



REPUBLIC OF KENYA



**Jonyo v Kisumu National Polytechnic & 8 others (Cause E001 of 2022)  
[2022] KEELRC 13345 (KLR) (1 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13345 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E001 OF 2022  
CN BAARI, J  
DECEMBER 1, 2022**

**BETWEEN**

**OSCAR ONYANGO JONYO ..... CLAIMANT**

**AND**

**KISUMU NATIONAL POLYTECHNIC ..... 1<sup>ST</sup> RESPONDENT**

**CHAIRPERSON OF THE GOVERNING COUNCIL OF THE KISUMU  
NATIONAL POLYTECHNIC ..... 2<sup>ND</sup> RESPONDENT**

**CHIEF PRINCIPAL, SECRETARY OF GOVERNING COUNCIL MADAM  
CATHERINE KELONYE ..... 3<sup>RD</sup> RESPONDENT**

**DEPUTY PRINCIPAL, ACADEMICS, MADAM LINDA AYUKU .... 4<sup>TH</sup>  
RESPONDENT**

**DEPUTY PRINCIPAL, ADMINISTRATION, MR CHARLES  
OPIYO ..... 5<sup>TH</sup> RESPONDENT**

**HOD OF INSTITUTIONAL DEPARTMENT, MADAM ROSE  
OOGO ..... 6<sup>TH</sup> RESPONDENT**

**HOD OF DEPARTMENT OF BUSINESS STUDIES, MADAM MILLICENT  
SAGERO ..... 7<sup>TH</sup> RESPONDENT**

**HUMAN RESOURCE MANAGER, MR OMINDE MOURICE .... 8<sup>TH</sup>  
RESPONDENT**

**EXAMINATION OFFICER, MR BARACK OORO ..... 9<sup>TH</sup> RESPONDENT**



## JUDGMENT

1. Before Court is the Claimant's Memorandum of Claim dated January 3, 2022, and filed on similar date. The Claimant seeks payment of overtime dues, salary increments, salary for the month of December, 2021, general damages for unfairly not renewing his Employment Contract for the year 2022, and sitting allowances all coming to a grand total of Kshs 2,575,144.00.
2. The Respondents entered appearance through the Office of the Attorney General and filed a Response to the claim on January 24, 2022.
3. The suit was heard on the October 5, 2022, where the Claimant testified in support of his case. He adopted his witness statement and produced the bundle of documents filed in support of his case.
4. The Respondents' case was heard on similar date, and the Respondent presented a Mrs Catherine Kayesi to testify on their behalf. Mrs Kayesi adopted her statement, and produced a bundle of documents filed in support of the Respondents' case.
5. Both parties closed their respective cases on the first hearing date, paving way to filing of submissions.
6. Both parties filed submissions in the matter.

### **The Claimant's Case**

7. The Claimant's case is that he was employed as a Council Trainer by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 8<sup>th</sup> Respondents on October 2, 2014, to teach Business Law units at the Department of Business Studies at a gross salary of Kshs 30,000 per month.
8. The Claimant states that in the preceding years, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents employed him as a Council Trainer in the Department of Business Studies, on a yearly fixed term Contract. It is his case that the last Contract commenced on January 15, 2021 and ended on December 31, 2021, on an all-inclusive monthly salary of Kshs 30,000.00
9. The Claimant states that due to his exemplary conduct and work, the 3<sup>rd</sup> Respondent appointed him as a member of a Constitutional Oversight Committee vide a letter dated September 8, 2017, where he served as the committee's legal officer until December 31, 2021. The Claimant further states that the Respondents failed to renew his Employment Contract when it expired in December, 2021.
10. The Claimant states that in his capacity as a member of the oversight committee, he earned a sitting allowance of Kshs 3,000.00 per sitting. It is his case that the Committee as a matter of practice, sat three times every academic term, translating to a sitting allowance of Kshs 9,000.00 per term.
11. The Claimant states that he was also appointed as a Departmental Member of the Examination Results Analysis Committee; Departmental member of the Planning and Budgeting Committee; and as a member of the Departmental Member of the QMS Process Implementation Committee vide letters dated June 12, 2018.
12. The Claimant states that he received a contract renewal occurring every year, in the years 2014, 2015, 2016, 2017, 2018, 2019, 2020 and 2021 due to his excellent performance. It is his case that he was issued and/or awarded a Certificate of Merit dated April 7, 2017, for his good performance.
13. The Claimant states that he worked for the Respondents for an extra and burdensome excess of 28 hours per week, without being remunerated and/or in any way being compensated for serving the two



Departments, contrary to the terms of his Employment Contract which stipulated that he was only supposed to service the Department of Business Studies.

14. The Claimant states that in the year 2017, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 8<sup>th</sup> Respondents, reviewed the salaries of all the Council Trainers by Kshs 6,628, with the exception of the Claimant's. The Claimant further states that in the year 2022, after failing to renew his Contract, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 8<sup>th</sup> Respondents went ahead and further reviewed all Council Trainers' salary to Kshs 40,000.00.
15. It is the Claimant's case that during his service period, the Respondents humiliated, discriminated and treated him unfairly in various ways; one such instance was forcing and or coercing him to apply for a renewal of his Contract, which by then was still running contrary to fair Labour practices.
16. The Claimant further states that on December 20, 2021, the Respondents issued all employees and interns with Naivas gift vouchers, except him, which in his view, amounted to an act of discrimination.
17. The Claimant states that on December 17, 2021, he wrote to the 3<sup>rd</sup> Respondent requesting her to renew his contract at the end of December 31, 2021, but that she refused to renew the contract, claiming that she had more qualified persons who can assume the Claimant's position.
18. The Claimant states that to date, the Respondents have not offered him any reason as to why his Contract was never renewed and that his December, 2021 salary was not paid.

### **The Respondents' Case**

19. The Respondents' case is that they employed the Claimant on contractual basis, and that the contract period was one year after which the Claimant was expected to apply for renewal if he wished to continue his engagement with the Respondents.
20. It is the Respondents' case that the school Principal had the discretion to accept or reject the application, and where his application was accepted, she would issue a new contract. The Respondents' further state that the Claimant's last contract was renewed vide a contract dated January 15, 2021, for the term beginning from January 1, 2021 to December 31, 2021.
21. The Respondents states that on December 17, 2021, they advertised vacant positions and that the Claimant did not apply. It is the Respondents case that the Claimant instead, sought to apply for renewal of his previous contract vide a letter dated December 17, 2021.
22. The Respondents further state that the fact that the Claimant's position was not declared vacant, was not in itself an indication that the Claimant's contract was going to be renewed. It is the Respondents' case that they were under no legal obligation to renew the Claimant's contract.
23. The Respondents state that it was a term of the Claimant's contract that upon its expiry his employment was automatically terminated unless expressly renewed within a period of one month following the expiry.
24. The Respondents state that the Claimant signed a contract every year agreeing on his remuneration at a rate of Kshs 30,000.00 and therefore cannot claim salary increment. It is the Respondents' case that it was not a term of the Claimant's contract that he will be entitled to production unit pay of Kshs 10,000.00, as production unit was only payable where the institution makes profit from items sold by the students for services rendered by students in the course of learning. The Respondents further state that the unit taught by the Claimant was not profit making.



25. It is the Respondents' case that all part time trainers are required to maintain records of classes taught, including student lesson attendance, and that there is no attendance form intimating that the Claimant taught overtime, hence the Respondent is under no obligation to pay the Claimant overtime.
26. The Respondents state that the trainer work load per the Ministry of Education, require a trainer to work between 18-24 hours, and that the Claimant's last contract required him to work for a minimum of 24 hours per week.
27. It is the Respondents' case that the timetables produced by the Claimant is evidence that the Claimant was required to teach for a total of 8 hours for the September, 2019 intake, 8 hours in the January, 2020 intake, and 6 hours in the October, 2020. The Respondents further state that this is a demonstration that they were compliant with the regulations.
28. It is the Respondents' case that there is nothing to prove that the Claimant worked overtime in the period between January, 2018 and December, 2021.
29. The Respondents state that the Claimant was only entitled to sitting allowance for committees in which he was appointed to if the committee convened meetings, and is not entitle to sitting allowance for 2022, since his contract terminated by effluxion of time and all the duties he was appointed to, expired along with it.
30. The respondents state that the Naivas Supermarket voucher that the Claimant produced, did not emanate from the institution and cannot therefore be used as a basis to claim that other employees were issued with vouchers, while he was left out.
31. It is the Respondents' case that at no time was the Claimant discriminated upon, and that the Huma Resource Department has never received any reports or threats from the Claimant on complaints of discrimination.

### **The Claimant's Submissions**

32. The Claimant submits that in the event the Regulations of the Ministry of Education and the Institution's teaching rules and regulations conflict, the Ministry's Regulations supersede those of the Institution. It is further submitted that the Employment Contracts issued to the Claimant herein since the year 2014 to the year 2021, provided that the Claimant was to teach for minimum of 24 hours per week
33. The Claimant submits that contrary to the terms of his Employment Contract, he was forced and/or coerced to teach Legal Aspects in Catering (Catering Law); and Legal Aspects in Food and Beverage within Institutional Department, thus working for an average of 52 hours per week contrary to the Regulations from the Ministry of Education
34. The Claimant further submits that at the end of every academic term, he prepared the students' mark sheets, and handover the original copies to the Heads of Departments, Institutional Department and Business Department.
35. The Claimant submits that he indeed worked outside the scope of his Contract of Employment by offering his services to the Institutional Department, contrary to the terms of his Employment



contracts, and as such, he should be compensated. He had reliance in the case of *Daniel Charo Karani v Daniela Malanchini* [2022] eKLR where the court held:

“24...I therefore find the evidence of RW1 and RW2 more believable and hold that the Claimant was paid for whatever other assignment that fell outside his main tasks at work...”

36. The Claimant submits that he is entitled to overtime pay. He relies on the case of *Evans Katiezo Aligulah v Eldomatt Wholesale and Supermarket Ltd* [2016] eKLR, where the court held that for the avoidance of doubt, the formula for overtime calculation is provided for under Rule 6 of the *Regulation of Wages (General) Order*
37. The Claimant further submits that he had legitimate expectation of the renewal of his employment contract as the contract provided for renewal, subject to the conditions outlined on the letter of employment and that the renewal was always being done after the lapse of the previous one, by the Claimant applying for a renewal.
38. The Claimant further submits that he had his contract renewed for 8 years with glowing reviews at each stage of the process. It is his submission that the practice took place for a period of 8 years. He further submits that all the requirements for the renewal were met, including satisfactory performance and tendering of an application letter.

### **The Respondents' Submissions**

39. It is submitted for the Respondents that at no point was the Claimant discriminated upon as alleged and outlined under Article 27 of the *Constitution* of Kenya and Section 5(3) of the *Employment Act* of Kenya. It is further submitted that no reports or complaints of the alleged discrimination were received by the Human Resource Department, and that the Institution has policies in place to determine grievances raised by employees hence do not and cannot tolerate any such acts.
40. The Respondents further submit that each lecturer was paid in respect to their expertise, a fact that the Claimant admitted in his cross exam and witness statements. It is submitted that evidence show that other part time lecturers earned about Kshs 21,000, while the Claimant earned Kshs 30,000
41. It is submitted that the School payroll for the month of December, 2021, at number 116, shows that the Claimant's December salary was duly paid and which fact was confirmed by the 3<sup>rd</sup> Respondent during the oral hearing.
42. The Respondents submit that the Claimant was only entitled to sitting allowances for the committees in which he was appointed to, if the committees convene meetings, and that no evidence has been adduced in court to show that he attended a committee meeting that was not paid for

### **Analysis and Determination**

43. I have considered the pleadings, the witnesses' testimonies and the Parties' written submissions. The issues for determination on are:
  - i. Whether the Claimant had a legitimate expectation for renewal of contract.
  - ii. Whether the Claimant is entitled to the remedies sought Whether the Claimant had a legitimate expectation for renewal of contract
44. The Claimant was employed by the 1<sup>st</sup> Respondent in the year 2014, as a part time lecturer in the department of Business studies, and placed on a one-year part time contract. The Claimant's contract was renewed upon expiry for another one year, and this happened continuously until the year 2021.



45. The Claimant's last contract with the Respondents lapsed in December, 2021, and was not renewed even after the Claimant had sought renewal in the same way his previous contracts were renewed.
46. The Respondents' contend that on December 17, 2021, they advertised vacant positions but the Claimant did not apply. It is the Respondents case that the Claimant instead, sought to apply for renewal of his previous contract vide a letter dated December 17, 2021.
47. The Claimant's assertion is that he did not apply for the advertised positions as his job was not amongst the positions that were advertised, and hence the reason he applied for renewal of his contract like he had done for the previous eight years.
48. The Respondents then told the court that the fact that the Claimant's position was not declared vacant, was not in itself an indication that the contract was going to be renewed, as they were under no legal obligation to renew the Claimant's contract.
49. The Respondents further contend that the Claimant's contract was fixed term, and had thus terminated automatically upon expiry.
50. Clause 9 of the Rules and Regulations for trainers appointed on temporary terms states: -
 

“This contract is given on a yearly basis and may be renewed by the lecturer writing to the Chief Principal through the HOD, subject to satisfactory performance of duties.”
51. For starters, all the contracts issued to the Claimant were christened “temporary” and not fixed term as the Respondent had indicated herein. Secondly, fixed term contracts are meant to be for a fixed period as they establish a start and an end date of the employment agreement.
52. In *Mombasa Apparels (EPZ) Limited v Tailor and Textiles Workers Union* (2016) eKLR, the court held that fixed term contracts are meant to lapse automatically unless parties mutually agree to extend them, and that there is no legitimate expectation for an employee under a fixed term contract that he would continue serving after the expiry of the contract
53. Further in the *Registered Trustees De La Salle Christian Brothers T/A St Mary's Boys Secondary School v Julius D M Baini* [2017] eKLR and the *Registered Trustees of the Presbyterian Church of East Africa & Another v Ruth Gathoni Kariuki* [2017] eKLR, the Court stated that: -
 

“We note that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry (emphasis mine), Accordingly, any claim based after the expiry of the Respondent's contract ought not to have been maintained. Similarly, since the Respondent's contract came to an end by effluxion of time any claim for wrongful termination could not be maintained”.
54. In my view, the fact that the Rules and Regulations for trainers appointed on temporary terms provided for renewal of the contracts, goes to confirm that the Claimants contracts were not fixed term, instead, they were renewable term contracts.
55. Further, the regular renewal of the Claimants' contracts for a consecutive eight (8) years, created legitimate expectation that he will continue being reappointed to the position, unless and until the terms of the contract are changed and/or reviewed.
56. This expectation in my view, entitled the Claimant to notice should the Respondents decide not to renew the contract. Further, the expectation created by the actions of the Respondents, then becomes protected based on the principle of fair dealing between the parties concerned.



57. I find and hold that the Claimant's contract ought to have been renewed or given proper notice and reasons as to why his contract would not be renewed.
58. The Respondents' failure to renew the Claimant's contract or give notice and reasons as to why the contract could not be renewed after religiously renewing it for 8 years, was an unfair termination, and I so hold.

#### **Whether the Claimant is entitled to the remedies sought**

59. The Claimant seeks payment of overtime dues, salary increments, salary for the month of December, 2021, general damages for unfairly not renewing his Employment Contract for the year 2022, and sitting allowances all coming to a grand total of Kshs '2,575,144.00.

#### **Overtime Dues**

60. The Claimant's contracts of service provided the minimum hours that he was required to work per week for the term of the contract. The hours ranged between 22 and 24 hours per week.
61. Other than the Claimant's letters of November, 2017 and January, 2020, requesting to be paid for overtime work, no evidence was led to the satisfaction of the court to show that the Claimant worked longer hours than was expected of him. This claim fails and is dismissed.

#### **Salary Increments**

62. The Claimant was appointment on contract, and which contracts were renewed every year. The contracts expressly stated what the Claimant's salary was, and which the evidence before court indicate as the amount he was paid.
63. Parties are bound by the terms of their contracts and the court cannot prescribe new terms on issues that parties agreed on in their contract agreements.
64. In all the contracts that the Claimant signed with the Respondents, the amount payable in salary was expressly stated. The Claimant cannot thus be heard to say that he was entitled to much more than he was paid or than he signed for. He ought to have negotiated his salary increments at the point of signing his contract.
65. The claim for salary increments fails and is dismissed.

#### **General Damages for unfairly not renewing the Claimant's Employment Contract**

66. The Court has found that the Claimant had a legitimate expectation that his contract would be renewed. The failure to renew the contract or issue the Claimant with notice and reasons for the refusal to renew, has been found to amount to an unfair termination.
67. According to Section 49 and 50 of the Employment, a finding of unfair termination entitles an employee to the remedies listed under Section 49 (4) of the *Employment Act, 2007*.
68. The Supreme Court in *Kenfreight (EA) Limited v Benson K Nguti* [2019] eKLR observed that the *Employment Act* provides for a number of remedies for unlawful or wrongful termination under Section 49, and that it is up to the Judge to exercise his or her discretion to determine whether to allow any or all of the remedies provided.
69. The Claimant was in the service of the Respondents for eight years.



In *Kenya Ports Authority v Festus Kipkorir Kiprotich* [2014] eKLR it was held that the measures of compensation should be guided by the statutory capping at the time of termination.

70. Premised on the period the Claimant was in the service of the Respondents, and the failure by the Respondents to satisfactorily explain the reasons for non-renewal of contract, I award the Claimant ten (10) months' salary as compensation for the unfair termination.

### **Sitting Allowances**

71. It is not disputed that the Claimant was appointed to various committees of the Respondents. His claim is that he be awarded sitting allowances for these committees for the year 2022, when his contract was not renewed.
72. The Respondents contend that the Claimant was only entitled to sitting allowance for committees in which he was appointed to, if the committee convened meetings, and is not entitled to sitting allowances for the year 2022, since his contract terminated by effluxion of time and all the duties he was appointed to, expired along with it.
73. The letters appointing the Claimant to the various committees did not give an indication of whether sitting allowances were payable, and if so, the amount per sitting.
74. Sitting allowances are in my view, only earned when one sits in a particular meeting. It would thus be absurd for a party to claim a sitting allowance in meetings he did not attend.
75. The claim for sitting allowances is found to lack merit and is dismissed.
76. In whole, Judgment is entered for the Claimant against the Respondents as follows: -
- a. 10 months' salary in compensation for unfair termination at Kshs 300,000/-
  - b. Salary for the month of December, 2021 at Kshs 30,000/-
  - c. Costs of the suit and interest until payment in full.
77. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 1ST DAY OF DECEMBER, 2022.**

**CHRISTINE N. BAARI**

**JUDGE**

#### **Appearance:**

Mr. Ogutu present for the Claimant

Ms. Kimberly h/b for Ms. Juma for the Respondent

Christine Omollo- C/A

