



**Mwangi v African Wildlife Foundation (Cause 1295 of 2016)
[2022] KEELRC 13070 (KLR) (3 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13070 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1295 OF 2016
JK GAKERI, J
NOVEMBER 3, 2022**

BETWEEN

REGINA NJERI MWANGI CLAIMANT

AND

AFRICAN WILDLIFE FOUNDATION RESPONDENT

JUDGMENT

1. The claimant commenced this suit by a memorandum of claim filed on June 30, 2016 claiming unlawful and unfair termination of employment and non-payment of house allowance.
2. The claimant avers that he was first employed by the respondent as the Administration and Finance Assistant on a fixed term contract on July 22, 2002 and the contract was renewed severally until January 31, 2015 when her services were terminated.
3. The claimant further avers that over the duration of the employment, her gross monthly salary rose from Kshs 29,000/= to Kshs 183,550/=.
4. That her position was advertised by the respondent after having served the respondent for 13 years.
5. It is the claimant's case that she was neither accommodated nor paid house allowance.
6. The claimant avers that subjecting her to fixed term contracts was unfair labour practice as the respondent had sufficient work for her to be engaged on permanent terms.
7. It is the claimant's case that her contract of employment was unfairly and unprocedurally terminated.
8. The claimant prays for;
 - i. House allowance for the duration worked Kshs 2,476,515.30cts
 - ii. Severance pay Kshs 1,372,033



- iii. Damages Kshs 2,532,984
Total Kshs 6,381,532.30
- iv. Costs of this suit
- v. Interest

Respondent's Case

- 9. The respondent admits that the claimant was its employee from July 22, 2002 to January 31, 2015 under different fixed term contracts and the gross salary was all inclusive.
- 10. It is the respondent's case that by letter dated December 10, 2014, the claimant was notified that her contract would not be renewed and was paid all her dues as provided by law and the respondent does not owe the claimant anything.
- 11. The respondent denied that the claimant was diligent and hard working or that it violated the provisions of the law.
- 12. It is the respondent's case that the claimant was not declared redundant as her contract of employment simply came to an end.
- 13. The respondent avers that the claim for house allowance is vague, severance pay was illegal and misinformed and termination of the claimant's employment was fair and lawful.
- 14. The respondent prays for the dismissal of the suit with costs.

Claimant's Evidence

- 15. The claimant adopted the written statement and was cross-examined.
- 16. The claimant testified that she signed all the fixed term contracts under which she served the respondent and had no objection.
- 17. The witness confirmed that the last of the contracts was scheduled to end on January 31, 2015.
- 18. It was her testimony that as at termination of employment, she was the Programme Administration and Finance and undertook her role and operations of the respondent well. That she was the Finance Officer of the programme based at Nanyuki.
- 19. The witness confirmed that the respondent's funds came from donors and well-wishers and salaries were dependent on the funds available.
- 20. The witness testified that the employer deducted and remitted NSSF contributions throughout the duration of employment and she was in addition a member of general pension fund.
- 21. CWI further confirmed that the employment contract was silent on renewal and that her employment was not terminated on account of redundancy.
- 22. It was her testimony that she expected the contract to continue till the end of the programme.
- 23. CWI also confirmed that she was given a one (1) month notice of non-renewal and certificate of service. That she last worked in January 2015 and was paid a net of Kshs 169,146.25 comprising basic and leave pay.



24. The witness confirmed that the last contract was 6 months. The witness further confirmed that the respondent honoured its part of the bargain.
25. On re-examination, the claimant testified that she expected another contract.

Respondent's Witness

26. RWI, Elizabeth Opee adopted the witness statement and testified that the claimant's contract of employment was not terminated on account of redundancy but lapsed since it was for a fixed duration. That the claimant did not raise the issue of house allowance at any point.
27. The witness confirmed the claimant's testimony that the respondent was funded by donors and well-wishers.
28. Further, the witness testified that the claimant's contract was not terminated and had no renewal clause.
29. On cross-examination, the witness confirmed that the claimant's contract of employment was renewed severally and renewal and non-renewal would be communicated at least 30 days before.
30. The witness testified that the grant expired on June 30, 2016.
31. It was her testimony that the respondent renewed contracts based on availability of funds and the claimant's last contract was to end on January 31, 2015.
32. RWI further confirmed that the position advertised on January 13, 2015 was lower than the claimant's position.
33. That the salary paid by the respondent was all inclusive or gross salary.
34. On re-examination, the witness confirmed that the claimant was engaged on fixed term contracts with no automatic renewal thus dependent on the employer's prerogative and the respondent's Board of Directors made decisions on renewals.

Claimant's Submissions

35. The claimant submitted on whether termination of the claimant's employment was fair and reliefs.
36. As to whether termination of employment was unfair, it was submitted that the constant renewals of the contract of employment for 2 years gave the claimant definite expectation that the contract would be renewed.
37. Reliance was made on the decision by Rika J in *Teresa Carlo Omondi v Transparency International-Kenya* (2017) eKLR to urge that for the principle of legitimate expectations to find life, the contract of employment must itself make a promise for renewal and over and above the employer's conduct and custom.
38. The decision of Nzioki Wa Makau J in *Tom Ukiru Kamaliki v Centres for International Programs-Kenya* (2021) eKLR was also relied upon.
39. It was urged that repeated renewals of the contract gave the claimant objective reasons for legitimate expectation.
40. That the claimant on cross examination confirmed that she would continue working for another 2 years as before. That no application was required before renewal.



41. Reliance was also made on the provisions of section 45 (2) of the *Employment Act, 2007* to urge that for a termination of employment to be deemed fair, it must pass the tests for substantive justification and procedural fairness. The decisions in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR and *Loice Otieno v Kenya Commercial Bank Ltd* (2013) were also cited to buttress the submission.
42. It was urged that the respondent advertised the claimant's position before her contract lapsed yet its witness testified that the grant was coming to an end.
43. That the respondent's witness testified that the positions were different as one was an assistant and other was officer. That the position did not exist. That this was a scheme to push the claimant out of employment.
44. It was submitted that the advertisement would suggest that the respondent has funds to continue hiring the claimant.
45. Further reliance was made on the provision of section 43 of the *Employment Act* on reason(s) for termination and the decisions in *Kenfreight (EA) Ltd v Benson K Nguti* (2016) eKLR and *Mary Chemweno Kiptui v Kenya Pipeline Co Ltd* (2014) eKLR on procedure for termination of employment.
46. On the reliefs sought, it was urged that the claimant was entitled to house allowance in that the payslips had no entry for house allowance and the claimant's salary was not consolidated. Section 31 of the *Employment Act* was cited as a justification.
47. Reliance was made on the decision in *Sheila Wikasbei Wikama & another v Super Broom Services Ltd* (2022) eKLR to urge the court to make a similar holding.
48. As regards severance pay, reliance was made on the claimant's email to the respondent dated December 23, 2014 on the benefits allegedly omitted in the notice of expiry of contract.
49. On damages for unlawful termination, reliance was made on the provisions of sections 45 (2) and 49 (1) of the *Employment Act* as well as the decision in *Abisalom Ajusa Magomere v Kenya Nut Co Ltd* (2014) eKLR to urge the court to award maximum compensation for unfair termination of employment.

Respondent's Submissions

50. By October 7, 2022 when the court retired to prepare this judgment, the respondent's submissions were not in the CTS and are thus not included in this judgement.

Determination

51. The issues for determination are whether;
 - i. The claimant had a legitimate expectation that her contract of employment would be renewed.
 - ii. The claimant's employment contract was terminated unfairly.
 - iii. The claimant is entitled to the reliefs sought.
52. As to whether the claimant had a legitimate expectation of renewal of her contract, the starting point is the nature of the contract the claimant had with the respondent.
53. It is common ground that the claimant was an employee of the respondent on 2 years fixed term contracts and upon lapsing, the claimant received renewals generally under the same terms and conditions though the salary kept on rising for 12 ½ years and the last 2-year contract was scheduled to



end on July 31, 2014. However, on August 1, 2014, the claimant's contract was extended for 6 months to January 31, 2015. Analogous to the previous contracts, the contract provided as follows;

“This contract will end on the 31st day of January, 2015. This employment contract shall not be renewed automatically at the expiry date, as it is a fixed term contract.”

54. By letter dated December 10, 2014, the respondent notified the claimant its intention not to renew the contract of employment on its expiry on January 31, 2015.

55. The law on termination of fixed term contracts is well settled. In *Savings and Loans Kenya Ltd v Mayfair Holdings Ltd* (2012) eKLR, the Court of Appeal expressed itself as follows;

“... applying the foregoing principles to the instant case, the inescapable conclusion in the view of the court is that the claimant's contract of employment ended on expiry of its duration on May 12, 2013 as submitted by the respondent and repeatedly confirmed by the claimant in cross-examination, and the respondent was under no obligation to renew the contract or notify the claimant that the contract had indeed lapsed.”

56. Similarly, in the *Registered Trustees of the Presbyterian Church of East Africa and another v Ruth Gathoni Ngotbo-Kariuki* (2017) eKLR, the Court of Appeal stated that;

“The rights and obligations of an employer and employee generally flow from the contract of service. Therefore, the construction of such a contract is to determine the terms and legal effect of the same. The general rule is that the intention of the parties to an agreement should be ascertained from the document as it is deemed that what the parties intended is what is stated in the agreement.”

57. The court was also emphatic that “fixed term contracts carry no rights obligations or expectations beyond the date of expiry.”

58. The related issue of whether an employer should give reasons why a fixed term contract should not be renewed was eloquently captured by Rika J in *Bernard Wanjohi Muriuki v Kirinyaga Water and Sanitation Co Ltd and another* (2012) eKLR that there was no such duty.

59. As to whether the claimant had a legitimate expectation of renewal of the contract after January 31, 2015, the starting point is the burden of proof as encapsulated by Rika J in *Teresa Carlo Omondi v Transparency International-Kenya* (supra) as follows;

“The burden of proof in legitimate expectation claims is always on the employee. It must be shown that the employer through regular practice or through an express promise leads an employee to legitimately expect there would be renewal. The expectation becomes legally protected, and ought not be ignored by the employer, when managerial prerogative on the subject is exercised. Legitimate expectation is not the same thing as anticipation, desire or hope. It is a principle based on a right grounded on the larger principles or reasonableness and fair dealing between employers and employees. The employee must demonstrate some rational and objective reason for her expectation. The representation underlying the expectation must be clear and unambiguous. The expectation must be induced by the decision maker. The decision maker must have the authority to renew. Repeated renewals, extended service beyond the period provided for in the fixed term contract and promise of renewal are some of the elements that would amount to objective



reasons underlying expectation of renewal. The presence of these elements however, is not to be taken as conclusive evidence of legitimate expectation.”

60. On the other hand, in *Francis Tonui v Heifer International Kenya* (2017) eKLR where the claimant had had 12 years of continuous service under successive 2 year contracts on the same terms and was finally extended for 3 months, the contract expressed itself as follows;

“In this regard, therefore, where there is a written contract of employment, the court is to take it in its ordinary meaning unless there is demonstration that the intentions of any particular clause is to be considered otherwise. The rationale is that a fixed term contract expires with effluxion of time and unless either party invites the other to renew it, then it automatically ends as contemplated.”

(See *Margaret A Ochieng v National Water Conservation & Pipeline Corporation* (2014) eKLR and *Rajab Barasa & 4 others v Kenya Meat Commission* (2016) eKLR).

61. In *Francis Tonui v Heifer International Kenya* (*supra*) the contract relied on the decision in *Samuel Chacha v Kenya Medical Research Institute (KEMRI)* (2014) eKLR to hold that

“I have carefully gone through the judgement in the case of *Teresa Carlo Omondi v Transparency International-Kenya* (2017) eKLR and the expositions therein with regard to the question of legitimate expectation in the renewal of a fixed term contract of employment and note the facts herein and the facts therein are fundamentally different. The position in *Samuel Chacha v KEMRI* cited above is more eschewed to facts herein. The question of renewal of a fixed term contract that has been extended on its terms once or twice does not create a right to continued renewal in future. Such a fixed term contract expires based on its term period.”

62. The court is guided by these sentiments.

63. In the instant case, it is not in dispute that the respondent renewed the claimant’s employment on several occasions until January 2015 and all the contracts were for a fixed term and non-renewal and the last renewal was for 6 months. Does the fact that an employer has renewed a fixed term severally create an obligation to continue renewing the contract until the employee resigns, dies or attains retirement age? Would that not destroy the essence of fixed term contract?

64. In the absence of a renewal clause, the employer, in this case had no obligation to renew the claimant’s contract of employment. It is not alleged that the respondent by word or conduct intimated that it would renew the last contract. The claimant did not question the shorter duration of last contract of 6 months. Perhaps because she was aware that the respondent had no obligation to renew the contract that ended on July 31, 2014.

65. Instructively, the respondent’s notice of non-renewal was given early enough to accord the claimant sufficient time to adjust to the reality. The change of terms of the contract may have been a warning shot.

66. Weighing the claimant’s evidence against that of the respondent, it is the finding of the court that the consistent renewals of the contract of employment by the respondent over the years notwithstanding, the claimant had no reasonable and objective reason to legitimately expect renewal of the contract for another 6 months. In the court’s view, the several renewals of the contract per se was not a firm basis to find that the claimant had a legitimate expectation that the contract of employment would be renewed.



67. As to whether the claimant's contract of employment was terminated unfairly as alleged, the homeport are the relevant provisions of the [Employment Act](#); these are sections 35 on notice, 43 on burden of proof, section 45 on validity and fairness of the reason(s) coupled with procedure, section 41 on the procedural precepts and section 47 (5) on justification as highlighted by the Court of Appeal in [Pius Machafu Isindu v Lavington Security Guards Ltd](#) (2017) eKLR.
68. It is trite law that for a termination of employment to pass muster, it must be substantively justifiable and procedurally fair as explained by Ndolo J in *Walter Ogal Anuro v Teachers Service Commission* (supra) and the Court of Appeal in [Naima Khamis v Oxford University Press \(EA\) Ltd](#) (2017) eKLR.

Reason(s) for Termination

69. Granted that the claimant's contract of employment was for a fixed term and not automatically renewable, and guided by judicial precedents such as [Savings and Loans Kenya Ltd v Mayfair Holding Ltd](#) (2012) as well as [Bernard Wanjohi Muriuki v Kirinyaga Water and Sanitation Co Ltd](#) (2012) eKLR, there was no obligation on the part of the respondent to give any reason for the separation other than the effluxion of time.
70. In the latter case Rika J was emphatic that
- “ . . . there is no obligation on the part of the employer to give reasons to an employee why a fixed term contract of employment should not be renewed . . . The only reason that should be given is that the term has come to an end and no more . . . ”
71. In the instant case, the contract of employment was unambiguous that it would not be automatically renewed on expiry as it was a fixed term contract. The renewal, if any was not dependent in any explicit consideration other than a decision of the board of the respondent.
72. The claimant's performance was not an issue as confirmed by RWI and funding was not a challenge at the time. Both CWI and RWI confirmed on cross-examination that there was no redundancy.

Procedure of Termination

73. In typical termination of employment or summary dismissal, the employer is required to comply with the provisions of section 41 of the [Employment Act, 2007](#).
74. The specific elements have been articulated in several decisions of this court and the Court of Appeal, such as *Loice Otieno v Kenya Commercial Bank Ltd* (supra) and [Postal Corporation of Kenya v Andrew K Tanui](#) (2019) eKLR among others.
75. The instant case, being one based on a fixed term contract, the respondent was under no obligation to notify the claimant that the contract was about to or had indeed lapsed as explained by the Court of Appeal in *Savings and Loans Kenya Ltd v Mayfair Holding Ltd* (supra).
76. However, the respondent gave a notice dated December 10, 2014 more than 40 days before the contract expired, a fact confirmed by the claimant.
77. In order to understand the context of the alleged unfair termination of the claimant's employment, it is essential to reproduce the contents of the alleged termination letter.



78. The notice under the reference ‘employment contract expiry’ stated in part;

“This is to notify you that your fixed term employment contract (“the contract”) dated August 1, 2014 will expire on January 31, 2015. Further please take note that the African Wildlife Foundation (“AWF”) does not intend to renew the said contract. This therefore means that your last day of service with AWF will be January 31, 2015.

AWF requests that you work until that date in order to effectively hand over to your supervisor or a designee to ensure a smooth transition and effective completion of your deliverables per contractual and statutory obligations, AWF will provide you with the separation benefits including the following subject to applicable taxes where applicable as mandated by law.

- i. Payment of your regularly salary through January 31st, 2015.
- ii. Payment of any accrued unused leave as of the last day of your employment.
- iii. Any retirement contributions withheld or contributed as per the terms of your employment contract to the Generali Worldwide Insurance Company . . .
- iv. Continued health coverage for you and your family through April 30, 2015.
- v. Certificate of service. All other benefits will end on January 31st 2015.

Should you have any questions about this notification, please do not hesitate to contact the undersigned.

Your respective managers will work directly with you to assist in transitioning your work.

I wish you only the best in your future pursuits.”

Sincerely,

Signed

Charly Facheux

79. The opening paragraph of the letter is unambiguous on its context and purpose.

80. The letter makes no accusation against the claimant nor state the reason for the alleged termination of contract other than the impending effluxion of time and the claimant’s dues are tabulated, absent figures as it was still early.

81. More significantly, the penultimate paragraph of the letter gave the claimant an opportunity to ask any questions she had about the notification. By an email dated December 23, 2014, the claimant wrote to Charly Facheux acknowledging receipt of the notification dated December 10, 2014 which she describes as “letter communicating termination of my contract with AWF”. The claimant states that she had noted omission of relocation allowance and severance pay (wrongly identified as severity pay) “on termination”. The email also raises the issue of salary.

82. In a response dated December 29, 2014, RWI informed the claimant she was responding to the issues she had raised because they were human resource related. RWI informed the claimant three things;

- i. To confirm her initial place of hire for purposes of payment of relocation allowance.
- ii. That AWF would counter-check the annual salary and make the necessary amendments as appropriate.



- iii. That the claimant was not eligible for severance pay under the laws of Kenya and the AWF policy as the reason for separation was end of a defined contract.
83. From the documentary evidence on record, it is unclear how the communication proceeded and how the issues were resolved.
84. The respondent is faulted by the claimant for having advertised the position of Program Finance and Administration Assistant on January 13, 2015 while the claimant's position was Program Finance and Administrative Officer.
85. It is submitted that the respondent could not advertise for someone to come in and provide assistance to a position that was in existent. That this was a fraudulent scheme to mislead the claimant and push her out of employment and have another person replace her. That the respondent used the word "assistant" to hide its intention.
86. On cross-examination, the claimant confirmed that she was the Finance Officer of the program based at Nanyuki and RWI also confirmed that the position advertised on January 13, 2015 was lower than the one held by the claimant. From the evidence on record, it is unclear if the respondent employed a person or not. Taken as a whole, the evidence on record does not demonstrate that the non-renewal of the claimant's contract of employment was actuated by ill-motive on the part of the respondent.
87. The circumstances in the instant case and those in *Teresa Carlo Omondi v Transparency International-Kenya* (supra) where the court held that the non-renewal of the claimant's contract of employment amounted to unfair dismissal, are distinctively distinguishable.
88. For the above stated reasons, it is the finding of the court that the claimant has on a balance of probability failed to demonstrate that the non-renewal of the contract of employment by the respondent after January 31, 2015 amounted to an unfair termination of employment.
89. Having found that non-renewal of the claimant's contract did not amount to unfair termination of employment, the issue of entitlement to remedies does not arise.
90. In conclusion, the claim herein is dismissed.
91. Parties to bear own costs.
92. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 3RD DAY OF NOVEMBER 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the



duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

