



**Nabwera & another v Kenya Meat Commission (Petition 59 & 60 of 2018
(Consolidated)) [2022] KEELRC 1624 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1624 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 59 & 60 OF 2018 (CONSOLIDATED)**

J RIKA, J

MAY 27, 2022

**IN THE MATTER OF: FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES
19,20,21,22,23, 27[2][4] [5], 41 AND 47 OF THE CONSTITUTION;**

AND

**IN THE MATTER OF: SECTIONS 12 [1] [A], 3,
AND 20 OF THE EMPLOYMENT AND LABOUR**

RELATIONS COURT ACT;

AND

**IN THE MATTER OF: SECTIONS 5[1] [A], [2], [3], [7]. [8] [C] 9[3] 43 AND 45 OF THE
EMPLOYMENT ACT, 2007**

BETWEEN

JULIE LUSIKE NABWERA 1ST PETITIONER

MUGAMBI LAWRENCE NJUE 2ND PETITIONER

AND

KENYA MEAT COMMISSION RESPONDENT

JUDGMENT

1. There are 2 Petitions in 1, No. 59 and 60 both of 2018, which come up for Judgment today.
2. The 1st Petition was filed by Julie Lusike Nabwera, the 2nd by Mugambi Lawrence Njue. Both were filed on 26th June 2018.
3. They were consolidated through an order of the Court, issued on 5th December 2018, with Petition No. 59 of 2018, designated as the mother file.



4. The Petitioners gave evidence, and rested their respective Petitions on 12th February 2021. Respondent's Human Resource Officer, Isaac Onsaringo gave evidence on 21st October 2021.
5. Parties adopted their Affidavits, Documents, Pleadings and Submissions on record. The Petitions were last mentioned in Court on 9th February 2022, when it was confirmed that Parties had filed and exchanged Final Submissions.

1st Petition.

6. The 1st Petitioner was employed by the Respondent State Corporation, on 1st November 2007, as a Distribution Supervisor Grade 5. She was employed on a 1-year contract, lapsing on 31st October 2008. Her net monthly salary was Kshs. 39,000.
7. The contract was renewed for another year, lapsing on 31st October 2009. It was renewed further for 3 years, from 1st November 2009 to 31st October 2012. On 2nd July 2012, the Claimant was promoted to the position of Senior Legal Assistant, on a monthly basic salary of Kshs. 62,000 and house allowance of Kshs. 24,000. She was not offered a new contract, but continued working on the same terms.
8. This changed on 22nd April 2013 when she was offered a contract for a period of 3 years from 1st November 2012 to end on 31st October 2015.
9. On 19th September 2013, the Petitioner received a letter from Respondent's Acting Managing Director, purporting to issue another contract, for a period of 1 year, running from 1st November 2012 to 31st October 2013.
10. On 4th October 2014, she received a contract renewal for the period November 2013 to 23rd February 2015.
11. She was appointed a Member of the Job Evaluation Change Agent on 21st May 2015, and Acting Company Secretary on 21st October 2015.
12. Her contract was renewed from 1st November 2015 to 31st January 2016. During this period, the Respondent rolled out a Staff Rationalization Program in which it embarked on a process aimed at identifying Staff who were willing to exit through Voluntary Early Retirement Program, in line with the Respondent's Turnaround Program.
13. The Petitioner applied for Voluntary Early Retirement on 30th May 2016. The application was rejected without explanation.
14. On 8th August 2016, her contract was renewed for 3 months from 11th August 2016 to 10th November 2016. She was advised by the Respondent that the remaining Employees would enjoy improved terms and conditions of service as recommended in the Staff Rationalization Report.
15. The Petitioner was therefore shocked, when on 7th October 2016, she received a letter from the Respondent, terminating her contract with effect from 11th November 2016. She was at the time, the Senior Legal Assistant.
16. She wrote to the Respondent seeking clarification, considering that she had earlier applied to leave on Voluntary Early Retirement Program. She was then advised that the Program only applied to Employees below job group 4.
17. A Corporate Affairs Manager, one Stella Muhoro, had exited on redundancy, on terms much similar to those under the Voluntary Early Retirement Program. The Petitioner wrote to the Attorney-General



protesting termination. The Attorney- General wrote back, changing the reason for termination. It was now the position of the Respondent, that it needed an Advocate of the High Court of Kenya in the Petitioner's role. The Petitioner was not an Advocate of the High Court of Kenya. Persons subsequently shortlisted by the Respondent in the particular position, were not Advocates of the High Court of Kenya, as confirmed by the Law Society of Kenya.

18. The Petitioner therefore holds that her constitutional rights specified in the title to her Petition, were violated by the Respondent.
19. She prays for Judgment against the Respondent as follows: -
 - a. Declaration that she is entitled to the rights set out in the Petition.
 - b. Declaration that the actions and omissions of the Respondent violated those rights, making the whole Voluntary Early Retirement Program null and void.
 - c. Declaration that her contract of employment was terminated unfairly.
 - d. Declaration that she was entitled to be considered for Voluntary Early Retirement or redundancy.
 - e. Compensation for breach of fundamental rights and freedoms.
 - f. Benefits under the Voluntary Early Retirement Program or redundancy.
 - g. Compensation for wrongful termination of employment.
 - h. Costs of the Petition.
 - i. Any other suitable order.

2nd Petition.

20. The 2nd Petitioner was employed by the Respondent as a Sales Clerk, Grade 8, on 1st September 2006. He was similarly given a 1-year contract, lapsing on 31st August 2007. His basic salary was Kshs. 15,000, and house allowance at Kshs. 5,000 monthly.
21. His contract was renewed severally. He rose through the ranks, to become Depots Supervisor, Nairobi. His last gross monthly salary was Kshs. 86,000. He was in job grade 4.
22. He too applied, on 30th May 2016, to exit under the Voluntary Early Retirement Program. The Application was rejected without explanation. He asked for explanation and was advised that the Program was restricted to Unionisable Employees. He was not Unionisable.
23. His contract was renewed after this debacle, on 8th August 2016, from 11th August 2016 to 10th November 2016. Like the 1st Petitioner, he was advised that reorganization would result in better terms and conditions of employment to the remaining Employees.
24. He was shocked when on 6th October 2016, he received a letter from the Respondent, advising that his contract had been terminated with effect from 11th November 2016. He enquired from the Respondent why his contract was terminated, in light of his failed application for Voluntary Early Retirement. He was advised that the Program was restricted to Employees below job grade 4, which he felt, was discriminatory. He cites the case of Stella Muhoro who applied for Voluntary Early Retirement unsuccessfully, but who was allowed to leave on redundancy, on terms comparable to those under Voluntary Early Program. The Claimant sought the ear of the Attorney-General. He was advised that



his contract had lapsed, but was not told why other Employees similarly situated, did not have their contracts terminated.

25. The 2nd Petitioner claims same violations and remedies as claimed by the 1st Petitioner.
26. Parties underscored their respective arguments in their Final Submissions.
27. The issues are: whether the Petitioners were treated discriminatively; whether they were eligible to exit under Voluntary Early Retirement Program or redundancy; whether their constitutional and statutory protections were violated in termination of their respective contracts of employment; and whether they merit the assortment of remedies pleaded.

The Court Finds: -

28. In her Replying Affidavit sworn on 28th January 2016, in E&LRC Cause No. 2262 of 2015, *Rajab Barasa & 4 others v Kenya Meat Commission* [2021] eKLR, the 1st Petitioner herein, at the time working for the Respondent as the Acting Company Secretary, told the Court that the Staff Rationalization Program, only involved the Unionisable Employees.
29. At paragraph 7 of the Affidavit, the 1st Petitioner, Julie Lusike Nabwera states: -

“That, in response to paragraph 6 and 7 of the Affidavit, I wish to state that the Staff Rationalization Program only involved Unionisable Staff Members of the Commission in which none of the Claimants herein are; they held managerial posts whereby their employment was governed by their individual employment contracts and the human resource policy, and were thus not Unionisable.”
30. There is no justification in the Petitioners taking a different position in these consolidated Petitions. They were both in Management. They were not Unionisable. The 1st Petitioner held the position Acting Company Secretary. The 2nd Petitioner was Depots Supervisor, Nairobi. They were not eligible for the Voluntary Early Retirement Program. This is confirmed by the 1st Petitioner in her Replying Affidavit, filed in Cause No. 2262 of 2015.
31. The Petitioners have not established that the Voluntary Early Retirement Program, was null and void; that they were entitled to be considered under the Program; and have not established that they should be paid any benefits under the Program. The Petitioners were not treated discriminatively. Declaratory orders sought to this effect are declined.
32. Left for determination is whether the Petitioner’s contracts were otherwise, terminated unfairly or unlawfully, and whether they merit remedy for unfair and unlawful termination.
33. The Petitioners had received serial renewal of their contracts of employment from the date of their employment in 2007 and 2006 respectively. The contracts were renewed without fail. Even when the Petitioners did not have active contracts, they continued to serve until renewal was subsequently made. They worked for 9 and 10 years respectively, under this strange, fixed-term contract arrangements.
34. They would by dint of their long service under this arrangement, legitimately expect renewal at the close of 2016, when the Respondent terminated their contracts.
35. The 1st Petitioner’s contract was renewed for 3 months, from 11th August 2016 to 10th November 2016. But midway, on 7th October 2016, she was notified that the contract would terminate on 11th November 2016.



36. She would have, having worked from 2007 on various fixed-term contracts for 9 years, that there would be renewal after 10th November 2016.
37. She was not told on 7th October 2016, that she was not an Advocate of the High Court of Kenya, and that the Respondent needed an Advocate of the High Court of Kenya to fill her position.
38. Her position, of Senior Legal Assistant, was not affected by the Staff Rationalization Program. If it was, and the 1st Petitioner's skills set deemed unsuitable for her position, she ought to have been advised as much, on 7th October 2016.
39. Termination letter did not allude to the fact that the 1st Petitioner was not an Advocate of the High Court of Kenya. She states that the Respondent did not require of her, to provide evidence of her qualification to the bar. She states, and this was not specifically discounted by the Respondent, that persons shortlisted to take her position, were not themselves Advocates of the High Court of Kenya, as confirmed by the professional body, the Law Society of Kenya.
40. The Respondent retained her for purposes of defending litigation initiated in this Court by her colleagues, who felt hard done by the Respondent in the process of restructuring, as captured in E&LRC Cause No. 2262 of 2015. She was the Acting Company Secretary, swearing an Affidavit defending the Respondent's position as of January 2016. Her career was on an upward trajectory. The Respondent treated her in a way that would only lead her to reasonably and legitimately expect continuity of service. Later the same year, 2016, the Respondent felt she had become dispensable, and terminated her contract.
41. The 2nd Petitioner was advised by the Attorney-General that his contract terminated on lapse of the contracted period. But multiple contracts had terminated through effluxion, from 2006, and had unfailingly been renewed. His last contract had been renewed, at the same time with the 1st Petitioners. Both Petitioners had been advised upon renewal to expect better terms and conditions of service, after some of their colleagues left on Staff Rationalization Program. This advice along with the conduct of the Respondent over a period of 9-10 years, would logically lead the Petitioners to reasonably and legitimately expect renewal, with improved terms and conditions of service.
42. Their positions were not phased out, and there was no redundancy situation. They have no reasonable ground, in advancing the argument that they should have exited on redundancy, if not Voluntary Early Retirement Program.
43. It was in all circumstances, the responsibility of the Respondent to show valid reason or reasons, justifying termination. In either Petition, the Court has not found a valid reason or reasons. Expiry of the contractual periods was not a valid reason as observed above. There was, well-founded grounds, to reasonably and legitimately expect renewal. The Respondent seems to have extended and applied its general policy of reducing its staff to the Petitioners, without expressly including them in Voluntary Early Retirement Program or Redundancy Program. It was always easy in the mind of the Respondent, to simply explain that the Petitioners contracts ended through effluxion of time. It was lost on the Respondent that for 9 -10 years, the Respondent had always renewed the Petitioners' contracts, promoted them, and increased their monthly salaries. The Respondent terminated the Petitioners' contracts unfairly.
44. The E&LRC has established in a catena of its decisions, including *Teresa Carlo Omondi v. Transparency International* [2017] e-KLR; *John Ogutu Ragama v. Bandari Sacco Society Limited* [2017] e-KLR; *Johnstone Luvisia v. Allpack Industries Limited* [2019] e-KLR; *Ruth Ngotho-Kariuki v. Presbyterian Church of East Africa* [2012] e-KLR; and *Margaret A. Ochieng' v. National Water*



Conservation & Pipeline Corporation [2014] e-KLR, that, an Employer's decision not to renew an Employee's fixed-term contract, may be challenged where: there is legitimate expectation of renewal; where decision not to renew is based on improper motive; or where there are countervailing circumstances. Termination or non-renewal of the Petitioners' contracts, fell within these limited exceptions to the general rule, that fixed-term contracts carry no expectation of renewal.

45. Adequate remedies are available, under the *Employment Act* 2007. There is no justification in resort to the *Constitution* of Kenya.
46. It is declared that termination of the Petitioners' contracts of employment was unfair.
47. The 1st Petitioner worked for 9 years. She had risen through the ranks to Senior Management. Her record was unblemished. She was routinely promoted. She expected to go on serving beyond the date the Respondent terminated her contract. She had applied for early retirement, which the Respondent declined, on the ground that she was ineligible. The Respondent subsequently renewed her contract. She did not play a role in the decision made to terminate her contract. She did not tell the Court if she mitigated loss of employment, by securing alternative employment.
48. The same facts, save for minor departures, would apply to the 2nd Petitioner. He served for 10 years. His record was clean.
49. They merit compensation for unfair termination.
50. The 1st Petitioner states that she earned a basic salary of Kshs. 62,000 and house allowance of Kshs. 24,000. This was as of 2nd July 2012. The Courts was not told if the same salary was payable in 2016. There is no specific sum pleaded as compensation for unfair termination. The Court adopts the gross monthly salary of Kshs. 86,000, and grants the 1st Petitioner equivalent of 9 months' salary in compensation for unfair termination at Kshs. 774,000.
51. The 2nd Petitioner's gross monthly salary is quoted at Kshs. 86,000 in his Petition. He is granted equivalent of 10 months' salary in compensation for unfair termination, at Kshs. 860,000.
52. There is no justification for compensation for breach of fundamental rights and freedoms. As concluded elsewhere in this Judgment, this dispute implicates contractual and statutory violations, with appropriate and effective remedies available under statute.
53. Costs to the Petitioners.

In Sum, it is ordered: -

- a. It is declared that termination was unfair.
- b. The Respondent shall pay to the 1st Petitioner, compensation for unfair termination, equivalent of her 9 months' gross salary at Kshs. 774,000; and to the 2nd Petitioner, compensation for unfair termination equivalent of his 10 months' gross salary at Kshs. 860,000.
- c. Costs to the Petitioners.

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

JAMES RIKA

JUDGE

