



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MALINDI

ELRC CAUSE NO 10 OF 2021

JUSTIN BESWICK.....CLAIMANT

VERSUS

LOCAL OCEAN CONSERVATION (LOC) KENYA LTD....RESPONDENT

JUDGMENT

1. The Claimant, a national of the Republic of South Africa was employed by the Respondent on 1st January 2019 in the capacity of project manager to oversee the Respondent's marine conservancy activities in Kenya. The contract was to run for two years commencing 1st January 2019.
2. Other terms of the engagement were that the Claimant was to: be paid an annual gross salary of Ksh. 1,200,000/=; get furnished accommodation worth of Ksh. 50,000/= per month; and be granted a medical insurance cover. Further, the Respondent was to be responsible for paying for the Claimant's work permit and was also to meet a percentage of the Claimant's airfare at the commencement and close of the contract.
3. The letter of engagement also contemplated extension of the contract beyond the initial two years. However, any such extension was to be discussed and agreed by the parties and evidenced in writing.
4. From the evidence tendered, the contract ran its full term, that is to say, up to 31st December 2020. Whilst the Claimant contends that he was entitled to renewal of the contract and that it was in fact and law renewed, the Respondent disputes this assertion. And hence the current litigation.
5. From the various email correspondence exchanged between the parties and their statements in court, it is evident that the Claimant and the Respondent's founder had a seemingly strained relationship for the better part of the two years that the contract of service ran. It does appear that for some time before the end of December 2020, there developed heightened mistrust between the two with the latter entertaining a strong conviction that the Claimant's activities at the Respondent organization were intended to instigate a forced takeover of the organization. This friction, it would appear, resulted in the emergence of two camps within and without the organization with divided loyalties each pulling in a different direction from the other.
6. In the pleadings and evidence presented by the Claimant, he states that as his contract drew to a close around December 2020, he was told by the Respondent's manager, one Moses Kamau that the contract will be renewed for a further two years starting 1st January 2021. The Claimant states that he was in fact asked to continue working as the renewal process, which included the procurement of a fresh work permit for the Claimant, went on.
7. It is the Claimant's case that the totality of the discussions with the Respondent's manager and board left him with genuine expectation that his employment contract would be renewed for another two years on similar or better terms. According to the Claimant, it was therefore surprising when the Respondent's board later resolved not to renew the contract.
8. The Claimant states that the meetings of the Respondent's board on 28th January 2021 and 4th February 2021 were convened to deliberate on the renewal of the contract. Therefore, he believes that the purported minutes of these meetings filed in evidence by the defense seeking to express the contrary view were manipulated to support the Respondent's changed position on the matter.
9. It is the Claimant's contention that since the Respondent allowed him to continue working after 31st December 2020, the Respondent by its conduct renewed the Claimant's employment. In the Claimant's view, the continued payment of his salary by the Respondent after 31st December 2020 cannot be interpreted otherwise than to imply renewal of his contract by the Respondent.

10. It is the Claimant's case that the Respondent was obligated by the contract between the parties to renew the Claimant's work permit. That the failure of the Respondent to discharge this contractual duty constituted a breach of the contract between the parties.

11. The Claimant further states that his dismissal on 23rd April 2021 was irregular and unlawful. In his view, the Respondent did not justify the reasons for the termination and neither did it adhere to the procedure regulating disciplinary processes preceding termination of employment.

12. On its part, the Respondent concedes that the Claimant had a two year employment contract running from 1st January 2019 to 31st December 2020. It is the Respondent's case that whilst the contract made provision for renewal, this was conditional on the parties agreeing on new terms of engagement which agreement had to be reduced into writing. The Respondent asserts that at the close of the contractual period on 31st December 2020, it did not renew the contract. A resolution in this respect was made by the Respondent's board on 4th February 2021 and the Claimant was duly notified of this fact.

13. The Respondent states that it never offered the Claimant a renewal of the contract after 31st December 2020. All that it did was to require the Claimant to hand over the project to the Respondent's new team. To facilitate this, it is the Respondent's case that it offered the Claimant a five months addendum contract from 1st January 2021 to enable him hand over. However, the Claimant declined to sign the said addendum contract.

14. The Respondent further contends that in furtherance of the clearance process, it procured a three months special pass for the Claimant running upto June 2021 so that he could lawfully remain in Kenya to hand over the project to the incoming team. The Respondent avers that the application for the pass dated 24th February 2021 is clear that the special pass was limited to the hand over activities.

15. The Respondent's position is that after the lapse of the two year contract between the parties, it did not in any event procure a fresh work permit for the Claimant to enable him to continue working in Kenya. And that any engagement with the Claimant in relation to work outside of the hand over process would in the circumstances have been illegal.

16. It is the Respondent's case that it continued paying the Claimant between January 2021 and March 2021 not because of the purported contractual obligation to pay salary to the Claimant but as a form of compensation to him for attending to the handing over process. In the Respondent's view, the handing over was executed outside the contract of employment between the parties which had lapsed on 31st December 2020.

17. The Respondent's further case was that on 23rd April 2021, it terminated the hand over exercise between the parties. According to the Respondent's witness, when it was realized the Claimant was involved in a scheme to poison the minds of the Respondent's staff and instigate resignations by them, a decision was taken to end the hand over exercise. That the decision to terminate the Claimant was further informed by the fact that the Claimant had begun a smear campaign against the Respondent's director and manipulating the Respondent's software passwords, matters which impacted negatively on the Respondent's activities.

18. As the relation between the Claimant and the Respondent's founder deteriorated, it appears that the Respondent hired an independent consultant to investigate the goings on at the organization. The intention, it would appear, was to try and identify and amicably resolve the underlying issues between the Claimant and the Respondent.

19. The Respondent's case is that the consultant invited the Claimant to show cause why his engagement with the Respondent should not be terminated for the various transgressions he had been accused of. According to the Respondent, it is only after the Claimant failed to respond to the notice to show cause that his engagement with the Respondent was terminated.

20. The Respondent further states that even after his termination, the Claimant continued to unlawfully undermine its activities. For example, it is alleged that the Claimant registered a similar organization called Bahari Hai run by his wife that was used to divert funding and projects intended for the Respondent. It is the Respondent's case that the Claimant's underhand activities were enabled by his unlawful mining of the confidential data that belongs to the Respondent.

21. After their oral testimony the parties filed written submissions. In this judgment, I have considered the record, evidence and submissions by the parties.

22. The parties did not file agreed issues before trial. However, in their written submissions, they have set out their viewpoints of the issues for determination. These two versions of issues are not necessarily in agreement. As a result, the court had to distill what appear to be the common issues for determination from the pleadings and the evidence tendered. Accordingly, the court considers the following to be the issues for determination: -

a. Was there legitimate expectation that the Claimant's contract of employment with the Respondent will be renewed after 31st of December 2020 and was it in fact and law renewed?

b. If the contract was renewed, was it rendered illegitimate by the failure of the parties to procure a work permit?

c. Is the Claimant entitled to any reliefs?

23. Regarding the first (1st) issue, the evidence shows that the contract of employment between the parties was concluded through the letter of appointment dated 1st September 2019. The letter appears as document number two on the Claimant's list of documents. As mentioned earlier, the contract was to run for two years from the date of the letter. This means that it came to a close on 31st December 2020. Indeed,

the parties confirm this both in their evidence to court and their written submissions.

24. The parties agree that the contract had a renewal clause. From the clause, it is clear that the renewal would only be upon discussion and agreement between the parties. And this had to be evidenced in writing. However, there is no mention in the instrument whether in the event of renewal, the renewed term was to be equal to or more than the two year term in the first contract.

25. There is no evidence tendered by the Claimant or indeed the Respondent that the parties expressly agreed to renew the contract or that they agreed on the terms for renewing it. Further, there was no evidence that if there were any deliberate negotiations to renew the contract that such negotiations were documented.

26. The Claimant has suggested that he was promised by one Moses Kamau, an official of the Respondent and the Respondent's board that the contract would be renewed. This is disputed by the Respondent. It was the Respondent's case that the Respondent being a body corporate only acts through its board of directors. Therefore, any decision by the Respondent to renew an employment contract must be evidenced in the board's resolution. That no such resolution was made by the Respondent's board.

27. I agree with the Respondent's position in this respect. Being a body corporate, the Respondent's decisions are ordinarily by resolutions of its board of directors at board meetings (see *Ibacho Trading Company Limited v Samuel Aencha Ondora & 3 others [2017] eKLR*). There was no evidence tendered to show that the Respondent's board passed a resolution to renew the Claimant's employment. To that extent, I hold that there was no express renewal of the employment contract between the parties in terms of the letter of appointment dated 1st January 2019 as read with the applicable law.

28. However, the fact that the parties did not expressly renew the contract is not the same thing as saying that there was no renewal of the contract in fact and law. Renewal, though not express can be implied from the conduct of the parties to the relationship (see *Caroline Muthoni Njoroge v LVCT Health [2019] eKLR* and *Eunice Mwikali Munyao v Elys Chemical Industries Limited [2017] eKLR*).

29. In *Registered Trustees of the Presbyterian Church of East Africa & another v Ruth Gathoni Ngotho- Kariuki [2017] eKLR*, the court expressed the view that although fixed term contracts terminate on expiry of the fixed term and are not renewable except as agreed between the parties, in exceptional cases, the court may infer renewal of such contracts from the conduct of the parties. In relation to implied renewal, the court expressed itself as follows: -

“We also do not think that the appellants' conduct implied that the said contract was renewed. Firstly, it is clear that the respondent was informed by a letter dated 31st March, 2010 that her contract had expired and further communication in respect of the same would come from the Head Office. Secondly, the respondent in her own evidence testified that she had been removed from the payroll once her contract expired. This was a clear indication of the appellants' position. Moreover, the decision to continue working in the hospital after the expiry of the contract was entirely on the respondent's own motion. She did not tender any evidence to the effect that she had been directed to continue working by the hospital's administration.”

30. From the record, when the Claimant's contract came to a close on 31st December 2020, he was not told that he will not benefit from the renewal clause in the contract. Meanwhile, the Respondent, by conduct, allowed the Claimant to continue working. And this remained the case until around 4th February 2021. As at 27th January 2021, the Respondent's board had not met to deliberate on the issue of renewal or otherwise of the contract. In the minutes of the meeting of the Respondent's board dated 28th January 2021, it is quoted as saying the following: -

“The Board members deliberated on Justin's future with the Board. Opinions differed with respect to offering him another 2 years contract.”

31. The decision not to renew the Claimant's contract appears to have been reached around 4th February 2021, more than one month after the Claimant's 2019 contract had lapsed. I say so because in the minutes of the Respondent's board meeting dated 4th February 2021 and produced as exhibit, the thrust of minute three (3) appears to have been a discussion on hand over by the Claimant. Indeed, the Respondent's statement of defense and the Respondent's witness's written statement indicate that the decision not to renew the Claimant's contract was made on 4th February 2021.

32. However and as both parties agree, the Respondent communicated in writing to the Claimant the decision not to renew the contract by the email of 17th February 2021 sent to the Claimant by one Shaun Mumford. This email was produced as an exhibit.

33. In the meanwhile, there is evidence that the Claimant remained at work at least between 1st January 2021 and 28th January 2021 when the Respondent first took up the issue of whether or not to renew the Claimant's contract. During this period, it is not denied by the parties that the Claimant remained at his workplace and in fact drew a salary. The Claimant has produced a pay slip for January 2021 appearing as document number four (4) on the Claimant's list of documents dated 16th August 2021. This document gives itemized details of what it is that the Respondent was paying the Claimant. It was clearly remuneration as contemplated under the Employment Act.

34. The Respondent has tried to justify the payments to the Claimant between January 2021 and March 2021 as compensatory payments for the duration the Claimant was involved in the handing over process. However, this cannot apply to the month of January 2021 as it is plain from the evidence that the question of whether or not to renew the Claimant's contract was first taken up by the Respondent at the tail end of January 2021.

35. As a matter of fact, the email correspondences between the Claimant and the other Respondent's management in January 2021 leave no

doubt that the Respondent still considered the Claimant as its employee despite the lapse of the employment contract on 31st December 2020. For instance, the email trail between the Claimant and Moses Kamau, the Respondent's manager dated 30th and 31st January 2021 appearing from page 3 to 8 of the Claimant's bundle and list of documents dated 2nd March 2022 and pages 5 to 7 of the Claimant's further list of documents dated 11th October 2021 shows the said manager engaging the Claimant on various work related issues including: approval of bi-weekly petty cash floats; accounting for expenditure; procuring of fuel cards and office safes; and preparation of the Respondent's 2021 budget. The Claimant is shown responding to the various issues raised and even indicating that he had shared the Respondent's proposed 2021 budget on 28th January 2021.

36. What comes out clearly from these set of facts is that after 31st December 2020, the Respondent continued to assign the Claimant routine work within its establishment and remunerate him for his effort in executing it. On the other hand, the Claimant continued to execute the work assigned to him and receive remuneration from the Respondent. This conduct by the parties can be contradistinguished with the facts in **Registered Trustees of the Presbyterian Church of East Africa & another v Ruth Gathoni Ngatho- Kariuki** where it is clear that the employer: notified the employee of its intention not to renew the contract on the contract's expiry date; immediately removed the employee from its payroll; and did not remunerate the employee for whatever work she unilaterally undertook after her contract had expired.

37. In effect, although the contract of 1st January 2019 between the parties lapsed on 31st December 2020, the parties by their conduct renewed this contract. This conduct is evidenced in the acquiescence by the Respondent to the Claimant's presence at work in January 2021. The Respondent allowed the Claimant to remain at its premises and continued to assign him work during this period thereby raising a legitimate expectation in the Claimant that his contract would be renewed. As a matter of fact the Respondent paid the Claimant salary for January 2021. This conduct implied renewal of the contract of service between the parties.

38. The Respondent, through the testimony of its witness, has suggested that since the Claimant was in control of the Respondent finances, he unilaterally paid himself what he now terms was salary for January 2021 to March 2021. This argument is not convincing. From the email trail referred to above, there is evidence that the Respondent's finances remained under close scrutiny by the Respondent's other management. Yet, there is no evidence that the Respondent ever raised a red flag that the Claimant was paying himself without authorization.

39. The scenario would have been entirely different if the parties had done no more in respect of their relationship after the contract lapsed on 31st December 2020. Had the Respondent not acquiesced to the Claimant's presence at the workplace in January 2021 and had the Respondent not assigned the Claimant duties and remunerated him for January 2021, then no legitimate expectation to renew the contract would have arisen. And no renewal of the contract would have been implied from the conduct of the parties.

40. The Respondent has argued that the contract between the parties could not in any event be renewed as the Claimant lacked a work permit. However, in her evidence, the Respondent's witness conceded that the Claimant's work permit that was issued on 5th March 2019 was to lapse around 4th March 2021. The work permit was produced as document number four (4) by the Respondent. Consequently, when the parties renewed the employment relationship by implication in January 2021, the Claimant still had a valid work permit. It follows that the employment contract between the parties which was renewed by implication in January 2021 was lawful and valid at least until 4th March 2021 when the work permit expired. Therefore, I answer issue number one in the affirmative.

41. The second (2nd) issue is whether the renewed contract of employment was rendered illegitimate by the failure of the parties to procure a work permit. It is clear from the evidence that the work permit the Claimant held was valid for two years from 5th March 2019. This means that its lifespan terminated on 4th March 2021.

42. Section 45 of the **Kenya Citizenship and Immigration Act** obligates an employer to apply for and procure work permits for its employees who are foreign nationals. The law further makes it an offense to work in the country without a valid work permit.

43. Therefore, the obligation was on the Respondent to procure a work permit for the Claimant to enable full implementation of the contract of service renewed by implication between them. This, the Respondent was to do before the work permit held by the Claimant lapsed on 4th March 2021. It was not open for the Claimant to continue working in Kenya after 4th March 2021 if the work permit that he held was not renewed by the Respondent.

44. I would like to imagine that the consequence of the foregoing is that the implied contract of employment between the parties was rendered illegitimate as from 5th March 2021 when the Respondent failed to renew the Claimant's work permit. However, the Court of Appeal in **Five Forty Aviation Limited v Erwan Lanoë [2019] eKLR** appears to indicate that such contract does not become illegitimate but is rendered unenforceable on account of frustration.

45. The Court of Appeal in the foresaid case appears to hold the view that as it is the obligation of the employer to renew the work permit for the employee, if an employer takes no steps to fulfill this obligation or deliberately becomes evasive about it, he thereby commits an act which renders the continued performance of the contract impossible. Thus, he frustrates the contract.

46. However, this suggestion by the court appears not to sit well with what comprises a frustrating event at least from the excerpts referred to by the court. One of the excerpts reads as follows: -

“Frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because, the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract...”

47. From this quotation, it appears to me that an event will be deemed to frustrate a contract if: -

a. The event happens after conclusion of the contract.

b. The event renders the performance of the contract impossible or renders the outcome of executing the contract completely different from that which the parties initially intended.

c. The supervening event comes into place without the default of either party to the contract.

48. In the *Five Forty Aviation Limited v Erwan Lanoë* case, the employer failed to renew the work permit despite the fact that the statutory obligation to apply for renewal was on the employer pursuant to section 45 of the **Kenya Citizen and Immigration Act**. Therefore, the reason for the collapse of the contract was the failure by the employer to apply for the work permit. The non renewal of the work permit did not happen without the default of either party. It was as a result of the default of the employer to discharge its statutory obligation under section 45 of the Act.

49. In my view, the law renders such contract illegal due to the non-availability of a work permit. I would therefore have thought that in the *Five Forty Aviation Limited v Erwan Lanoë* case the contract collapsed not due to frustration but because of illegality following the absence of the work permit.

50. This is the position the Court of Appeal appears to take in the earlier case of *Kenya Airways Limited v Satwant Singh Flora [2013] eKLR*. However, it is noteworthy that in the *Kenya Airways v Satwant* case, the immigration law had not been altered to make it the obligation of the employer to procure a work permit for his foreign employees.

51. That said, I am convinced that the position taken by the Court of Appeal in the *Kenya Airways v Swatwant* case that a contract of employment in Kenya involving a foreigner becomes illegal if it is not supported by a valid work permit is the correct position to be applied to this matter. This position is further supported by the High Court's decision in *Five Forty Aviation Limited v Richard Oloka [2015] eKLR* where the court observed as follows: -

“Although the trial court found that it was the Appellant responsible to procure the work permit and that the contract of service between the parties did not refer to the issue of procuring the work permit, that did not stop the contract from falling foul of the Immigration Act. To my mind, it does not matter that it was the Appellant who was obligated to procure the work permit or not. The moment the contract was against the law, it became illegal and therefore unenforceable.”

52. However, the latter Court of Appeal decision in *Five Forty Aviation Limited v Erwan Lanoë* is deemed to declare the current position of the law on the matter. I am bound by this position. I therefore declare that the renewed contract between the parties became frustrated from 5th March 2021 when the Respondent failed to obtain a work permit for the Claimant after the parties impliedly renewed their relation in January 2021 as explained above.

53. In terms of the *Five Forty Aviation Limited v Erwan Lanoë* decision, the contract having been frustrated by failure to renew the Claimant's work permit, the Respondent ought to have invoked the procedure under section 41 of the Employment Act as read with sections 43 and 45 of the Act to close the relationship. This would imply that the Respondent ought to have raised frustration as a ground for termination and processed the termination through the normal internal administrative machinery that would permit the Claimant to be heard in response to the proposed closure of the contract. There is no evidence that the Respondent resorted to this procedure to close the now frustrated contract between the parties.

54. As I have said, the parties impliedly renewed their employment relationship in January 2021 when the Respondent acquiesced to the Claimant's continued presence at the workplace. This implied renewal fell before 4th February 2021 when the Respondent purported to take the decision not to renew the 2019 contract. Therefore, it is my view that the 2019 contract having been renewed by implication in early January 2021 it was no longer open to the Respondent to purport to determine whether or not to renew the same contract in its subsequent meetings of 28th January 2021 or 4th February 2021. This decision had already been made by operation of law.

55. The foregoing being the position, it follows that it was no longer open to the Respondent to require the Claimant to hand over in purported closure of the already closed contract. The Respondent could only require the Claimant to hand over in respect of the new contract after lawfully terminating it.

56. Therefore, the process the Respondent undertook to procure a special pass limited only to granting the Claimant authority to hand over following closure of the 2019 contract was without legal foundation. There was no handing over that could be done at the time under the guise of the closed contract. At that time, the new implied contract of service between the parties had already come into existence and was in force. The Respondent could only opt out of it in terms of the procedure under the Employment Act. And there is no evidence that the Respondent invoked this procedure before asking the Claimant to start doing the hand over exercise in the meeting of 17th February 2021.

57. The Respondent has raised other matters as forming the basis of its decision to terminate the Claimant. These are set out partly in the letter of show cause dated 14th April 2021 and the letter of termination dated 23rd April 2021.

58. In the letter of 14th April 2021, the Claimant is accused of engaging in personal attacks against the person of Nicky Parazzi thereby exposing her character and integrity to opprobrium in the eyes of the Respondent's partners. However, the particulars of the personal attacks were not given. In the letter of termination dated 23rd April 2021, the Respondent gives an additional reason for terminating the Claimant as the failure by the Claimant to hand over password keys to the Respondent's system.

59. It is perhaps important to note that all these grounds in support of the decision to summarily terminate the Claimant were raised around

14th April 2021 after the Claimant's contract with the Respondent had collapsed on account of frustration for failure by the Respondent to renew the Claimant's work permit after the initial one expired on 4th March 2021. Therefore, the summary termination, in law had no effect as the employer-employee relationship between the parties had already collapsed on account of frustration of contract.

60. Be that as it may, even assuming that the contract between the parties was still subsisting as at 23rd April 2021 the date of the summary termination, the question to consider is whether the Respondent's action to terminate the Claimant met the statutory threshold for lawful termination. From the record, it is clear that the Respondent sent the Claimant a letter of show cause on 14th April 2021. The letter mentions the ground for the Claimant's possible termination as his besmirching of the character of the Respondent's CEO. However, it does not give specific details of the acts which led the Respondent to accuse the Claimant of tarnishing the character of its CEO.

61. In response to the notice to show cause, the Claimant wrote to the Respondent on the same date asking for further and better particulars of the accusations against him in order for him to respond to them. From the record, it does not seem that these particulars were ever sent to the Claimant. Instead, all that the Respondent's consultant did was to send the Claimant an email dated 14th April 2021 indicating that she was still undertaking an in-depth investigation into the matter and that she required the Claimant to confirm whether he had authored an email to the Respondent's funders sending a list of individuals who were ready to give evidence about the alleged incompetence of the Respondent's CEO in running the organization.

62. This email was to later be followed by the letter dated 23rd April 2021 terminating the Claimant for gross misconduct. In the dismissal letter, the Respondent accused the Claimant of having failed to respond to the show cause letter. Yet, the Respondent had not supplied the Claimant with the particulars of misconduct sought by the Claimant through his email of 14th April 2021 so as to enable him respond to the show cause. Suffice it to say that there was no disciplinary session called to address the issues raised against the Claimant before the termination was handed down to him.

63. The foregoing procedure of handling the case against the Claimant appears to fly in the face of the requirements of due process as set out under section 41 of the Employment Act. But for the fact that the contract between the parties had already suffered collapse on 5th March 2021 through frustration, the manner in which the Respondent handled the Claimant's termination was clearly irregular.

64. The Respondent appears to rely heavily on the fact of absence of a work permit to rubbish the Claimant's position that there still remained an employer-employee relation between the parties after 31st December 2020. In support of this argument, the Respondent argues that it only applied for a special pass around 24th February 2021 to facilitate the Claimant to clear with the organization by 25th June 2021. That the special pass was not a work permit that would entitle the parties to continue with the employer-employee relationship.

65. Whilst I partially agree with the Respondent's position in this respect, I have emphasized that this argument can only make sense in relation to the period after 4th March 2021. As I have demonstrated in this judgment, after 31st December 2020, the parties impliedly renewed the contract of service between them through their conduct. And this new contract continued to run lawfully on the basis of the balance of the term of the work permit held by the Claimant until 4th March 2021 when it lapsed.

66. In any event, the Respondent's own correspondence betrays its current position in the case. The record shows that the Respondent was quite ambivalent about the status of the Claimant in the Respondent organization between 28th January 2021 and 23rd April 2021. While some correspondence insinuate that the Claimant was allowed to remain with the Respondent for clearing purposes only the contract of employment having terminated, other correspondence imply that the Respondent considered the Claimant as its employee. Three examples of this will suffice.

67. The first example is the application for the special pass dated 24th February 2021. This application clearly shows that the Respondent intended to retain the Claimant for a while not as its employee but for handing over purposes.

68. Yet, in the second example, the Respondent's letter to the Director of Immigration Services dated 23rd April 2021, the Respondent says this of the Claimant: -

“ The company has since summarily dismissed him on the grounds of gross misconduct and as such, he is no longer our employee. We therefore request that you cancel the special pass in light of the current circumstances.” Emphasis added.

69. Further, in the letter of termination dated 23rd April 2021, the Respondent states as follows: -

“ On the foregoing premise, I hereby advise and confirm to you that the management in consideration of all the facts and circumstances concluded that you betrayed the confidence it bestowed upon you and consequently, under the provisions of section 44(4) specifically sub-sections (c), (d) and (e) of the Kenyan Employment Act, you are hereby summarily dismissed with effect from 23rd April 2021.

You shall be entitled to the following final dues (if any) subject to deduction of statutory requirements, any company loan, salary advance, pending I.O. U's or any other monies that you may owe the company:-

a. Salary for the days worked up to and including 23rd April 2021.

b. Any pending leave days up to and including end of April 2021 pro-rated at 1.75 days for every completed month for year 2021 i.e 7 (seven) days as stipulated in your contract.

c. A contribution towards your airfare of the equivalent of \$ 550 converted to Kenya Shillings.

d. A Certificate of Service.” Emphasis added.

70. In my view, the latter statements can only be understood to mean that the Respondent considered the Respondent as its employee as at 23rd April 2021. One can only rely on the provisions of the Employment Act (as the Respondent did) to address issues arising from an employer-employee relationship.

71. Besides, in the termination letter, the Respondent still refers to the employment contract between the parties as providing the basis of working out the Claimant’s entitlements, including salary up to 23rd April 2021. To my mind, this reference (in the letter of termination dated 23rd April 2021) to computing the balance of the Claimant’s leave days “*as stipulated in your contract*” can only imply that the Respondent had reverted to some of the terms of engagement between the parties under the January 2019 contract as a guide to their renewed contract.

72. That the 2019 contract was renewed is therefore not contestable. The only contest in my view would perhaps relate to the term of the new contract.

73. From the unsigned addendum instrument produced in evidence by the parties and the special pass procured by the Respondent, it can be reasonably be inferred that the Respondent was intent on having a labour relation with the Claimant but limited to a period running up to June 2021. In my view, it can be reasonably inferred that in the Respondent’s sub conscience, it entertained a renewal period of six months at most. This is probably one of the reasons the Claimant rejected the proposed contract in the addendum instrument. But I dare say that it was not open to the Claimant to dictate the terms of renewal of contract to the Respondent, implied or otherwise. I can only infer from the two documents (whose existence the parties to the dispute acknowledge) that the Respondent’s intention may have been to extend the contract by perhaps a maximum of six months. Indeed, in its submissions, the Respondent mentions that the relationship between the parties was to close by 25th June 2021 the date the purported hand over was to close. This means that either way, the renewed contract would have determined at the close of June 2021.

74. This can be contradistinguished with *Eunice Mwikali Munyao v Elys Chemical Industries Limited [2017] eKLR* where the court held that the contract was deemed as renewed for a term equivalent to the term of the extinguished contract. It should be noted that, unlike in this case where the parties shared an addendum draft suggesting an extension, the court in *Eunice Mwikali Munyao v Elys Chemical Industries Limited* reached the decision on the full term because there was no material from which the court could reasonably infer a contrary intention by the parties.

75. In conclusion, it is my considered view that although the parties had a legitimate contract of service implied by the conduct of the parties as from 1st January 2021, this contract was frustrated following the failure by the Respondent to secure a work permit for the Claimant from 5th March 2021. However, had the work permit been secured, it is clear to me that from the Respondent’s conduct, it can reasonably be inferred that it had intended that the extended contract runs from 1st January 2021 to at most 25th June 2021.

76. Having found as foresaid, the third (3rd) issue is what remedies the Claimant is entitled to if at all. On this, I make the following observations and orders: -

a. I declare that the Claimant had legitimate expectation that his employment contract with the Respondent would be renewed and that the same was renewed in January 2021 by conduct of the parties and operation of the law. However, from the conduct of the Respondent and other evidence available, it can reasonably be inferred that the renewed contract was to close by 25th June 2021.

b. I further declare that until when the contract was frustrated on 5th March 2021 for non availability of a work permit, the Claimant was entitled to the benefits and protections similar to the ones under the contract of 1st January 2019 save as mentioned in 76 (a) above.

c. As the Respondent did not follow the release process suggested in the *Five Forty Aviation Limited v Erwan Lanoe* case, the Claimant is entitled to compensation for violation of his employment rights. Indeed, article 41 of the Constitution obligates parties to an employment contract to uphold the right to fair labour practices. In my view, in the circumstances of this case, the right required the Respondent to fairly handle the issue of renewal of the Claimant’s work permit so that the Claimant is not unfairly prejudiced in the process. Guided by the provisions of section 49 of the Employment Act, and having regard to the fact that the term of the implied contract would have reasonably lasted up to June 2021, I award the Claimant damages equivalent to his gross salary for three months.

d. I note that the Claimant produced a pay slip showing that his January 2021 gross salary was Ksh. 255,000/=. In her evidence, the Respondent’s witness confirmed that the Claimant’s salary had been increased from the initial pay as set out in the January 2019 contract albeit informally. In the absence of evidence to the contrary, I take it that the improved monthly salary for the Claimant was as evidenced in the January 2021 pay slip. This is because the figure of Ksh. 255,000/= in the January 2021 pay slip agrees with the one in the March 2021 pay slip. I will ignore the February 2021 slip because it is at variance with the January and February 2021 pay slips which are in agreement and consistent.

e. I note that the Claimant is already in employment. Therefore, he is considered to have considerably mitigated his losses following his termination. Proceeding from the premise that his gross monthly salary was Ksh. 255,000/= the sum total of the award is Ksh. 765,000/=.

f. I award the Claimant a contribution towards his airfare of the equivalent of \$ 550 converted to Kenya Shillings as offered by the

Respondent in the letter of termination.

g. I award the Claimant interest on the sum aforesaid to run at court rates from the time of institution of the suit till payment in full.

h. I award the Claimant costs of the case.

i. The award of compensation shall be subject to the applicable statutory deductions as contemplated under section 49 of the Employment Act.

j. I also order the Respondent to issue the Claimant with a Certificate of Service in terms of section 51 of the Employment Act and the Respondent's letter of termination.

DATED, SIGNED AND DELIVERED ON THE 28TH DAY OF APRIL, 2022

B. O. M. MANANI

JUDGE

In the presence of:

No appearance for the Claimant

No appearance for the Respondent

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M. MANANI

JUDGE