitioner's constitutional right to equal protection and benefit under the law and freedom from discrimination;

h. A declaration that by failing to give the Petitioner an opportunity to be heard prior to the adverse decision not to renew her contract of employment, the Respondent infringed on the Petitioner's constitutional right to Fair Administrative Action;

i. A declaration that by failing to give any reason for its adverse decision not to renew the Petitioner's employment contract, the Respondent infringed on the Petitioner's constitutional right to Fair Administrative Action;

j. A declaration that the totality of the Respondents actions leading to the Petitioner's termination from employment amounts to constructive dismissal and an unfair termination under section 45 of the Employment Act.

k. 12 months' salary equivalent being damages for unfair termination.

l. General damages for breach of the Petitioner's constitutional and statutory rights;

m. Costs of the suit and interest.

16. In opposition to the petition the Respondent filed the replying affidavit of EDWARD MONGARE MWASI, the Chief Executive Officer in which he deposes that the Respondent's staff are engaged on contractual terms as and when need arises. That such contracts are extended subject to the satisfactory performance of the employee and the capacity needs of the Respondent at the material time.

17. The Affiant deposes that contrary to the allegations of the Petitioner that the appointment on contractual terms is limited to KYEB grade 1 to 3, the same extends to instances where capacity is lacking or specific skills are required, or where appointments are made to senior management as determined from time to time by the Board of Directors.

18. That to achieve its objectives and in line with the foregoing, the Board of Directors resolved that all staff in the Technical Department (editorial and production) would be placed on contract given that the workload is time bound thereby requiring the staff within that department to be highly driven individuals who produce results within the shortest turnaround time, hence the placement of the position of Associate Editor on contract terms.

19. That an employee serving on contract terms of service and who wishes to have his contract renewed is required to make a written application to the Chief Executive Officer at least 3 months before the expiry of the contract and such a renewal can only be done once. The renewal is not automatic, but is based on the demonstrable performance and other terms of employment by the employee.

20. On the engagement of the Petitioner, the Affiant deposes that she was first engaged as sub-editor/writer by contract letter dated 3rd October 2011 for a term of 3 years. That upon expiry of the contract she was employed on a one-year contract vide letter dated 6th October 2014.

21. That when her contract was renewed for a further 3 years by letter dated, 11th August 2015, the contract took effect from 1st November 2014 when the initial contract expired. That this was in line with Clause 2.1315 of the Human resource Policy of the Respondent that envisaged that a contract can only be renewed once. The Petitioner handed over following the expiry of the said contract and left employment.

22. The Affiant deposes that the Petitioner's contract commencing 1st March 2018 was unrelated to the first and arose from an advertised vacancy of Associate Editor which the Petitioner applied for, was shortlisted and upon successful interview, was employed on a 3 years contract which expired on 28th February 2021 and was not renewed.

23. The Affiant deposes that the Petitioner's averment that she was on permanent and pensionable terms of employment, or that her employment was terminated without being subjected to a disciplinary process, and amounts to constructive dismissal is dishonest, *malafides and an abuse of court process*.

24. That the allegations by the Petitioner that the Chief Executive Officer's Memo of 2nd November, 2020 to all staff informing them of the proposed merger with other government entities into a new entity called Promotion Kenya afforded her a legitimate expectation on her contract renewal and/or extension of her employment is not only misguided, but lacks any legal foundation or basis for reasons that: -

i. The said entity "Promotion Kenya" is non-existent and cannot have employees as it is still but a proposal;

ii. The written fixed term employment contract of the Petitioner was not and could not be varied by a general memo to staff of the Respondent; and

iii. Even if the entity Promotion Kenya were to come into *effect, it would develop its own structures, policies and/or regulations including on matters employment and such a memo cannot be binding on it.*

25. The Affiant deposes that the Petitioner's allegations of breaches of constitutional rights are far-fetched, misconceived and generally bereft of merit. That the Petitioner was employed under fixed term contracts that were separate and distinct from each other and to which she voluntarily agreed.

26. The Affiant further avers that the Petitioner was never diligent and never rose through the ranks as alleged in the petition. That on the contrary, during her service the Petitioner was entangled in a lot of disciplinary issues including but not limited to insubordination, failure to meet expected turnaround times as well as gross misconduct and was on several occasions subjected to internal disciplinary processes resulting to suspension on some occasions. That to turn around and allege impeccable service is thus a great show of dishonesty on the part of the Petitioner.

27. The Respondent has annexed several disciplinary letters dated 27th August 2019, 5th April 2019, 7th December 2018, 6th July 2020 and 25th April 2019. The Respondent further annexed minutes of disciplinary meetings in respect of the Petitioner hold on 3rd February 2020 and 7th August 2019.

28. The suit was disposed of by way of written submissions.

Petitioner's Submissions

29. It is the Petitioner's submission that having been hired as Associate Editor grade KYEB 4, served 6 months' probationary period and been

confirmed in employment, then pursuant to the Respondent's own human resource policies and procedures she was automatically admitted into the permanent and pensionable establishment.

30. The Petitioner further contends that having been appointed to employment grade KYEB 4 and served a six-month probationary period, she had a legitimate expectation that after satisfactory performance and upon confirmation, she would automatically be admitted to the permanent and pensionable establishment pursuant to the Respondent's own human resource policies and procedures

31. The Petitioner further submits that notwithstanding the insinuation in the appointment letter that she was a contract employee, after satisfactory performance in her probation and upon confirmation she is deemed to have been constructively hired on permanent and pensionable terms.

32. She relies on the decision in **Benjamin Nyambati Ondiba v Egerton University [2014] eKLR** where the Court rendered itself thus:

"The effect of the respondent's action in deferring the confirmation of the claimant unilaterally and failing to review and confirm his employment was that he became constructively confirmed as of 31st December 2011. The respondent failed the provisions of the law outlined in Section 42 of the Employment Act That failure must be interpreted to the benefit of the employee, the claimant in this case. He effectively became permanent and pensionable as under the applicable CBA, 2010 that remained valid at the time of the claimant's employment."

33. It is submitted for the Petitioner that being a permanent employee, the termination of her employment was unlawful as it did not comply with Section 45 of the Employment Act. The Petitioner relies on the decision in **Joseph Aleper & Another v Lodwar Water and Sanitation Company Limited [2016] eKLR** where the Court stated –

"Constructive dismissal has its roots in the law of contract under the doctrine of 'discharge by breach.' Under this doctrine, an employee was entitled to treat himself as discharged from further performance of his obligations where the employer's conduct was a significant breach going to the root of the contract. The termination would be due to the employer's conduct."

34. The Petitioner further relies on the decision in **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR** where the Court found that constructive dismissal occurs where an employee is forced to leave his job against his will, because of his employer's conduct. Although there is no actual dismissal, the treatment is sufficiently bad, that the employee regards himself as having been unfairly dismissed. The Court went ahead to give basic ingredients in constructive dismissal as being inter alia, the employer being in breach of the contract of employment and the breach being so fundamental as to be considered a repudiatory breach.

35. The Petitioner submits that she was forced to leave her job against her will ostensibly upon expiry of her contract yet a reading of her employment letter, together with the Respondent's Human Resource Policies and Procedures Manual leave no doubt that the Petitioner had been admitted to the permanent and pensionable terms.

36. On whether the Respondent violated her constitutional rights, the Petitioner submits that for nine years, she was employed on perennial short contracts in junior positions of sub-editor/writer and Associate editor despite the human resource policies of the Respondent reserving contract employment to senior positions.

37. It is further the Petitioner's submissions that by hiring her in grade KYB4 which was within permanent and pensionable establishment but placing her on fixed contract terms and further by subjecting her to probationary terms yet failing to admit her to permanent terms the Respondent violated the constitutional rights under Article 41 of the Constitution. She relies on the decision in **Joseph Maina Theuri v Gitonga Kabugi & 3 others [2017] eKLR** where Court stated –

"The fulcrum of the employment relationship in this country is fair labour practices as envisaged under Article 41 of the Constitution. What is fair straddles and goes beyond what is lawful or legal."

38. The Petitioner further relies on the decision in **Kenya County Government Workers' Union v County Government of Nyeri & another [2015] eKLR**, where the Court held:

"It is the opinion of the court that the right to "fair labour practices" encompasses the constitutional and statutory provisions and the established work place conventions or usages that give effect to the elaborations set out in Article 41 or promote and protect fairness at work. These include provisions for basic fair treatment of employees,"

39. The Petitioner further relies on the decision in **Esther Njeri Maina v Kenyatta University [2020] eKLR** where the Court held:

"Indeed, fair labour practices include adherence to the law through the issuance of an employment contract, confirmation of employment after serving under probationary period or being a casual employee for a period exceeding 3 months. The Respondent failed to adhere to the law and therefore subjected the Petitioner to unfair labour practices."

40. She submits that the right to fair labour practices takes prominence as the right to employment has an essential bearing on the right to life as held in **Air-India Statutory Corporation v United Labour Union** cited in **V M K v C U E A [2013] eKLR** where the Judge observed:

"This court has held that right to life to a workman would include right to continue in permanent employment which is not a bounty of the employer nor can its survival be at the volition and mercy of the employer. Income is the foundation to enjoy many fundamental rights and when work is the source of income, the right to work would become as such a fundamental right. Fundamental rights can ill* afford to be consigned to the limbs of undefined premises and uncertain application."

41. She submits that Article 47 of the constitution provides for the right to fair administrative action that is lawful, reasonable and procedurally fair, relying on the case of **Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR** and **County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR**. She submits that she was never heard before her employment was terminated.

42. On violation of the Petitioner's freedom for discrimination the Petitioner submits that there was no valid reason for isolating her to serve on contract terms out of all the permanent staff. That her selective employment on contract was discriminatory.

43. On the Respondent's averments that the Petitioner was incompetent, she submits that apart from the claims being false, the petition is in respect of violation of her constitutional rights and not an evaluation of her otherwise exemplary service to the Respondent. That as a matter of fact, the Respondent considered the Petitioner for the higher position of Editorial Manager as late as 7th August 2020 as is evident from annexure "ENM17". She states this would not have been the case if the Respondent's allegations were true.

44. The Petitioner prays that her petition be allowed.

Respondent's Submissions

45. The Respondent submits that under the Employment Act, employment may be on casual terms, fixed term contract or under permanent and pensionable terms. That fixed term contracts are for a fixed period of time to carry out a specific job or because a special skill is needed.

46. Further that under the Respondent's Human Resource and Administration Policies and Procedures Manual (The HR Manual) appointment on contractual terms is permitted under the following circumstances –

- i. Where persons to be appointed may not qualify for pension as per the respective scheme.
- ii. Where employees are appointed to serve on fixed term projects.
- iii. Appointment at senior levels as determined by the Kenya Yearbook Editorial Board (KYEB) from time to time.
- iv. Where the capacity in the KYEB is lacking or specific skills are required.

47. The Respondent submits that the Petitioner was hired on contract terms because capacity in the KYEB was at the time lacking.

48. The Respondent submits that the Petitioner's letter of appointment dated 30th March 2020 leave no doubt that the contract was for a period of three years. That the fact that the Petitioner applied for renewal thereof is an admission that the contract was for a fixed term due to expired on 1st March 2021.

49. The Respondent relies on the case of **Samuel Chacha Mwita v Kenya Medical Research Institute [2014] eKLR**, where the Court held:

"Once there is a written contract, the court will seek to give meaning to such a written contract based on its terms in determining any issue that may arise especially any dispute. The court as guided by the provisions of section 10 of the Employment Act will give the ordinary meaning to any written agreement between parties unless there is proof that there is ambiguity on the face of the contract."

50. The Respondent further relies on the case of **Kenya Plantation and Agricultural Workers Union v Kenya Cuttings Limited [2013] eKLR**, where Court stated that:

"Once there is a written contract, the court will seek to give meaning to such a written contract in determining any issue that may arise especially any dispute. The court as guided by the provisions of section 10 of the Employment Act will give the ordinary meaning to any written agreement between parties unless there is proof that there is ambiguity on the face of the contract."

51. The Respondent urges the Court to find that the Petitioner was on a fixed term contract.

52. With respect to the whether the termination of the Petitioner's employment was fair, the Respondent submits the same lapsed by effluxion of time on 1st March 2021. That the request by the Petitioner for renewal was declined by the Respondent's Board of Directors, who as provided in the Respondent's HR Manual have discretion to agree or refuse such requests. That in considering requests for renewal of contract, the Board of Director's exercise discretion based on the needs of the Respondent, the internal organisation structure, and the competence, performance and suitability of the employee.

53. That the Board of Directors was thus undertaking their functions as under the Respondent HR Manual when denying the Petitioner's request for renewal. Further, they were under no legal obligation to advance reasons to the Petitioner for their failure to renew the same as there was no expectation of renewal, nor was there a contractual obligation to advance the same.

54. The Respondent relied on the ruling in **Geoffrey Mworira v Water Resources Management Authority [2015] eKLR** as quoted in **John Moogi Omare v Kenya National Commission for Unesco [2020] eKLR** where the Court stated as thus,

"The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as

recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process."

55. The Respondent submits that the legal position regarding renewal of fixed term contracts was enunciated in **Margaret A. Ochieng v National Water Conservation and Pipeline Corporation [2014] eKLR** as follows,

"Courts have upheld the principle that fixed-term contracts carry no expectancy of renewal, in a catena of judicial authorities. This Court has done so in Industrial Court Petition No. 35 of 2012 between George Onyango v. The Board of Directors Numerical Machining Complex Limited & Others, [2014] eKLR and in the Industrial Court Cause No. 1541 of 2010 between Bernard Wanjohi Muriuki v. Kirinyaga Water and Sanitation Company Limited and Others. The general principle is that fixed-term contracts carry no expectation of renewal.

Exceptions to this general principle are limited. The expiring contract may contain a clause giving expectancy of renewal as discussed by Hon. Justice Byram Ongaya in Industrial Court Case between Ruth Gathoni Ngotho-Kariuki v. the Presbytery Church of East Africa & Anor, [2012] eKLR. In this case the Employer was obliged to give the Employee notice, 3 months before the 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. This Court similarly expressed the view in the case of Bernard Wanjohi Muriuki that an outgoing contract may impose the expectancy of renewal.

In the **United Nations Appeals Tribunal [Tribunal D3 Appel Des Nations Unies] UN AT, Case No, 2010 -125 between Frencon v. The Secretary- General of the United Nations**, the Tribunal found that the decision of an Employer not to renew a fixed-term contract may be challenged on limited grounds. These include where the actions of the Employer give rise to legitimate expectation on the part of the Employee, that there would be renewal; and two, where the decision not to renew is based on improper motives or there are countervailing circumstances."

56. The Respondent submits that the Petitioner had no legitimate expectation that there would be renewal of her contract, and further, the Respondent's decision not to renew the same was neither based on improper motives, nor were there countervailing circumstances.

57. The Respondent submits that they responded to Petitioner's request for renewal well in advance and by the time the contract expired, the Petitioner had no expectation of renewal.

58. The Respondent submits that it is well established law that an employee has the burden of proving an unfair termination of employment has occurred as was stated in the case of **George Onyango Akuti v Security Services Kenya Limited [2013] eKLR**.

59. The Respondent submits that the Petitioner's contract was not terminated but expired. That the Petitioner's employment was thus not terminated unfairly.

60. On the question whether the Respondent breached the Petitioner's fundamental rights under the Constitution the Respondent relies on the decision of the Court in **Elizabeth Washeke and 62 Others versus Airtel Networks (K) LTD & another [2013] eKLR** where while addressing what unfair labour practice entails, held;

"To determine the ambit of this open-ended right, regard must be had, first, to what is meant by a labour practice, and, thereafter, to what is meant by a fair labour practice. In both issues, reference must be made to the unfair labour practice jurisprudence by the Industrial Court. The Employment Act, 2007 once enacted allowed the court to declare their view on labour relations policy. Section 43. (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

This power to give meaning to the concept of fair and unfair labour practices results in the court being used by employers and employees as an arena of struggle. The fruit of this struggle is a body of jurisprudence regulating both individual employment relations and collective labour relations.

With regard to individual labour relations, the Court has handed down decisions dealing with virtually all aspects of the employment relationship, ranging from unfair dismissals, [**Industrial Cause No. 1616 of 2012, Aviation and Allied Workers Union versus Kenya Airways Limited et al**] ... employment opportunities Industrial Cause No. 567 of 2012, Silas Rukungu Karanja vs. Teachers Service Commission] ... appointment [**Industrial Cause No. 1065 of 2012, Dr. Anne Kinyua vs. Kenya Tea Development Authority and Others**] ... and selective criteria to promotions. [**Industrial Court, Petition No. 41 of 2012 in Robert Muriithi Ndegwa vs. Ministry of Tourism**] ...

These pronouncements of the Industrial Court relating to labour practices within the realm of the individual employment relationship indicate something of what conduct constitutes a labour practice. As far as the issue of fairness of a labour practice, regard must be had to the Employment Act, 2007.

61. The Respondent further relied on the decision in **George Onyango Akuti v Security Services Kenya Limited [2013] eKLR**, where the Court held;

“An unfair termination could be because no notice was given as required by Section 35 (1); no reasons were given or because the employee was not afforded a hearing as required by Section 41 of the Employment Act. The reasons can be various based either on failure to comply with the statute or the terms of the actual employment contract.”

62. The Respondent submits that it neither failed to comply with statutory provisions nor with terms of the actual employment contract and as such cannot be guilty of unfair labour practice.

63. The Respondent submits that the Petitioner’s right to fair administrative action was upheld at all material times, putting in mind that the Petitioner was employed on a fixed-term contract which elapsed by effluxion of time and that further, they were neither entitled to a notice of termination, nor to a disciplinary hearing.

64. The Respondent relies on the decision in **Stephen M. Kitheka v Kevita International Limited [2018] eKLR** where the Court held that they Claimant having been on a fixed term contract with an ascertained date of expiry, was not entitled to notice of termination.

65. The Respondent further submits that the Petitioner failed to establish how she was discriminated by the Respondent. It is submitted that all staff in the Respondent’s Technical Department (editorial and production) were placed on contracts, given that the workload in the department is time bound.

66. The Respondent submits that the Petitioner is not entitled to the reliefs sought. It further submits that in accordance with Section 5 of the Employment Act, the Petitioner was paid her terminal benefits and has no legal claim against the Respondent.

Analysis and Determination

67. I have considered the pleadings and submissions. The issues for determination are whether the Petitioner was unfairly placed on contract terms, whether the Respondent violated her constitutional rights under Articles 41 and 47 of the constitution, whether she was constructively dismissed and if she is entitled to any reliefs.

68. It is not contended that the Petitioner was on fixed term contract until the effluxion of her last contract on 1st March 2021, which contract was not renewed upon her application. She filed this petition on 25th February 2021 together with a motion under certificate of urgency seeking to stay the decisions of the Respondent vide its letter dated 13th November 2020 declining her application for renewal of the contract. The petition was amended following the lapse of their contract as the Court declined to grant the orders sought in her application.

Was the Petitioner wrongly placed on contract term?

69. According to the Petitioner, the Respondent’s Human Resource Manual provides that only senior positions can be on fixed term contract. That the position she held being grade KYEB 4 scale 5 (lower) is not supposed to be on fixed term contract and is not subject to probation.

70. Clause 2.13 of the Respondent’s HR Manual provides for appointments on contract as follows –

2.13 Appointment on Contract Terms of Service

2.13.1 Appointments on contract terms will be made under the following circumstances: -

- i. Where persons to be appointed may not qualify for pension as per the respective *pension scheme*.
- ii. Where employees are appointed to serve on fixed term projects.
- iii. Appointments at senior levels as determined by the KYEB from time to time.
- iv. Where the capacity in the KYEB is lacking or specific skills are required.

2.13.2 Appointment of employees on contract and renewal of such contracts shall be made on authority of the Board of Directors. The Chief Executive Officer shall report to the Board all cases of appointment on contract terms which require renewal at least three (3) months before expiry of such contract.

2.13.3 An employee serving on contract terms of service and who may wish to have his contract renewed shall make a written application to the Chief Executive Officer at least 3 months before the expiry of the contract and six months for the position of the Chief Executive Officer.

2.13.4 An employee serving on contract, and whose services are still required will be informed in writing at least three (3) months before the expiry of the contract. On acceptance of the offer, the case will be referred to the KYEB of Directors for approval of renewal

2.13.5 Contract appointments will be limited to a maximum period of three (3) years, renewable once subject to demonstrable performance and other terms of the contract.

2.13.6 At the expiry of the contract period, an employee will be entitled to service gratuity which shall be calculated at the rate of 31% (or the prevailing rate) of the employee's basic salary over the contract period. However, an employee whose contract is terminated before the contract expires shall be paid gratuity on a pro-rata basis.

71. Contract of employment is further provided for in Clause 2.4 of the HR Manual as follows –

“2.4 Contract Terms of appointment

2.4.1 Contract terms of appointment shall apply to employees appointed to undertake assignments within a specific time period.

2.4.2 Employees in grade KYEB 1 to KYEB 3 shall be appointed on contract for a period of three (3) year renewable once, subject to performance.

2.4.3 The KYEB may also hire an Expert and/or a Consultant on contract terms to undertake a special assignment for a specific period of time.

2.4.4 An employee serving on contract terms of service shall be subject to the terms and conditions of service as spelt out and shall be eligible for payment of service gratuity at the rate of 31% (or the prevailing rate) of his basic salary over the period worked.

2.4.5 Where an employee shall not complete the period of contract, he shall be paid service gratuity on a pro-rata basis.”

72. The Petitioner's averment that only senior staff of the Respondent can be on contract and that her fixed term contract was not in conformity with the Respondent's HR Manual is not supported by the provisions of the Manual. The Manual, clearly provides that any category of employee may be engaged on contract.

73. The Petitioner's averment that she was placed on contract for nine years is also not supported by the evidence on record. According to the record, the Petitioner was first engaged on a three-year contract on 3rd October 2011. When the contract expired, she was placed on a one-year contract from 6th October 2014. On 11th August 2015, the Petitioner was issued with a contract for a fixed term of three years effective 1st November 2014, which was the date on which her first contract was due for renewal. Upon expiry of the second contract, it was not renewed. The Petitioner's next contract according to the record was entered into following advertisement for the position of Associate Editor.

74. The Petitioner applied, was interviewed and engaged to the position on a three-year contract commencing 1st March 2018. Upon the Petitioner's application for renewal of this contract for a second term the Respondent by letter dated 13th November 2020 informed her that it will not renew the same. It is this letter declining her application for renewal that precipitated the instant suit as is reflected in the application filed with the suit which seeks conservatory orders staying the letter refusing to renew her contract and to restrain the Respondent from terminating her employment.

Was there unfair termination of the Petitioner's employment contract

75. As has been pointed out in the contract and as is evident from all the contracts entered into between the Petitioner and the Respondent, all the contract had a start date and an end date. As has been held by the courts in numerous cases, including the ones cited by the Respondent, an employee on a fixed term contract is aware of the date of expiry of the contract from the date the contract is signed. Such an employee needs no notice for termination of the contract as the contract terminates by the expiry of its term.

76. Such an employee does not go through the provisions of Section 41 of the Employment Act or Section 45. The employee's employment is not terminated on disciplinary grounds and there is no necessity for a disciplinary hearing. The reason for the termination need not be given to the employee as it is expiry of the term of the contract that brings the employment relationship to an end.

77. The courts have also held severally that there is no legitimate expectation of renewal of the employment contract unless the employer has expressly communicated this to the employee.

78. In this case, the Petitioner avers that she had legitimate expectation of renewal of the contract or continued employment following the Respondent's letter on the establishment of the Promotion Kenya Agency. In the internal memo the Respondent's CEO informed staff that a decision had been made by the Cabinet to merge the Respondent with four other entities, the Kenya Investment Authority, Kenya Export Promotion and Branding Agency, Kenya Tourism Board and the Kenya Yearbook Editorial Board to form Promotion Kenya. That consequently all staff of the merging entities would transit to Promotion Kenya.

79. It is this letter that the Petitioner cites as the basis for the legitimate expectation to continue in employment.

80. The letter does not state that staff whose contracts had lapsed would be issued with new contracts. The letter does not even promise that all staff of the Respondent would be retained.

81. In any event, that merger had not happened at the time the Petitioner's contract lapsed. Only what is in existence is capable of being preserved. If a contract had lapsed, there is nothing, no contract to preserve. I find no promise of renewal of contract or of absorption of the Petitioner in the employment of the Respondent capable of raising a legitimate expectation of the Petitioner for continued employment.

82. The Petitioner further alleged constructive dismissal. The definition of constructive dismissal was given by the Court in the case of **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR** as –

- a. What are the fundamental or essential terms of the contract of employment?
- b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer?
- c. The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.
- d. An objective test is to be applied in evaluating the employer's conduct.
- e. There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e causation must be proved.
- f. An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.
- g. The employee must not have accepted, waived, acquiesced or conduct himself to be estopped from asserting repudiatory breach; the employee must-within a reasonable time terminate the employment relationship pursuant to the breach.
- h. The burden to prove repudiatory breach or constructive dismissal is on the employee.
- i. Facts giving rise to repudiatory breach or constructive dismissal are varied.

83. The instant case does not fall within the definition of constructive dismissal as there was no dismissal, constructive or otherwise. Constructive dismissal occurs where an employee terminates his/her employment because of frustration by the employer, either by the employer breaching fundamental terms of the employment contract or making the environment at work unbearable to the employee, thus forcing the employee to terminate the contract. The circumstances of this case do not lend themselves to any interpretation of constructive dismissal.

84. The Petitioner further averred that her rights under Article 41 and 47 were breached by the Respondent. This has not been proved by the Petitioner who left employment upon the lapse of her fixed term contract.

85. Having failed to prove any of the averments in the petition, I find the petition without merit and dismiss the same.

86. Each party to bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF MARCH, 2022

MAUREEN ONYANGO

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, the 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 the 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.

MAUREEN ONYANGO

JUDGE