



Muthui v Kenya Rural Roads Authority (Kerra (Petition E210 of 2021) [2022] KEELRC 4024 (KLR) (30 June 2022) (Judgment)

Neutral citation: [2022] KEELRC 4024 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E210 OF 2021**

M MBARŪ, J

JUNE 30, 2022

BETWEEN

MARGARET WANJA MUTHUI PETITIONER

AND

KENYA RURAL ROADS AUTHORITY (KERRA RESPONDENT

JUDGMENT

1. The petitioner is seeking the following orders;
 - a. A declaration that the intended action by the respondent to terminate the petitioner's employment on an alleged existing three (3) year contract is a breach of her constitutional rights under the *Constitution of Kenya*, the *Fair Administrative Action Act*, the *Employment Act* and the respondent's human resource management policy and procedures manual. The said action is therefore null and void for all intents and purposes.
 - b. A declaration that the only employment contract in existence between the petitioner and the respondent is in terms of the respondent's appointment letter dated June 15, 2015 in which the petitioner was employed by the respondent on permanent and pensionable basis.
 - c. An order of judicial review of *certiorari* do issue quashing the respondent's letter dated December 14, 2021 purporting that the petitioner had a three (3) year employment contract with the respondent.
 - d. That a perpetual mandatory injunction and/or the prerogative order of prohibition do issue restraining the respondent by itself or through its agents and/or servants from prematurely terminating the petitioner's employment with the respondent.
 - e. That the respondent be condemned to pay the costs of the petition.
 - f. Any other relief that this court may deem fit to grant.



Petition

3. The petitioner is a female adult. The respondent is a state corporation established under section 6 of the [Kenya Roads Act](#).
4. The petition is based on the facts that the petitioner is the deputy director, supply chain management of the respondent but she was issued with letter dated December 14, 2021 informing her that her 3 years employment contract would be lapsing on December 31, 2021 yet her employment with the respondent is on permanent and pensionable basis through letter dated June 15, 2015. The petitioner has never executed any term contract with regard to her employment other than the letter dated June 15, 2015.
5. The respondent has previously been stopped by this court from deploying the petitioner elsewhere in a judgement delivered on February 19, 2018 in Petition No.11 of 2017 and the court quashed letters dated 8th and February 13, 2017 deploying the petitioner to the office of performance management and coordination under the presidency following an advisory opinion she had tendered during a tender process which opinion was not considered favourable to the interested parties and the respondent.
6. Another action taken by the respondent was to deploy the petitioner to the state department off infrastructure through letter dated February 10, 2021 which she challenged in ELRC Petition No.E027 of 2021 and which is pending determination.
7. The respondent chose to ignore the finding of the judgement in Petition No.11 of 2017 by revisiting the same issue for the 2nd time through letter dated February 10, 2021 deploying the petitioner to the department of infrastructure in a letter dated July 14, 2021 suspending the petitioner from employment and in the midst of the suspension the respondent invented the matter of a 3 years contract purported to expire on December 31, 2021.
8. The letter dated June 15, 2015 enlisted the petitioner as a permanent and pensionable employee and hence is due to retire at age 60 regulated under the respondents human resource manual. The purported 3 years contract and letter terminating employment dated December 14, 2021 are simply a revisit of matters the petitioner has challenged and raised in court against the respondent. Such letter is malicious and in breach of the petitioner's contractual employment on permanent and pensionable basis and in breach of court orders issued in Petition No.11 of 2017 and interim orders in ELRC Petition No.E027 of 2021.
9. The petition is that the actions of the respondent are in breach of the constitution, [Fair administrative Action Act](#) and the [Employment Act](#) for lack of due diligence, fair hearing and an act that has unilaterally vitiated and/or varied the petitioner's employment contract illegally. The orders sought should issue.
10. The petitioner supported the petition through her Affidavit and also testified in court that on November 2, 2009 she was employed by the respondent in the procurement department rising through the ranks to the position of procurement officer, procurement manager, which is now designated as the deputy director, supply chain management and which position she has held since the year 2014.
11. Since the year 2017 she has had problems with the respondent who had on 2 occasions tried to deploy her and remove her from the position of deputy director, supply chain management but the court in Petition No.11 of 2017 and Petition No.E027 of 2021 stopped the same.
12. While the court in Petition No.E027 of 2021 stopped the deployment pending hearing of the main suit, the respondent decided to suspend the petitioner from her employment in a letter dated July 14, 2021.



13. It is the petitioner's case that her suspension from employment by the respondent went contrary to Clause 11.17 of the human resource management policy which only allows a suspension where the employee is convicted of a criminal offence or has been charged with a corruption offence or economic crimes. There is no criminal case against the petitioner and the only matter she has is Civil Suit No.E019 of 2021 in which the asset recovery authority has sued her alongside 5 others seeking recovery of assets of 3rd parties based on unsubstantiated allegations. The suspension is the subject of Petition No.E120 of 2021 which has been consolidated with Petition No.E027 of 2021.
14. On December 17, 2021 the petitioner received an email from the respondent which forwarded a letter stating that her contract allegedly took effect on January 1, 2018 and is lapsing on December 31, 2021 yet she has never executed such a contract. Her only employment with the respondent is through letter dated June 15, 2015.
15. The letter dated December 14, 2021 purporting to advise the petitioner that her employment was lapsing on December 31, 2021 is part of a malicious scheme from the year 2017 when she challenged her deployment and leading to Petition No.11 of 2017 and which was determined in her favour.
16. The petitioner also testified that despite the positive judgement, the respondent for the send time purported to deploy her outside her employment which she challenged through Petition No.E027 of 2021. The intended termination of her employment through a purported 3 years term contract is in breach of the Constitution article 41, 47, 50 and the Fair Administrative Action Act.
17. On February 13, 2017 the petitioner received letter of deployment to the office of the President. These deployments were preceded by a dispute of a tender opinion the petitioner had issued as required as a procurement manager which is her specialisation and in the midst of all these, the respondent has come up with a 3 year contract which the petitioner never executed and used it to purport and terminate her employment and despite the court stopping the execution of the same, the respondent stopped the payment of her salary from January, 2022 and proceeded to pay her a gratuity without any explanation. Such gratuity monies are held in her bank account awaiting directions from the court.
18. The petitioner testified that she has had the hardest time of her life being thrown back and forth by the respondent with deployments from her employment and suspension which has forced her to file several petitions in court to secure her employment and rights. Such has caused her grief, psychological suffering and seek the court to award as prayed in the petition.

Response

19. In response, the respondent filed the replying affidavit and supplementary affidavit of C.P.A Dan Manyasi the director of corporate services of the respondent and avers that he also holds the human resource function at the respondent and he is conversant with the petitioner's case
20. In October, 2009 the petitioner was appointed as a procurement officer of the respondent and she rose through the ranks and was promoted to the position of procurement manager effective June 3, 2014. Such position translated to deputy director supply chain management on contract following the re-categorisation of the respondent by state corporations advisory committee in the year 2018.
21. On December 24, 2018 a contract was delivered to the petitioner which she signed to have received but intentionally and maliciously failed to neither sign the contract nor return the signed copy to the human resource management however she proceeded to perform her duties and assumed office in the position of deputy director supply chain management.
22. The petitioner has for the period since January, 2019 conducted herself and been treated as the deputy director supply chain management as per the contract issued to her, payslips showing her salary of that



- a deputy director, copies of memos she referred herself in such position and evidence of payment of gratuity for the period of her 3 years contract.
23. The petitioner assumed her responsibility of the position on January 1, 2019 being fully aware that her position was contractual having received and signed to have received the contract and has served in that position until the expiry of the contract. The petitioner did not at any time raise the issue of her contract term and has been paid the due gratuity of ksh.2, 331,513.25 in line with the subject contract and which she accepted and has not refunded back.
 24. Mr Manyasi testified that accordingly to the state corporations advisory committee all managerial positions in all state corporations are contractual and the petitioner cannot be exempted of the save in the whole county. Every employee in equivalent position and level of the petitioner is serving under a contract and the petitioner is not the only one on contractual terms of 3 years which is renewable upon application.
 25. Until the petitioner was suspended from employment following investigations against her following proceedings in the anti-corruption and economic crimes court and which was instituted in respect of the *Proceeds of Crime and Anti-Money laundering Act*, the petitioner served as the deputy director, supply chain management on contractual terms.
 26. The petitioner was suspended in line with section 10.38 of the respondent's human resource policy to allow for investigations and determination of allegations made against her. This was found necessary action.
 27. Mr Manyasi also testified that the re-categorisation and restructuring of the respondent, the terms of service of all management positions including that held by the petitioner were reviewed to be on contract and renewable subject to performance. The position of deputy director of supply chain management was therefore no longer available on permanent and pensionable terms. the petitioner was given an offer and a contract which she accepted but did not return the signed offer but continued to enjoy the salary and benefits as laid out in the contract. If the petitioner wanted to be on permanent and pensionable terms she should have resigned from her position and revert to a junior position based on the structure introduced in January, 2018.
 28. It would be discriminatory and irregular to have one senior manager on permanent and pensionable terms contrary to the set policy.
 29. In compliance with orders in Petition No.11 of 2017 and E027 of 2021 the petitioner was allowed back to office and her suspension was on account of investigations and the proceedings in the Anti-Corruption and Economic Crimes Court.
 30. There was no termination of employment but the 3 year term contract ended on its terms.
 31. In a letter dated January 10, 2022 the respondent corrected the error in respect of the commencement date of the petitioner's contract of employment and did not withdraw the contents thereof. The letter dated December 14, 2021 was emailed to the petitioner on the fact of expiry of her contract of employment. The petitioner failed to make an application for renewal of her contract and this was taken as lack of interest and having been paid her due gratuity the orders sought in the petition should be dismissed with costs.

At the close of the hearing, both parties filed written submissions.

Determination

32. There are uncontested facts in this case.



33. The petitioner was employed by the respondent on November 2, 2009 in the procurement department. She was promoted over the ranks and last promotion was that of procurement manager. The respondent re-categorised the ranks and the petitioner's position translated to that of deputy director, supply chain management from the year, 2014.
34. The respondent's case is that following advisory from the state corporations advisory committee, the managerial positions changed to contractual terms renewable based on performance and the position held by the petitioner became deputy director, supply chain management from January 1, 2018.
35. At his paragraph 6 and 7 of the replying affidavit dated April 4, 2022 Dan Manyasi avers that;
- On December 24, 2018 a contract was delivered to the petitioner which she signed to have received the contract. ...
- The petitioner intentionally and maliciously failed to neither sign the contract nor return the signed copy to the human resource management however she proceeded to perform her duties and assumed office in the position of deputy director supply chain management.
36. All along the petitioner was under a letter of offer of appointment to the position of manager (procurement) dated June 15, 2015 and the preamble to the offer was that the petitioner was from June 3, 2014 on permanent and pensionable terms in addition to other terms outlined in the letter.
37. The law contemplates a scenario where an employer can revise, review or seek to convert an employment contract. Once an employer has issued an employee with an employment contract pursuant to section 9(2) and (3) of the *Employment Act*, 2007 (the Act); the employer is responsible for causing the contract to be drawn and issued to the employee to accept and signify consent by executing the contract.
- (2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).
- (3) For the purpose of signifying his consent to a written contract of service an employee may—
- (a) sign his name thereon; or
- (b) imprint thereon an impression of his thumb or one of his fingers in the presence of a person other than his employer. ...
38. An employment contract issued in terms of section 9 of the act, a review, change of its terms and or any revision must abide the provisions of section 10 (5) of the act that any revision must be with the knowledge and consent of the employee;
- (5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.
39. Indeed, the respondent, based on advisory from the state corporations advisory committee did a re-categorisation of positions and converted the management positions from permanent and pensionable terms to 3 years contract renewable based on performance. such decision could not be implemented without the approval/consent of the petitioner to her disadvantage since she already held a letter of offer dated June 15, 2015 with an outline of her position and benefits thereof.

Conversion of employment terms cannot be unilateral.



40. Revision of an employment contract must be with consent of the employee. This is the import of the entirety of section 10 of the act.
41. In the respondent's human resource management policy and procedures manual,
 1. Section 2.15 relates to appointments made by the board;
Section 2.16 relates to recruitment procedures;
Section 2.19 relates to offers and acceptance;
Section 2.20 relates to acceptance of offer; and
Section 2.21 relates to the record of previous employment and qualifications.
42. None of these provisions make it a misconduct or gross misconduct where the employee fails to accept an offer of employment or where an employee rejects or fails to accept a revision of the terms of a contract.
43. In the entire policy document, there is no matter addressed with regard to an employee who has been issued with a revised contract of employment and has failed to return or sign it and or failed to return a copy thereof. No such matter is addressed as resulting in misconduct or gross misconduct.
44. For all intents and purposes, the petitioner's employment was regulated under a written contract allowed in law and a revision of the same was regulated in law. without the petitioner's consent, any other revised terms of her employment were not binding on her. the respondent had no letter or document of authority to apply and negate the petitioner's employment.
45. Where indeed the petitioner was issued with a contract documents and she accepted, her failure to return a signed copy thereof was not addressed. She could not be forced to accept such a contract despite the advisory by the state corporations advisory committee. employment was between the petitioner and the respondent and the contract allegedly taking effect on January 1, 2018 is not executed and is therefore not binding on the petitioner.
46. The respondent had equally no legitimate authority to apply the contract dated January 1, 2018 against the petitioner.
47. On these findings, the petitioner's employment is regulated under letter dated June 15, 2015 and none other. There being no signed term contract, the respondent cannot justify the application of any other document to regulate the petitioner's employment.
48. The defence that the petitioner cannot be the only one in management on permanent and pensionable terms whereas she enjoys the perks that go with her current position is not sufficient defence to negate the mandatory provisions of section 10(5) of the act.
49. where indeed the respondent was keen to address all management employee to be under a fixed term contract, reason should have been taken to address the same formally and not apply underhand tactics of purporting to terminate a 3 years contract that was never there in the first place. To engage in such a practice is contrary to fair labour practices protected under article 41 of the Constitution, 2010.
50. After the respondent handed the petitioner her contract on December 24, 2018 the respondent sat back and did nothing to ensure that there was a return of either a signed contract or the matter was addressed administratively. To try and seal the loopholes at this stage is contrary to fair labour practices. There is no justification for such practice and amounts to unfairness to the petitioner in view of section



45 of the act. such matter cannot be revisited against the petitioner as such offends the provisions of section 46(h) of the act.

51. In this regard, letter dated December 14, 2021 and further letter dated January 10, 2022 have no legal basis and are hereby quashed for lack of validity and application on the petitioner.

52. Before final orders are issued, the respondent has raised the issue that the petitioner has since been paid a gratuity following the lapse of her 3 years contract. Such term contract has no legal foundation. It issued contrary to section 10(5) of the act.

Any payment made under such contract is invalid.

53. In the case of Emmanuel Wambua Muthusi & 6 others v Khoja Shia Ithna Ashari Education Board t/a Jaffery Academy [2020] eKLR the court held that;

Section 5 of the Employment Act 2007, prohibits discrimination at the workplace. Article 47 entitles everyone, to fair administrative action which is reasonable and lawful. The Respondent was bound to give the Petitioners written reasons for the decision. Article 47 is buttressed by section 10 [5] of the Employment Act, which obligates the employer to make changes to an employee's contract, only in consultation with the Employee. Further, the petitioners state, their rights to human dignity, under article 28 and the right not to be treated in cruel, inhuman or degrading manner under article 29, have been violated.

...

section 10 [5] of the Employment Act requires that where the particulars in any employment contract change, the Employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing. without agreement, neither party can lawfully vary the terms of the contract.

54. In the case of Kenya County Government Workers Union v Wajir County Government & Another [2020] e-KLR the court emphasised the application of section 10(5) of the act in mandatory terms. Any employer who acts contrary to these provisions offends the provision, and violates article 41 of the Constitution. See Banking Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd & another [2016] eKLR.

55. The application by the respondent of the alleged 3 term contract to effect a payment to the petitioner is done contrary to the clear provisions of article 226(5) of the Constitution, 2010 which prohibits any public officer from paying or approving a payment of public funds contrary to the law and such person is liable to make good any loss.

(5) If the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not.

56. The accounting officer of the respondent who approved the payment of the alleged gratuity from a non-existent 3 years contract is liable for any such loss.

57. Such payment shall not be applied to deny the petitioner her salary dues for the entire period of her employment with the respondent including January 1, 2022 unless the employment is lawfully terminated. See Judicial Service Commission v National Assembly & 2 others [2017] eKLR the court held that Article 226(5) of the Constitution is the basis for holding each individual accounting officer and other public officers directly and personally liable for any loss of public funds under their watch.



58. The finding of these proceedings shall not be applied to the detriment of the petitioner. The petition is found with good cause and foundation pursuant to section 46(h) of the act;

The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty—

...

(h) An employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation; or

59. The filing of the petition shall not be used to disadvantage of the petitioner. It is filed on good foundation.

60. The petition herein is found with good foundation and the following orders are hereby issued;

- a. A declaration is hereby issued that the petitioner's employment is regulated under the letter dated June 15, 2015 and none other and unless and until there is a revision through mutual consent;
- b. Letters dated December 14, 2021 and January 10, 2022 with regard to an alleged expiry of 3 years contract are null and void and are hereby quashed;
- c. The petitioner shall resume her duties and regulated under her employment contract as (a) above unless otherwise lawfully revised or the employment is lawfully terminated;
- d. The petitioner shall be paid her due salaries from January 1, 2022 to date and until her employment is lawfully terminated; and
- e. The petitioner is awarded costs.

DELIVERED IN COURT AT NAIROBI THIS 30TH DAY OF JUNE, 2022.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Peter Kigotho

..... and

