



**Kinyuru v Tangaza University College (Cause E443 of 2020)
[2022] KEELRC 13015 (KLR) (28 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13015 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E443 OF 2020
J RIKA, J
OCTOBER 28, 2022**

BETWEEN

JOSEPH MWONGI KINYURU CLAIMANT

AND

TANGAZA UNIVERSITY COLLEGE RESPONDENT

JUDGMENT

1. The claimant filed his statement of claim on August 27, 2020. He states that he was employed by the respondent, a private University, on August 15, 2005, until June 30, 2018 when he left employment.
2. He worked under various fixed-term contracts. The contracts were renewed based on the claimant's exemplary service. He worked as personal assistant to the director, from August 15, 2005 to July 2, 2008, and as academic advisor from July 3, 2008 to June 30, 2018.
3. His last salary was Kshs 162,056 monthly.
4. He worked on renewable contracts of 1 year for the period between 2005 and 2010. In 2010, 2013 and 2014, the claimant's contracts were renewed. The terms remained the same, except for the salary which was reviewed.
5. He was issued another contract in 2014, despite having a 3-year un-expired contract executed in 2013. He was in the position of academic advisor, under these contracts.
6. Upon expiry of the contract on June 30, 2017, he consulted the director, Father Jude Mmassy, and the Vice-Chancellor, Rev Stephen Mbugua, concerning lack of communication on renewal of the contract.
7. There was no response. The claimant continued to work under terms and conditions spelt out in the expired contract, for a period of 2 years, until June 30, 2018, when he received a notice of termination.



8. The respondent had in place an employee handbook, which formed part of the employees' terms and conditions of service. It governed termination in all circumstances.
9. On February 5, 2018, the claimant was informed through a letter from the Deputy Vice-Chancellor Father Joseph Caramazza, of structural changes to be implemented at the respondent institution. He was advised that his position would be affected, by appointment of program leaders and staff support. The claimant's position had already been renamed program leader, back in 2017. He was issued a month's notice of termination, dated May 29, 2018, grounded on the reason that there was restructuring at the respondent.
10. He avers that the respondent went on to advertise and hire for the same position held by the claimant. He holds therefore, that termination was based on unfair and unlawful redundancy. His contract was 24 months away from expiry; his position was advertised, while the respondent claimed it had been phased out; redundancy did not conform with section 40 of the Employment Act; and the claimant was asked to hand over to the new program leader, demonstrating that there was no redundancy.
11. The claimant therefore urges the court, to find that termination was an unfair labour practice under the Constitution; it was unfair and unlawful; and was malicious and not founded on valid reasons.
12. He prays for: -
 - a. Severance pay at 15 days' salary for 13 complete years of service at Kshs 1,053,364.
 - b. Salary for 24 months remaining under the contract, at Kshs 3,889,344.
 - c. 12 months' salary in compensation for unfair termination at Kshs 1,944,672.
Total...Kshs 6,887,380.
 - d. Declaration that termination amounted to unlawful declaration of redundancy and unfair termination.
 - e. Costs and interest.
13. The respondent filed a statement of response dated 1 August 4, 2020. Its position is that the claimant was initially issued a temporary contract of 2 months, on September 20, 2004. He was offered fixed term contracts from August 15, 2005. He was employed on 1 year contracts, until July 1, 2014, when he was issued a 3-year contract. On July 18, 2017, his contract was renewed for 1 year, effective July 1, 2017.
14. The respondent undertook restructuring and notified the claimant that his department would be affected. He was invited to apply for the relevant position once it was advertised. He refused to apply. Others applied and one person was appointed to the position. His contract was expiring on June 30, 2018. The respondent issued him a notice, detailing terminal benefits payable. He was paid Kshs 253,445 in terminal benefits. The job requirements for the new position were different from those held by the claimant. As of March 12, 2018, there were 3 months left to the expiry of the claimant's contract. The contract lapsed on June 30, 2018. With a new person appointed, it was only proper for the claimant to hand over. The contract lapsed; it was not terminated on any redundancy. The respondent urges the court to dismiss the claim.
15. There is a reply to the statement of response, dated October 1, 2020, filed by the claimant. He denies receiving the contract document, dated July 18, 2017. The letter of termination indicated reason was restructuring, and not lapse of the contract.



16. The claimant gave evidence and rested his claim on November 18, 2021. Human Resource Officer, Faith Miring'u, gave evidence for the respondent on February 25, 2022, resting the hearing. The claim was last mentioned in court on July 6, 2022, when the parties confirmed filing and service of their submissions.
17. The claimant restated the contents of his statements of claim and witness, in his evidence. He adopted as exhibits his documents [1-68]. He told the court that his contract had not expired on termination. His office was not abolished. He was on a 3-year contract and had served 1 year on termination. Termination was on the ground of redundancy, justifying severance pay.
18. Cross-examined, the claimant told the court that he was initially employed as a personal assistant to the director. He became an advisor in 2008. He was placed on fixed-term contracts. His contract was renewed in 2014, for 3 years. It was renewed further through a letter dated July 18, 2017 for 1 year. The claimant did not receive the letter renewing the contract for 1 year. Other contracts were preceded by appraisal. The one for July 18, 2017 differed from the previous ones. The director in question was not identified. Renewals were normally made after the outgoing contract lapsed. The claimant received information that the respondent was in the process of acquiring a charter. There were new positions created. Employees were invited to apply for the new positions. The claimant did not apply for the new positions. There could have been positions suited to the claimant's qualifications. The position of program leader, required the holder to have a PhD. The claimant holds a PhD in religious studies. The position he held was not new. His contract did not expire in June 2018. He was paid salary for June 2018 and paid leave days. The position of program leader is still in place at the respondent today.
19. Redirected, the claimant told the court that there was no new position which was created. There are minutes showing that the position of academic advisor was renamed program leader. There was no new position. He had renewal of contract for 3 years, in 2013 and 2014. Termination was not based on claimant's lack of qualifications. The reason given was that his contract had expired, and would not be renewed.
20. The Human Resource Officer, Miring'u, adopted in her evidence, her witness statement, original documents and supplementary documents filed by the respondent. She confirmed that the claimant was employed by the respondent under various contracts, between 2005 and 2018.
21. The contract of 2014 was to end in June 2017. He served the contract to the end. He was issued another for 1 year, through a letter dated July 18, 2017. It lapsed in June 2018.
22. Criteria for holding program leader position, was changed by the regulator, Commission for University Education [CUE], requiring a holder to possess PhD. The respondent was looking for a charter to become a full University, which necessitated reorganization. The claimant was informed about this by the Deputy Vice-Chancellor. He was aware that his position would be affected. He was advised to apply for the new position. Academic advisor would change to program leader. Qualification for the new position included a PhD, which the claimant did not have, at the time of reorganization. He needed to be a senior lecturer. Applications closed on March 28, 2018. The claimant did not apply. His contract was to expire on June 30, 2018. He did not discuss whether there were other positions suitable to him. The respondent did not terminate his contract on June 30, 2018; the contract lapsed.
23. Cross-examined, Miring'u told the court that program leader's duties were wider than academic advisor's. program leader supervised students, hence the need for a PhD. This was a requirement by the regulator CUE. The position of program leader was not new per se. There are minutes of a meeting held on September 8, 2017, involving program leaders. In the minutes of a meeting dated February 5, 2017, the claimant was referred to as a program leader. There was appraisal before renewal of contracts.



There was no appraisal in the contract of July 18, 2017. There were discussions held between the claimant and the director. This was because the respondent was in the process of transitioning into a full university. There was no need for appraisal preceding the contract of July 18, 2017. The contract of 2013 was for 3 years, not 1 year. Reason for termination of the contract is stated. It was decided not to renew the contract after expiry. The actual reason was restructuring. No other position of program leader was advertised. It was only the position held by the claimant that was advertised. He did not apply for ranking. It was not his position alone that was affected.

24. Redirected, the Human Resource Officer told the court that there was faculty ranking at the respondent. Employees were peer-reviewed and formally reviewed. The claimant did not comply with the requirements for faculty ranking. The terms program leader and academic advisor were used interchangeably during the transition. The claimant was not substantively qualified for the position of program leader. It was his responsibility to apply. The respondent would not compel him to apply. The respondent was not restructuring; it was realigning itself with the requirements of CUE. There were other positions with terms and conditions of service, similar to those enjoyed by the claimant.
25. The issues as identified by the parties are: whether the claimant's contract was unfairly terminated by the respondent; and whether he is entitled to the remedies pleaded.

The Court Finds: -

26. It is common ground that the claimant was employed by the respondent under various limited-term contracts, between August 15, 2005 and June 30, 2018.
27. He was initially appointed as Personal Assistant to the Director in the Institute of Social Communications [ISC], *vide* the letter of appointment dated August 15, 2005.
28. He was promoted to the position of Academic Advisor of the ISC, upon the recommendation of the Director, Father Maury Schepers, dated January 28, 2008. The director states in his recommendation, that the claimant "is the most valuable member, of the leadership team of this institute and it is difficult to imagine how I might manage without his active presence."
29. Subsequently, the claimant enjoyed annual renewal of contract for periods of 1 year each, and received salary increment on each renewal. The period in the renewed contracts changed in 2013. The letter of renewal dated September 27, 2013 states that the claimant's contract had expired on June 30, 2013, and had been renewed for 3 years with effect from July 1, 2013.
30. Before the 3-year period lapsed, the respondent renewed the claimant's contract with effect from July 1, 2014 for a period of 3 years. Effectively, this contract would lapse on June 30, 2017.
31. The respondent alleges it issued the claimant a letter dated July 18, 2017, advising him that his contract had been renewed for 1 year, beginning July 1, 2017, lapsing June 30, 2018. The claimant disputes receiving this letter on renewal. His position is that he continued working after June 30, 2017, under the expired contract, and considered himself on a new contract of 3 years. He had therefore worked for 1 year out of 3 years, by the time of termination on June 30, 2018, and claims salaries for the remaining 24 months.
32. The court does not have evidence of a renewed contract, covering the period after June 30, 2017. There is no contract document, executed by both parties, showing renewal for 1 year or 3 years. The letter dated July 18, 2017 is disputed by the claimant, and on its own, does not constitute a binding contract of employment. It is not signed by the claimant, in terms of section 9 [3] of the [Employment Act](#). A proper renewal of contract would involve execution of the contract by both parties, such as was done by the parties on July 15, 2009 and September 1, 2010. A letter of renewal on its own, is



- not sufficient evidence of a contract of employment, without the acceptance through execution of the renewed contract, by the employee. The court does not have adequate ground to agree with the respondent, that there was 1-year renewal, after June 30, 2017.
33. The claimant would have legitimate expectation of renewal for a period of 3 years, after June 30, 2017. He went on serving unperturbed, in the same position of academic advisor. He says and without much challenge from the respondent, that he asked the respondent for clarification on the status of his contract, after June 30, 2017, without response. He went on working, and had been placed on 3 year contracts from 2013, without variation. The claimant would have legitimate expectation that he was serving a 3-year contract, after June 30, 2017.
 34. The respondent terminated his contract through a month's notice, issued on May 29, 2018. The letter does not say that the claimant's contract had come to an end, and would not be renewed, which firms the above position that the parties intended the claimant was on another contract of 3 years, after June 30, 2017. The letter of termination does not refer to a contract of 1 year, which was coming to an end. It refers to restructuring in the ISC, as the ground for termination. The respondent had an obligation under section 43 of the *Employment Act*, to prove the reason or reasons for termination. The reason stated in the letter of termination, is restructuring of ISC. In essence, the claimant was told that he had to leave, because his position had become redundant.
 35. The position was that of academic advisor. There is evidence that the respondent was restructuring, because it was pursuing a charter, to gain the status of a full university. It explained to the court that it was required by the CUE, to reorganize, to be accorded the charter. The Witness for the respondent made a play of semantics, in explaining the reason for termination, alleging that there was no redundancy, just a realignment with the requirements of CUE, in order to be conferred with a charter.
 36. The respondent explained that, the claimant's position was changed to program leader, from academic advisor. The claimant did not have a PhD, to work in the position of program leader. He was advised to apply for a new position but did not do so.
 37. This position by the respondent is discounted by its meetings held on September 8, 2017, September 19, 2017, October 18, 2017 and March 20, 2018. In these meetings, the claimant alongside others, was referred to as program leader. The respondent did not refer to him as an academic advisor. The position of program leader did come with restructuring in 2018. It was there before restructuring. It was not a new position. It was an old position, already being discharged by the claimant, and others, whose names are captured in the minutes of the meetings above.
 38. The respondent, having concluded that it was restructuring, did not adopt the procedure laid down under section 40 of the *Employment Act*. There was no clear consultation held between the claimant and the respondent. He was not given notice of the intended restructure. It was not made clear why him alone, was affected. His position as stated above was not abolished. It was assigned to a new employee.
 39. The claimant had served from 2005. In 2008, the Director described him as being indispensable to the respondent. He had been promoted and his salary increased with every renewal of contract. He was denied severance pay, the respondent having given him the reason for termination, as redundancy. At the same time, the respondent deliberately obscured the reason for termination, hiding behind principles of expiry of a limited-term contract, and the discretion of an employer on renewal of contracts. In the end, the letter of termination stated the reason for termination to be redundancy, which the respondent failed to prove, as a valid reason.
 40. The court is satisfied that the claimant left employment on an unfair and unlawful redundancy process.



41. He has not convinced the court that he merits anticipatory salaries of 24 months. The court has considered, in granting him compensation for unfair termination, that he legitimately expected to work a further 24 months, on the date of termination. Reasonable expectation of an employee, as to the length of service, is a factor in considering the amount of compensation, under section 49 [4] [f] of the Employment Act. He did not contribute to the circumstances leading to termination. He had worked from August 15, 2005 to June 30, 2018, a period of 12 years 10 months. He had 12 complete years of service.
42. The court grants him compensation for unfair termination equivalent of 12 months' salary, at Kshs 1,944,672.
43. He worked for 12 complete years of service and merited severance pay, the respondent having declared that the claimant's position as an academic advisor, had been phased out, and the claimant unsuitable for the position of program leader. He is granted severance pay under section 40 of the Employment Act, at 15 days' salary over a period of 12 complete years of service, amounting to Kshs 972,336.
44. Costs to the claimant.
45. Interest allowed at the court rates, from the date of judgment till payment is made in full.

In sum, it is ordered: -

- a. It is declared that termination was unfair and unlawful.
- b. The respondent shall pay to the claimant: equivalent of 12 months' salary in compensation for unfair termination at Kshs 1,944,672; and severance at Kshs 972,336 – total Kshs 2,917,008.
- c. Costs to the claimant.
- d. Interest allowed at court rates, from the date of judgment till decree is satisfied in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 28TH DAY OF OCTOBER, 2022.

JAMES RIKA

JUDGE

