



REPUBLIC OF KENYA



KENYA LAW

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

**Adan & 20 others v National Transport Safety Authority (Cause
E077 of 2021) [2022] KEELRC 1628 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1628 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E077 OF 2021**

J RIKA, J

MAY 27, 2022

BETWEEN

TARI ADAN 1ST CLAIMANT
EVERLYNE SILSIL 2ND CLAIMANT
CATHERINE NJERI 3RD CLAIMANT
KIPLANGAT KITUR 4TH CLAIMANT
KIPNGETICH KOECH 5TH CLAIMANT
PATRICIA CHEPKURUI 6TH CLAIMANT
TERESIA WACHIRA 7TH CLAIMANT
JACKSON RONO 8TH CLAIMANT
STEPHEN MINANGICH 9TH CLAIMANT
ALBERT ALELA 10TH CLAIMANT
MORRIS MUTWIRI 11TH CLAIMANT
CHRISTOPHER KASYOMO 12TH CLAIMANT
BRIAN MUTUA 13TH CLAIMANT
STANLEY MBUVA 14TH CLAIMANT
SUSAN MWANGI 15TH CLAIMANT
KEVIN KEROSI 16TH CLAIMANT
GEORGE KUBAI 17TH CLAIMANT
STEVE MURIUKI 18TH CLAIMANT
CARLOS MUTAI 19TH CLAIMANT



.STEPHEN MBUGUA 20TH CLAIMANT
MARTIN MEJUNGI 21ST CLAIMANT

AND

NATIONAL TRANSPORT SAFETY AUTHORITY RESPONDENT

JUDGMENT

1. The claimants filed their statement of claim on February 3, 2021.
2. They filed authority to sue, donated to the 1st, 2nd and 7th claimants.
3. The authority is not signed by the 21st claimant, either physically or virtually. The claim by the 21st claimant against the respondents is declined from the outset, for want of authority.
4. The claimants state that they were employed by the respondent state corporation as Road Traffic/ Footbridge Marshalls, on diverse dates, between the years 2016 and 2018.
5. They were initially employed on 1- year fixed-term contracts, which were routinely renewed or extended.
6. In 2018, the Employees were required to sign a Human Resource Policy, which comprised their terms and conditions of service. The policy states that all Employees were entitled to gratuity on termination.
7. The claimants were denied salaries for November and December 2020. The respondent demanded that they disclaim any liability and forfeit their right to bring any claims for unfair termination.
8. The policy provides that employees in grades 3-12 are permanent and pensionable employees. The claimants fell within these categories. They reasonably and legitimately expected to be retained as permanent and pensionable.
9. They were not paid risk allowance, despite their work being extremely risky. They did not benefit from work injury insurance. They were not paid house allowance.
10. They submit that section 26 [2] of the *Employment Act*, mandates the court to enforce terms and conditions of employment which are more favourable to an Employee, whenever different sets of terms and conditions of employment are alleged to apply. In their case, there were terms in their individual contracts which were inferior to what was given under the Human Resource Policy. The terms and conditions in the Human Resource Policy took precedence over all else.
11. The policy offered gratuity. It offered house allowance. It offered service pay at the rate of 15% of the basic pay. They seek judgment against the respondent for:
 - a. Payment of full salaries for November and December 2020.
 - b. Payment of full salaries for the period from January 2021 until the claim is determined.
 - c. Declaration that the letters issued by the respondent to the claimants in November and December 2020, purporting not to renew their contracts are void and null, without legal effect.
 - d. Declaration that the claimants are permanent and pensionable employees of the respondent.
 - e. Reinstatement without loss of any rights.



- f. Payment of house allowance from the date of employment.
 - g. In the alternative, payment of maximum compensation for unlawful termination; payment of full salaries; and payment of gratuity as provided for in the Human Resource Policy.
 - h. Costs.
12. The respondent does not seem to have filed a statement of response, as required under rule 13 of the *Employment and Labour Relations Court [Procedure] Rules, 2016*. Instead, the respondent appears to rely on an affidavit which was filed in response to an application filed by the claimants dated January 25, 2021, sworn by Human Resource and Administration Manager, Jane Musyoka on May 5, 2021.
 13. A respondent who intends to respond to a claim, must file a statement of response, as required by the Rules.
 14. Musyoka basically states that the claimants were employed initially as casuals. They were later placed on fixed term contracts. The contracts were subsequently extended. The signing of the Human Resource Manual in 2018, did not convert the claimants' fixed term-contracts, into permanent and pensionable employment. Employees can belong to the same grade, but on permanent, casual or fixed-term contracts. Gratuity was payable to the claimants upon clearance. The respondent does not pay risk allowance to any employee. The claimants were covered under group personal accident benefit insurance. They were on consolidated monthly salaries of Kshs 45,889. The claim for house allowances has no merit.
 15. It is confirmed by the parties in their submissions that the prayer for gratuity has since been settled. The issues left for the determination of the court have been reduced to the following: -
 - a. Whether the claimants had legitimate expectation that their contracts were converted from limited-term to permanent and pensionable contracts, through the human resource manual;
 - b. Whether they merit house allowances;
 - c. Whether they merit general damages for breach of contract and discrimination at the workplace, and what the quantum of those damages should be.
 - d. Whether they should be paid costs of the claim.
 16. It was agreed by the parties that these issues be canvassed and considered on the strength of written submissions. The parties confirmed filing and exchange of submissions at the last mention, on February 1, 2022.
 17. The claimants restate the contents of their statement of claim, in their submissions. They invoke section 26[2] of the *Employment Act*, in urging the court to find that the human resource manual, was more favourable to the claimants, and must therefore be enforced by the court, above all other terms and conditions of service; section 31 on payment of accrued house allowance; and section 35 [6] on service pay. They submit that they have received gratuity from the respondent. Clause 2.7.6 provides for payment of house allowance, while clause 4.1.6 emphasizes that all contracted and permanent employees are entitled to house allowance. Clause 2.5.3 stipulates that officers in grade 3 to 12, shall be appointed on permanent and pensionable terms.
 18. The respective contracts indicated the claimants were in job group 3. With the promulgation of the Human Resource Policy in 2018, the claimant automatically transited to permanent and pensionable employees, being in job group 3. They had legitimate expectation that they would be converted to permanent and pensionable employees. They were paid basic salary of Kshs 45,889. The pay slips



- show the slots for house allowance and commuter allowance were left blank. There is no proof of consolidated salary. The claimants submit that they are entitled to compensation equivalent of 12 months' salary, for breach of their respective contracts of employment, at Kshs 550,668 per claimant.
19. They further submit that they were discriminated against, at their workplace. Their salaries for October, November and December 2020 were withheld until they signed clearance forms. They were denied their right to fair labour practices. They were subjected to ridicule. They seek general damages at Kshs 2 million each. They ask for costs of the claim.
 20. The respondent submits that the claimants were on fixed term contracts. These would be extended periodically and the claimants informed when this happened. The respondent engages its employees through letters of offer, not through the Human Resource Manual. Employees can be engaged on casual, contractual, temporary, or permanent and pensionable terms. Employees could all be clerical officers, but engaged under different forms of employment contracts.
 21. The claimants' fixed term contracts were never converted to permanent and pensionable terms as alleged. They are bound by what is in their respective contracts, not what is in the human resource manual. Section 26[2] of the *Employment Act* does not apply in this dispute. The court would set a dangerous precedent by disregarding contracts of employment and upholding human resource manuals. The human resource manual was signed in 2018. The claimants have executed fixed term contracts after the manual came into force. They did not decline those contracts. There is no legitimate expectation shown. There was no expectancy of renewal.
 22. The letters of appointment indicated the claimants would earn consolidated salary at Kshs. 45,889 monthly. There is no merit in the pursuit of house allowance. They never asked for house allowance during their service. They were informed their contracts would not be renewed, and there was no breach on the part of the respondent. The prayer for general damages is unmerited. There was no discrimination. Employees are employed under different terms and conditions of service. The respondent submits that the claim should be dismissed with costs.

The Court Finds: -

23. The claimants were initially offered employment by the respondent corporation on casual terms. They were engaged as Footbridge Marshals, earning Kshs 1,000 for everyday worked.
24. They were subsequently offered different fixed-term contracts. They were to receive monthly salary of Kshs 45,889 each which, is described in the contracts to be consolidated. They were advised that their positions fell in job grade 3.
25. The contracts would be extended for periods of about 6 months. The last extensions were up to November 30, 2020. They received letters from the respondent, in the middle of November 2020, advising that the contracts would not be renewed upon expiry, on November 30, 2020.
26. They argue that there was a Human Resource Policy Manual, adopted in 2018, which converted their terms, to permanent and pensionable.
27. The document which was availed to the court, titled 'Human Resource Policies and Procedures Manual 2018,' marked as 'AA1' by the claimants, does not bear the signature and stamp of the respondent. There is a stamp and signature at every page, indicating for 'Secretary, State Corporations Advisory Committee.'
28. Further, it is not signed by any of the claimants. There is nothing to show that they, endorsed it as part of their contracts of employment.



29. The court would be making fundamental presumptions, by concluding that the Human Resource Policy document on record was ratified by the respondent and adopted; and that it was signed by the parties to indicate their acceptance of the policy as part of their contracts of employment.
30. A Human Resource Policy Manual must be shown to have been signed or thumb-printed by the employee, just like the initial contract is, to signify consent of the employee in a written contract under section 9[3] of the *Employment Act*.
31. The claimants unfortunately have not provided the court with copies of the Human Resource Manual signed by themselves, to signify incorporation of the contents of the Manual, in their individual contracts.
32. None of the individual contracts has a clause, indicating that the Human Resource Policy Manual, was part of the individual contracts.
33. There is therefore no basis for the court to conclude that their fixed- term contracts were in any way altered by the Human Resource Manual.
34. Even had the claimants established that the Manual is formally valid, and incorporated in their respective contracts, the court has not seen any clause in it, which requires that employees on fixed-terms contracts, are converted to permanent and pensionable Employees. The manual states that appointment at the respondent, shall be based on either of the following terms of service: permanent; contract; temporary; or casual.
35. The claimants executed contracts post- the manual of 2018, which were for fixed periods, and within the classification contained in the manual. Whereas the Manual contains a clause on extension of fixed-term contracts, the court has not encountered any, on conversion of fixed term-contracts to permanent and pensionable terms.
36. The claimants did not ask for conversion, when they signed fresh contracts after 2018. They submit that their job grouping under grade 3, captured in their contracts, meant they were permanent and pensionable.
37. This assertion is not founded on any express clause in their contracts.
38. The court finds that the claimants' contracts were not converted into permanent and pensionable terms of service under the manual of 2018. The formal validity of the manual, and its incorporation as part of the claimants' individual contracts, has not been established.
39. On house allowance, the sum of Kshs 45,889 paid as monthly salary, was described in the contracts as 'consolidated.'
40. Consolidated means remuneration including all allowances, attached to a particular post. The claimants signed contracts accepting that what was paid to them, comprised their basic salary and all allowances attached the position of Footbridge Marshal. There is no justification in demanding additional allowances of any form, while the contracts indicate salaries paid were consolidated.
41. The 3rd issue is whether the respondent terminated the claimants' contracts unlawfully or unfairly, whether they were discriminated against, and whether they are entitled to damages.
42. The extended contracts had clear dates of expiry. The respondent informed the claimants that there would be no further extension or renewal upon expiry. The court is not persuaded that there was legitimate or reasonable expectation of renewal on the part of the claimants. The claimants accepted their appointments subject only to terms and conditions contained in the letters of appointment.



There was no obligation on the part of the respondent to give reasons why the contracts would not be extended or renewed.

43. The claimants have not established discrimination. They freely entered into fixed-term contracts with the respondent. They cannot say that there was discrimination in relation to other employees, who had been employed from the outset, under other forms of employment contracts. They do not show that other employees on either casual or fixed- terms contracts were converted into permanent and pensionable terms of service, through the Human Resource Manual or through other mechanisms. They had themselves been fairly treated by the respondent, by being offered fixed-term contracts after their initial employment as casual employees.
44. The court is therefore not able to agree with the claimants that their contracts were unfairly or unlawful terminated; that they were discriminated against; or that they are owed any form of damages.
45. They were paid gratuity at the end of service. Nothing turns on service pay/ gratuity.

It is ordered: -

- a. The claim is declined.
- b. No order on the costs.

DATED, SIGNED AND RELEASED ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 27TH DAY OF MAY 2022.

JAMES RIKA

JUDGE

