



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kibogong v Kenyatta National Hospital Board of Management (Cause 151 of 2014) [2022] KEELRC 1295 (KLR) (7 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1295 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE 151 OF 2014**  
**MN NDUMA, J**  
**JULY 7, 2022**

**BETWEEN**

**DR. DUNCAN KIMOSOP KIBOGONG ..... CLAIMANT**

**AND**

**KENYATTA NATIONAL HOSPITAL BOARD OF  
MANAGEMENT ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed suit on February 10, 2014 against the respondent seeking the following reliefs:
  - (i) A declaration that the termination of the Claimant's employment was and was done in gross violation of the law, in a discriminatory manner and in violation of the fundamental rights of the claimant and hence unfair, wrongful.
  - (ii) A declaration that the Claimant is entitled to reinstatement and in the alternative payment of all the salaries, allowances, and benefits that would have accrued to the Claimant as permanent and pensionable employee similar to counterparts of equal job group, experience and responsibilities from the date of his termination to the date of retirement at the mandatory age of 60 years.
  - (iii) Terminal dues amounting to Kshs 5,394,566/= as particularized in Paragraph 16 (i-iv) above.
  - (iv) Aggravated and exemplary damages for breach and violation of fundamental rights of the Claimant.
  - (v) Costs of this suit.
  - (vi) Costs and interest on (iii), (iv) (v) above as the Court deems fit.
  - (vii) Certificate of Service.



- (viii) Any other relief as the Court may deem fit and just to grant.
2. C.W.1, the claimant testified that he is a Medical Doctor and was employed by the respondent on September 4, 2009. That he worked until September 6, 2012. That he was given a one-year renewable contract. The contract was renewed in 2010 for one year and subsequently. The contract was further renewed on September 4, 2011 to September 3, 2012. C.W.1 stated he did not get a subsequent renewal. That himself and his colleagues continued working until the September 6, 2012 hoping to get a renewal.
  3. That they were informed that renewals were out but when his colleagues got theirs, the claimant received a cessation of contract. C.W.1 said he had not received any notice that his contract would not be renewed. That C.W.1 continued working after the expiry of the contract since he was on the duty roster for the hospital for the month of September. C.W.1 said that he never received any letter or warning about his work performance and conduct during the pendency of his contract. C.W.1 stated that he was aware of the respondent's Human Resource Manual and terms of service. That the manual was applicable to fixed term contracts.
  4. The manual provides for procedure for conducting performance assessment at page 35 on Terms and Conditions of service. That no review or assessment of C.W.1's work was done with the supervisor during the pendency of the contracts. That the assessment is done thrice a year.
  5. C.W.1 testified further that his colleagues were offered permanent and pensionable terms and promoted to higher job groups.
  6. C.W.1. appealed the decision not to renew his contract. C.W.1 stated that he was called for a hearing by the respondent over the appeal. C.W.1 stated that he attended the hearing but the outcome of the appeal was never communicated to him. That he followed up without success until he filed the suit. That C.W.1's advocate wrote a demand letter which was not responded to. That he had no adverse record whatsoever over his performance or conduct.
  7. That he was not aware of alleged confidential report which assessed his performance as wanting. That this was unlawful and unfair and discriminatory treatment in violation of the Human Resource Manual.
  8. C.W.1 stated that he was not paid any terminal benefits upon non-renewal of his contract and claims to be paid as prayed. Under cross-examination the claimant denied having been summoned on the issue of lateness by management. Claimant stated he was never paid service gratuity with regard to all the contracts of service.
  9. R.W.1 Carillus, Zephaniah Ochieng, Mc'ffullo testified for the respondent that he is the Deputy Human Resource Manager of the respondent appointed in July, 2021. That he knew the claimant as a former temporary staff of the respondent. That he was engaged on one (1) year contract renewable. That he had to give three (3) to (6) six months' notice for renewal. That he served from August 17, 2009 to July 15, 2012. That the claimant was notified that his last contract would not be renewed. That his last day at work was September 4, 2012. That any claims made after that date are not valid. That the contract ended by effluxion of time. The claimant is not entitled to any notice of non-renewal. That the claimant never made a formal request for renewal within three to six months in term of the contract.
  10. That the claimant had issues of performance due to lateness and desertion of duty. That the claim for unpaid leave days is not valid. That he had 34 unutilized leave days upon expiry of the contract. The claimant is entitled to payment in respect of the 34 days.
  12. That the claimant is not entitled to service pay because he was on pension.



13. That the claimant was paid 31% gratuity for the period worked. That gratuity was not paid in respect of the last contract since the claimant did not clear with the respondent.
14. R.W.1 stated that they have not tabulated the final dues for the claimant to-date.
15. R.W. 1 stated that the claimant is not entitled to compensation for wrongful dismissal because he was not dismissed from employment.
16. That the respondent has not refused to pay any dues to the claimant since he has not made any formal request for payment. R.W.1 however conceded that a letter of demand for payment of final dues dated December 29, 2013 was served on the respondent.
17. Under cross-examination, R.W. 1 stated that he was employed by the respondent on February 17, 2002 and the claimant started working for the respondent on September 14, 2009. R.W.1 stated the last contract was dated September 4, 2011 and was to end on September 3, 2012. That the contract was not renewed. The notice of non-renewal is dated August 24, 2012 and was served on the claimant on September 6, 2012. This was just a reminder that the contract would not be renewed. That the claimant had not requested for the renewal of the contract as per requirement. That the claimant worked in the casualty department as a medical doctor. That about 10 doctors' contracts were renewed. R.W.1 admitted gratuity and 34 days leave was due but had not been paid dues to non-clearance by the claimant. R.W.1 stated that the claimant appealed the decision against non-renewal and was given a hearing and that the claimant did not face any disciplinary matter and his contract was not terminated but expired by effluxion of time.
18. R.W.1 prays that the suit be dismissed with costs.

### **Determination**

19. The parties filed written submissions and the issues for determination are as follows: -
  - (a) Whether the employment of the claimant was terminated by the respondent unlawfully or his contract of employment expired lawfully by effluxion of time.
  - (b) Whether the claimant is entitled to the reliefs sought.
20. The undisputed documentary evidence before Court is that the claimant was first employed by the respondent as a medical doctor in the Accident and Emergency Department on a one-year contract dated July 15, 2009.
21. In terms of the agreement the claimant was entitled to among other benefits to payment of gratuity calculated at 31% of the total earnings at the end of the contract period.
22. The contract was renewed by a letter dated August 30, 2010 for a further term of one year commencing on September 4, 2010. The contract again expired and was renewed for a further one-year term by a letter dated August 16, 2019 effective on September 4, 2011. The total earnings of the claimant were Kshs 175,376 per month as per the pay slip of September 3, 2012.
23. The respondent served the claimant with a letter dated August 24, 2012 titled Cessation of Contract of Appointment.
24. In the said letter, the respondent noted that the claimant's work performance and general conduct during the current term of contract has not been satisfactory. That accordingly, the respondent had decided not to renew the contract of the claimant upon expiry on September 4, 2012.



25. The respondent added that to facilitate processing and payment of the claimant's gratuity, the claimant needed to complete and return Clearance Certificate; Official Secrets Act Declaration; and Declaration of income, Assets and Liabilities forms.
26. The claimant appealed the decision not to renew his contract protesting that his work performance had not been lawfully assessed in terms of the Human Resource Manual and Terms and Conditions of Service of the respondent. The appeal was declined and therefore the contract was not renewed.
27. The claimant claims that the conduct by the respondent amounts to unlawful and unfair termination of employment whereas the respondent states that the employment of the claimant lawfully expired by effluxion of time, and in any event the claimant had not given notice of renewal of contract within between 3 to 6 months as was provided in his contract of employment.
28. At the outset, the Court finds that whereas the claimant has pleaded and testified that he was not paid gratuity in respect of the (3) served contracts, the respondent has provided evidence to the contrary.
29. In other words, the respondent has rebutted the evidence by the claimant that he is owed gratuity calculated at 31% of his total earnings for the three completed contracts of service with the respondent. In this respect, the respondent produced payment vouchers in respect of gratuity paid for the contract served between September 4, 2009 to September 3, 2020 and the contract served between the period September 4, 2010 to September 3, 2011.
30. The respondent admitted that it has not paid gratuity in respect of the last contract because the claimant failed to clear as required. The Court finds that the claimant has failed to demonstrate that he is still owed gratuity in respect of the first two contracts but finds that the respondent owes the claimant gratuity and other terminal benefits in respect of the last contract and the Court awards the claimant as prayed in the Memorandum of Claim as follows: -
31. Unpaid gratuity for the last contract calculated at  $(31\% \times 175,376 \times 12)$  in the sum of Kshs 652,398/=
32. The respondent also admitted that it owes the claimant payment in respect of 43 days untaken leave and the Court awards the claimant accordingly in the sum of Kshs 251,372.
33. On the question whether the employment of the claimant was unlawfully terminated, the Court finds that the last contract of service of the claimant expired by effluxion of time. The Court finds that the claimant had not served the respondent with a written notice of renewal of the contract within between 3 to 6 months of the expiry.
34. The Court finds that it was inappropriate for the respondent to bring into the letter of non-renewal matters which it had not properly handled in terms of the Human Resource Manual.
35. That notwithstanding, the claimant has failed to adequately prove that his employment with the respondent was unlawfully terminated. Upon expiry of the contract of employment of the claimant on September 3, 2012, issue of termination of employment contract did not arise. The suit before Court is not one of re-engagement on lawful grounds but is couched as one of unlawful termination of employment after the horse had bolted from the staple.
36. Accordingly, considering the decision of the Court of Appeal in Trocaire -vs- Catherine Wambui Karuno [2018] eKLR, where the judges stated: -

It follows that the contract in question automatically lapsed on June 30, 2014 by effluxion of time. That being the case, the reason given by the appellant in its letter to the Ministry of Labour for its decision not to renew the respondent's contract and the payment of what



was termed as a redundancy package in our view, has no relevance to this dispute. We also find that the same could not have been a basis of finding that the respondent had been declared redundant. Once a fixed term contract is at an end, the employee has no obligation to justify termination on other grounds beyond the lapse of the fixed period. This much was appreciated by this Court in Oshwal Academy (Nairobi) & Another -vs- Indu Vishwanath [2015] eKLR which quoted with approval Rika J.'s sentiment in Bernard Wanjohi Muriuki -vs- Kirinyaga Water and Sanitation Company Limited & Another [2012] eKLR: -

“In the view of the Court, there is no obligation on the part of an employer to give reasons to an employee why a fixed-term contract of employment should not be renewed. To require an employer to give reasons why the contract should not be renewed is the same thing as demanding from an employer to give reasons why a potential employee should not be employed. The only reason that should be given is that the term has come to an end, and no more. ... Reasons, beyond effluxion of time, are not necessary in termination of fixed-term contracts, unless there is a clause in the contract, calling for additional justification for the termination.”

37. This Court finds unequivocally that upon expiry of the contract, the respondent had no obligation to renew it and or give reasons for non-renewal of the contract. Had the claimant given the requisite notice, any matters arising would have been dealt with between the time of giving notice and expiry of the contract. In this case, the appeal by the claimant was rejected and the Court finds that failure by the respondents to communicate to the claimant on the outcome of the appeal does not derogate from the fact that the contract expired by effluxion of time and the respondent had no obligation to renew it. The Court therefore finds that the claim for unlawful termination and the relief sought in respect thereof lack merit and is dismissed.
38. In the final analysis, judgment is entered in favour of the claimant as against the respondent as follows: -
- (a) Payment of Kshs 652,398 service gratuity.
  - (b) Kshs 251,372 in lieu of leave days not taken.  
***Total: Kshs 903,770.***
  - (c) Interest at Court rates from the date of expiry of the last contract (September 3, 2012) till payment in full.
  - (d) Costs of the suit.

**DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 7<sup>TH</sup> DAY OF JULY, 2022**

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

Mr. Muga for Claimant

Mr. Mukangi for Respondent

Ekale – Court Assistant

