



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2262 OF 2015**

**RAJAB BARASA.....1<sup>ST</sup> CLAIMANT**

**JOHN MUTWIRI GICHURU.....2<sup>ND</sup> CLAIMANT**

**MARTIN MONO.....3<sup>RD</sup> CLAIMANT**

**VINCENT AKARAH.....4<sup>TH</sup> CLAIMANT**

**BETH MWENDWA SILAS.....5<sup>TH</sup> CLAIMANT**

**VERSUS**

**KENYA MEAT COMMISSION.....RESPONDENT**

**JUDGEMENT**

**The claims;**

- a. A Declaration that notices issued to the Claimants terminating their employments are/were invalid and unlawful and amounted to unfair labour practice.*
- b. A declaration that the renewals of the Claimants' employment for any period shorter than 3 years were invalid and unlawful.*
- c. A declaration that the Claimants' contracts of employment were deemed to have been duly and automatically renewed and converted to open ended contracts.*
- d. A declaration that the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Claimants were deemed to have been confirmed to the respective higher positions they held on acting capacity after the period of six months and that they are entitled to back pay on the basis of reviewed salaries and benefits.*
- e. An order for unconditional reinstatement of the Claimants on employment on 3 year renewable contracts on full pay and without loss of benefits.*
- f. Terminal dues be paid to the Claimants.*
- g. Damages for violations of fundamental rights protected by the Constitution of Kenya 2010.*
- h. The costs of this suit be borne by the Respondent.*

**Claim**

The claimants are adults and formerly employees of the Respondent . The claimants were employed under contracts of employment and the Respondent's Guidelines on Terms and Conditions of Service for State Corporations and the Respondent's Human Resource Policy, Regulations and Procedures Manual. The Claimants were on renewable employment contracts in various positions. This was in line with clause 3.2.3.1 of the Human Resource Policy which provided that appointment on contract terms should be for a maximum renewable period of three years.

The claim is that in breach of the applicable law and the provisions of the HR policy, the Respondent renewed the Claimants' employment for shorter periods and shortly thereafter issued notices purporting to terminate their contracts. The Respondent did not give any reasons for the abrupt termination of the contract of the parties.

The Respondent has undertaken a staff rationalisation program as set out in the Kenya Meat Commission Turnaround Plan and 120 employees took up the voluntary retirement offer by the Respondent and have been paid their terminal dues. The Respondent then advertised vacancies for new positions believed to have been created as part of the rationalisation program. Some of the duties hitherto performed by the Claimants were included in the advertised positions implying that their positions had been declared redundant.

The 1<sup>st</sup> Claimant was employed by the Respondent as a Chief Internal Auditor by a letter of appointment dated 4<sup>th</sup> November 2009. By a letter dated 24<sup>th</sup> August 2010 he was confirmed as the Chief Internal Auditor on a three year renewable contract. Following the expiry of the 1<sup>st</sup> Claimant's employment contract on 27<sup>th</sup> December 2012, the Claimant continued to work for the Respondent. He wrote various letters requesting for confirmation of the renewal of his employment contract and by a letter dated 2<sup>nd</sup> September 2013 the respondent renewed the employment contract effective 28<sup>th</sup> December 2012 to 27<sup>th</sup> December 2013. The conversion from a 3 year renewable contract to a 1 year contract was unlawful. The Claimant expected to serve in the employment of the Respondent for a further 3 years.

By a letter dated 4<sup>th</sup> October 2014, the Respondent informed the 1<sup>st</sup> Claimant that his contract had been renewed with effect from 27<sup>th</sup> December 2013 to 20<sup>th</sup> February 2015 pending recommendations of the Kenya School of Government's study on the restructuring of the Respondent. A copy of this letter is at page 129 of the Claimants documents annexed hereto. Without informing him of the outcome of the restructuring, the Respondent unprocedurally and unlawfully extended his contract of employment and shortly thereafter issued a notice to terminate his employment contract. The unlawfulness is that Claimant served in various positions as follows;

- a. Acting Chief Human Resource Manager from 12<sup>th</sup> July 2011 to 1<sup>st</sup> December 2011;
- b. Acting General Manager - Commercial Division from 3<sup>rd</sup> June 2013;

At the date of termination, the 1<sup>st</sup> Claimant held the position of Chief Financial Officer as well as Acting General Manager Commercial Division, a position he held since 3<sup>rd</sup> June 2013. The Respondent's Human Resource Manual provides that where an employee takes up another employee's responsibilities, an acting allowance of his salary is payable. The 1<sup>st</sup> Claimant was not been paid an acting allowance.

The 2<sup>nd</sup> Claimant was employed by the Respondent as an IT Technician on 1<sup>st</sup> September, 2006 on a 12 months renewable contract. The contract was renewed for a second term from 1<sup>st</sup> September 2007 to 31<sup>st</sup> August 2008. Thereafter, the employment contract was renewed for a period of 3 years from 1<sup>st</sup> September 2010 to 31<sup>st</sup> August 2013. Following this, the Respondent renewed the contract for a period of 1 year by a letter dated 2<sup>nd</sup> October 2013. The conversion from a 3 year renewable contract to a 1 year contract was unlawful. The Claimant expected to serve in the employment of the Respondent for a further 3 years.

By a letter dated 27<sup>th</sup> July 2012, the 2<sup>nd</sup> Claimant was appointed by the Respondent as the ICT and Communications Officer at its office in Kibarani. The contract was further renewed for a further period of one year from 1<sup>st</sup> September 2013 to 31<sup>st</sup> August 2014. Upon expiry of the period in the foregoing contract he continued working for the Respondent until he received the impugned renewal and termination of the employment contract as set out below. The termination of contract of employment was discriminatory due to the following reasons:

- a. Pursuant to the Kenya Meat Commission Turnaround Plan, the Respondent's ICT Department was to get additional staff. No employees were therefore earmarked for retrenchment. Despite the need for additional staff, the 2<sup>nd</sup> Claimant was singled out and his employment contract terminated unfairly.
- b. The 2<sup>nd</sup> Claimant is the only Grade 4 member of staff whose contract was terminated.

The 3<sup>rd</sup> Claimant was employed by the Respondent as an Engineer Trainee on 1<sup>st</sup> September 2006 on a 12 months renewable employment contract. The contract was signed on 25<sup>th</sup> September 2006. The contract was renewed vide letter dated 1<sup>st</sup> September 2007 for a further period of 1 year effective from 1<sup>st</sup> September 2007 to 31<sup>st</sup> August 2008. He was confirmed as a Mechanical Engineer vide a letter dated 11<sup>th</sup> March 2008 following successful completion of the graduate training. The contract was renewed for a further period of 1 year effective from 1<sup>st</sup> September 2008 to 31<sup>st</sup> August 2009.

By a letter dated 30<sup>th</sup> August 2010, the Respondent renewed the 3<sup>rd</sup> Claimant's employment contract for a period of 3 years effective from 1<sup>st</sup> September 2010 to 31<sup>st</sup> August 2013. In breach of the provisions on the renewal of the contract for another period of 3 years, the Respondent by a letter dated 2<sup>nd</sup> October 2013 renewed the 3<sup>rd</sup> Claimant's contract for one year with effect from 1<sup>st</sup> September 2013 to 31<sup>st</sup> August 2014 when the period for the foregoing contract lapsed. The conversion from a 3 year renewable contract to a 1 year contract was unlawful. The Claimant expected to serve in the employment of the Respondent for a further 3 years from September 2013 to August 2016.

By a letter dated 4<sup>th</sup> October 2014, the Respondent extended the 3<sup>rd</sup> Claimant's contract from 1<sup>st</sup> September 2014 to 26<sup>th</sup> August 2015 pending recommendations of the Kenya School of Government's study on the restructuring of the Respondent.

The extension was a breach of the provision for extension of the contact for a period of 3 years. Without informing him of the outcome of the restructuring, the Respondent unprocedurally and unlawfully extended the contract of employment and shortly thereafter issued a notice to terminate the contract. Details of these are set out below.

The 3<sup>rd</sup> Claimant was underpaid in that he was placed on job grade 3 when he was appointed as Plant Engineer while his predecessor Mr. Hudson Obanda held job grade 2.

The 4<sup>th</sup> Claimant was employed by the Respondent as a Legal Officer from July 2007 to 2012 when he was promoted to the Chief Legal Officer. The initial letter of appointment was dated 1<sup>st</sup> November 2007 under which the 4<sup>th</sup> Claimant served a probation period of 6 months subject to confirmation by the management after being satisfied with his performance. By a letter dated 30<sup>th</sup> April 2008 he was confirmed as the Legal Officer with effect from 1<sup>st</sup> May 2008 and in a memo dated 1<sup>st</sup> July 2010 he requested for renewal of his contract. On 1<sup>st</sup> November 2010, the Respondent renewed the 4<sup>th</sup> Claimant's contract of employment for a further period of 3 years lapsing on 31<sup>st</sup> October 2013 but he continued working in his substantive position as well as in the acting positions set out below.

a. Acting Company Secretary from July 2011 to December 2011 and May 2013.

b. Chief Human Resource and Administration Manager from February 2012 to June 2012.

The 5<sup>th</sup> Claimant was employed by the Respondent as a Livestock Field Officer on 31<sup>st</sup> March 2011 on a 3 year renewable contract. By a letter dated 16<sup>th</sup> August 2011 she was confirmed as a Livestock Field Officer and on 9<sup>th</sup> March 2012 she was promoted to the position of Assistant Livestock Manager. Prior to the expiry of her contract, on 10<sup>th</sup> January 2014, she requested for an extension for another period of 3 years which period was to run up to April 2017.

On 27<sup>th</sup> February 2014, the 5<sup>th</sup> Claimant was appointed as a Livestock Manager in an acting capacity which position she served until 27<sup>th</sup> October 2015 when she was asked to revert to her substantive position of Assistant Livestock Manager. The Respondent did not respond to this letter but the 5<sup>th</sup> Claimant continued working after the expiry of the contract in April 2014.

On 4<sup>th</sup> October 2014, the Respondent informed 5<sup>th</sup> Claimant that her contract had been renewed with effect from 11<sup>th</sup> April 2014 to 4<sup>th</sup> February 2015 pending recommendations of the Kenya School of Governments study on the restructuring of the Respondent. This extension was contrary to the contractual and HR policy provisions for renewal of the contract for another 3 years. Without informing her of the outcome of the restructuring, the Respondent unprocedurally and unlawfully extended the contract of employment and shortly thereafter issued a notice to terminate the contract.

Upon expiry of their renewable contracts of employments, the Claimants have remained in the Respondent's employment and continued to faithfully discharge their duties.

Through letters dated 28<sup>th</sup> September 2015, the Respondent directed the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Claimants to proceed on leave from 29<sup>th</sup> September 2015 so as to purportedly clear their pending leave days. The 5<sup>th</sup> Claimant had not accrued enough leave days so as to be considered to be having „pending? leave days. Some of the Respondent's other employees had „pending? leave days but were not directed to proceed on leave. The Claimants nevertheless complied with the direction of the Respondent and proceeded on leave.

Whilst the Claimants were handing over it became apparent that there was an ulterior motive to terminate their employment. Unlike previous occasions, the Claimants were requested to handover their laptops and some were even escorted out of the Respondent's premises by the Respondent's security officers. The request to hand over the laptops was done by a memo dated 14<sup>th</sup> October 2015. Some Claimants such as the 4<sup>th</sup> Claimant disputed the manner in which this was done by a letter dated 19<sup>th</sup> October 2015.

On 23<sup>rd</sup> October 2015, the Claimants noticed that the Respondent had advertised some of their job positions both in acting capacity as well as substantive position in the Daily Nation newspaper edition of 23<sup>rd</sup> October 2015. The Claimants also noted in the newspaper advertisement that some of their job positions appeared to have been made redundant by the Respondent as their duties were included in the advertised positions. The Respondent advertised a newly created position of Chief Operating Officer which had taken some of the responsibilities of some of the Claimants' job positions. From the advertisement, the Chief Accountant's reporting line changed from the 1<sup>st</sup> Claimant to the newly created position of Chief Operating Officer.

The claim is also that while the Claimants were on leave, the Respondent issued letters purportedly extending their contracts from various dates between December 2015 and April 2016 and thereafter issued letters of termination as follows:

1<sup>st</sup> Claimant contract of employment expiring on 5<sup>th</sup> February 2016.

2<sup>nd</sup> Claimant contract of employment expiring on 31<sup>st</sup> December 2015.

3<sup>rd</sup> Claimant contract of employment expiring on 31<sup>st</sup> December 2015.

4<sup>th</sup> Claimant contract of employment expiring on 31<sup>st</sup> April 2016.

5<sup>th</sup> Claimant contract of employment expiring on 31<sup>st</sup> December 2015.

The Claimants wrote various letters objecting to the notices of termination which letters have not been responded to. The purported termination was haphazard and illogical as some of the Claimants' resumption dates from leave were after the termination date of their contracts. For instance, the notice issued to the 1<sup>st</sup> Claimant lapsed on 5<sup>th</sup> February but he had been sent on leave lapsing on 3<sup>rd</sup> March 2016.

The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Claimants had been serving in acting positions for prolonged period of times, well beyond the six month period provided in clause 5.2.5 the Human Resource Manual.

Prior to the impugned renewals and the subsequent termination notices, some of the Claimants had raised issues relating to the manner in which the Respondent's management was conducting affairs including the following;

- a. The salary payable to the newly recruited Managing Commissioner which was above the government's approved salary structure for parastatals.
- b. Questions regarding the procurement of consultancy services for modernization when this had not been provided for in the annual procurement plan and the budget.
- c. Refusal to pay recurrent expenditure from capital grants and escalation of the matter to the Permanent Secretary in the State Department of Livestock.
- d. Questions regarding the misuse by the Respondent's Managing Commissioner of the Respondent's vehicles.
- e. Questions regarding the lodging of false per diem claims by the Respondent's Managing Commissioner.
- f. Refusal to make payment for bodyguards attached the Respondent's Chairman and Managing Commissioner as this was not a benefit they were entitled to.
- g. Refusal to raise a Local Purchase Order (L.P.O) in favour of a company the Respondent's Chairman was using to trade with the Respondent.
- h. The 4<sup>th</sup> Claimant reported that his signature had been forged by the Chairman of the Respondent's Board at the Athi River Police Station under OB No 11/19/6/2015.

It is also claimed that termination of employment was done in a discriminatory manner. Out of the 130 employees who were on renewable employment contracts as at 30<sup>th</sup> April 2015, only 7 employees (including the claimants) had their employment contracts terminated. As at 30<sup>th</sup> November 2016, 38 employees with renewable employment contracts had been retrenched through the Kenya School of Government rationalisation program. There were 85 employees whose employment contracts had expired years ago but were still working for the Respondent.

Prior to the termination notices, the Claimants had served on three year renewable contracts which had come to an end but the Claimants continued to work on the same terms and conditions. The contracts were therefore deemed as having been renewed automatically and were converted to open ended contracts on the same terms and conditions. The purported renewals for shorter periods of time and the subsequent termination are unlawful and without legal basis.

Various employees with similar terms and conditions as the Claimants were not treated in the same manner as the Claimants whose contracts were renewed and terminated in the manner set out above, which amounted to discrimination in that;

- a. Some Claimants have been receiving their salaries late. For instance, the 3<sup>rd</sup> Claimant was paid his salary by way of a cheque dated 7<sup>th</sup> December 2015 when the Respondent had in the past paid salaries by electronic means on or about the last day of each month.
- b. The 5<sup>th</sup> Claimant was on one occasion insulted by the respondent's employees, servants or agents and was accused of having "bad blood".
- c. The 3<sup>rd</sup> Claimant was prevented from resuming his duties when he reported back after the compulsory leave as the officer who was covering for him indicated that he had instructions from the Managing Commissioner not to hand over the duties.
- d. Upon reporting to work on 7<sup>th</sup> January 2016, the 3<sup>rd</sup> Claimant was harassed by the Respondent's Managing Commissioner. He reported the harassment at the Athi River Police Station under OB No 35/15/1/2016.

The termination of the Claimants' employment was a calculated move to deny the Claimants any separation packages they were entitled to for the following reasons:

- a. Despite the claim by the Respondent that the staff rationalization process only involved unionisable staff, non-unionisable staff have since been restructured and paid off.
- b. By a memo dated 24<sup>th</sup> May 2016, the Respondent's Managing Commissioner invited all the Respondent's employees to apply for voluntary early retirement.

This invitation for voluntary early retirement was not limited to the Respondent's unionisable staff members as deponed in Julie Nabwera's Replying Affidavit sworn on 20<sup>th</sup> January 2016.

c. Some of the Respondent's employees held managerial posts similar to the claimants but were retrenched and paid as per the Kenya School of Government (KSG) rationalization program. It is therefore not true that employees holding managerial positions were not to be included in the rationalisation program as evidenced in a retrenchment letter dated 11<sup>th</sup> October 2016 for Ms. Stella Wambui Muhoro, a former Corporate Affairs & Communication Manager, and a payment transfer of Kshs 5,200.406 from the Respondent. Some employees on renewable employment contracts similar to the claimants who were retrenched received their terminal dues payment as per the Kenya School of Government ("KSG") rationalisation program. They also received additional payments as long service awards as evidenced in a retrenchment letter dated 1<sup>st</sup> July 2016 addressed to Mr. Walter Nyaribo Qkemwa and the tabulation of the payment he received from the Respondent.

d. The Respondent's retrenched unionisable staff were paid as per the KSG rationalization program with an additional payment of long service award.

e. As of 30<sup>th</sup> November 2016, the Respondent had retrenched 120 employees. Most of the retrenched employee's contracts of employment had expired. For instance Stella Muhoro's contract expired on 26<sup>th</sup> June, 2015 while Mr. Walter Nyaribo's contract expired on 14<sup>th</sup> November 2009.

The claim is also that under Clause 5.2.5 of the Human Resource the acting periods for employees should not exceed 6 months. The Claimants however acted in various positions for period in excess of this period. Being a document authored by the Respondent, any interpretation as to the effect of such prolonged acting should be construed against the Respondent. The Claimants who held various acting position beyond the 6 months were deemed to have been confirmed in those position after the lapse of the 6 months. Purporting to take away this accrued right without due compensation is unlawful.

The Respondent actions amounted to unfair labour practice for which the Claimants are entitled to compensation and/or damages.

The claimants are seeking the following dues;

1. Gratuity at the rate of 31% of the basic salary- clause 3.2.3.3 of the HR Policy.
2. Acting allowance at the rate of 15% of the basic pay- Clause 5.2.1 of the HR policy.
3. Responsibility allowance at the rates determined by the Board- clause 5.9 of the HR Policy.
4. Leave allowance - clause 5.12 of the HR policy.
5. Claimants be paid twelve month's salary as compensation for wrongful and unlawful termination of employment.
6. Damages for violations of fundamental rights protected by the Constitution of Kenya 2010.
7. The costs of this suit be borne by the Respondent.
8. Terminal dues be paid to each claimant.

## **Defence**

The respondent's case is that the claimants were employees at managerial levels and under fixed term contracts of service. The written contracts provided for terms and conditions binding the parties and regulated the employment relationship. The HR Policy is merely a guideline for administrative purposes.

On 26<sup>th</sup> August, 2013 the board resolved that all managerial contracts be renewed for a period of one year pending performance appraisals and upon the expiry of the claimants' fixed term contracts, the respondent issued them with letters renewing their contracts for a period of one year. The requirement for a 3 years contract as provided for in the HR Policy did not necessarily infer that all contracts had to be for such periods as it only set the maximum and any shorter period of time was within the guidelines. The term „renewable“ does not mean automatic renewal upon expiry and without performance appraisal.

In principle, either party to a fixed term contract can bring it to an end by notice or payment in lieu of notice as embodied under section 36 of the Employment Act.

The defence is also that the claimants were not declared redundant. The staff rationalization programme only involved unionisable employees and the claimants were not unionisable.<sup>1</sup> There was no redundancy declared.

The respondent advertised the positions that were available vide notice published on 23<sup>rd</sup> October, 2015 and through internal memo of equal date upon the board decision that all positions at the managerial level be filled competitively. Such positions have since been filled.

The claimants were fully aware of the recruitment process and were in a position to apply but failed to do so. The existing term contracts for 3 years were renewed for a year which was lawful. The contracts were renewable and the respondent made it clear to the extent that the claimants who wished to be reappointed in the same position would have to make a written request at least 3 months before expiry of contract. The claimants were aware that the contracts issued had a termination clause, renewal was not automatic, and the contract term had a

start and end date.

The 1<sup>st</sup> claimant was aware of the KSG study on restricting of the respondent and the contracts of employment were renewed pending recommendations of the same. There was no dispute with regard to the renewed term contracts. His contract was terminated lawfully and his claims should be dismissed.

The 2<sup>nd</sup> claimant's term contracts for 3 year and one year was communicated to him and this was lawful. The change was as a result of recommendations by the KSG that was engaged for the purpose of turning around the difficulties the respondent was facing at the time. He did not object to his contracts as issued and termination of employment was lawful and due process was followed and as such, the claims made should be dismissed.

The 3<sup>rd</sup> claimant had his contract for 3 years and which was renewed to one year which was lawful and procedural. The contract made provision for termination. It was not to convert automatically. The claims made should be dismissed.

The defence is also that the 4<sup>th</sup> claimant previously worked with the respondent and such employment ended and the claims made are without basis.

The 5<sup>th</sup> claimant was an employee of the respondent and he was aware of the KSG study on restructuring and his contract was renewed pending its recommendations. The renewal of his fixed term contract was not automatic and was subject to performance appraisal. Termination of employment was procedural and lawful.

The claimants are no longer in the employment of the respondents and the claims made for payment over the various positions held are not justified. The positions previous held by the claimants have since been filled by other persons and there exists no employment relationship to justify the claims made.

On the claim for payment for leave, the response is that the Principal Secretary in the Ministry of Agriculture, Livestock and Fishery, State Department of livestock directed all employees of the respondent to clear all pending leave days as the factory was operating below capacity. Such notice was circulated to all employees. The claimants did not comply and on 28<sup>th</sup> September, 2015 the respondent resolved that the management were to clear pending leave days and were to hand over to their deputies and proceed on leave.

The recruitment process was initiated pursuant to the KSG report and the board's decision. The claimants were aware of the positions to be filled. This was not due to redundancy as no position was declared redundant as alleged. There was reorganization of the respondent as recommended by KSG study.

The respondent lawfully and procedurally terminated the claimants' employment pursuant to the termination clause in the employment contracts.

The 1<sup>st</sup> claimant was not on an acting position at the time his contract of employment was terminated. By a letter dated 24<sup>th</sup> June, 2013 the 4<sup>th</sup> claimant was appointed as acting company secretary and it was clarified that he would hold such position until recruitment for the same was completed. By a letter dated 27<sup>th</sup> October 2015 the 5<sup>th</sup> claimant was informed that she would act as assistant livestock manager until the respondent recruited for the position.

The allegations made with regard to discrimination against the claimants are denied and there is no cause of action in this regard. Employment contracts lapsed and were not renewed as this was not automatic. The claimants failed to apply for the advertised positions. Discrimination does not apply as alleged.

The 3<sup>rd</sup> claimant was paid his terminal dues in accordance with his contract. The HR Policy has no express or implied term to confer the benefits claimed outside the term contracts. Service pay is payable at the end of employment and based on the court interpretation. The respondent is ready and willing to pay gratuity once the suit herein is settled.

The defence is also that the respondent as an employer cannot be compelled to reinstate an employee whose fixed term contract has expired and employment terminated lawfully. The employment relationship between the parties has come to an end as stipulated under the contracts. The claim should be dismissed in its entirety with costs.

In evidence the respondent called Anthony Ademba, the company secretary, who testified that the claimants were employees of the respondent under fixed term contracts which expired and the respondent opted not to renew them thereby ending the employment relationship.

The 1<sup>st</sup> to 4<sup>th</sup> claimants were employed in managerial levels on fixed term contract of 3 years and on 26<sup>th</sup> August, 2013 the board resolved that one year contracts would be issued pending performance appraisals. The HR policy at clause 3.2.3 provides that a contract term shall apply to positions that cannot be filled on pensionable terms and would be renewed for a maximum period of 3 years and when the claimants contract 3 year term contracts expired they were issued with letter renewing for one year.

Mr. Ademba also testified that the respondent had a staff rationalisation programme which involved unionisable employees and the claimants were in management and held individual employment contracts thus not unionisable.

The restructuring and rationalisation of employees of the respondent affected unionisable employees with the exemption of casual or

temporary employees who left employment at the end and expiry of contract like the claimants.

Due to the poor performance of the respondent the Minister for Agriculture, Livestock and Fisheries vide letters dated 29<sup>th</sup> August, 2014, 10<sup>th</sup> March, 2015 and 15<sup>th</sup> October, 2015 directed for the restructuring of the respondent. On 6<sup>th</sup> May, 2013 the respondent was further directed not to issue contracts of more than a year. The KSG was contracted to provide study for a turnaround and by its report of 20<sup>th</sup> July, 2015 it recommended reduction of employees with a view of rationalizing the workforce and viability. The claimants actively participated in the study and process and are aware of its contents.

The claimants were issued with letters renewing their employment contracts for one year as the respondent commenced recruitment through a competitive process. On 23<sup>rd</sup> October, 2015 the respondent advertised for various positions in the management level and those who qualified applied and interviews conducted. Between 8<sup>th</sup> to 10<sup>th</sup> December, 2015 the persons who qualified filled these positions. This was done before the claimants filed this suit.

By letter dated 23<sup>rd</sup> October, 2015 the Minister directed the respondent's employees with pending leave days to proceed on leave. All employees were notified. The respondent resolved to send all management staff on leave and thus the need to handover while on leave and while the recruitment process was ongoing. The claimants did not apply for any position as advertised. The 1<sup>st</sup> claimant was not in any acting capacity.

The 4<sup>th</sup> claimant vide a letter dated 24<sup>th</sup> June, 2013 was appointed the acting company secretary until the substantive position was filled. The 5<sup>th</sup> claimant was also appointed in acting capacity until the substantive position was filled.

The claim that employment was terminated unlawfully on 17<sup>th</sup> March, 2016 is not correct save for the 4<sup>th</sup> claimant whose contract terminated in April; 2016. The 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> claimants are no longer employees of the respondent but continue to occupy respondent's houses without authority. The 4<sup>th</sup> claimant wrote seeking extension of lease to December, 2016 and on 7<sup>th</sup> October, 2016 but the request was declined and the claimants have refused to vacate such houses. By letter dated 19<sup>th</sup> January, 2017 the Respondent wrote demand to vacate the premises and in reply the claimants asserted that they would only do so upon payment of their terminal dues. The claimants have since been fully paid but have refused to vacate the premises.

Mr. Ademba also testified that he was employed by the respondent on 1<sup>st</sup> August, 2020 and did not work with the claimants and his evidence is based on the records. The rationalization programme involved unionised employees and the turnaround plan was meant for the entire workforce. The KSG report does not refer to unionisable employees only. The final dues paid to Stella Muhoro included the payment for;

- a. Salary due;
- b. Severance pay at 3 months for each year worked;
- c. Gratuity pay; and
- d. 3 months' notice pay.
  - a. Golden handshake;
  - b. Severance pay;
  - c. Gratuity pay;
  - d. Notice pay.

For both employees, their contracts had expired on 26<sup>th</sup> July, 2015 and 14<sup>th</sup> November, 2009 respectively. That the claimants' contract expired and were not paid like Stella and Walter as the respondent had a voluntary retirement programme applicable to employees who applied under it and the respondent paid on this basis. There was no discrimination against the claimants as alleged. The early retirement offer was voluntary but they did not apply. The claimants are due for gratuity pay and all their terminal dues have since been paid. The 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> claimants were in acting positions and acting allowance is payable at 15% of the basic pay.

The claim by the 3<sup>rd</sup> claimant that he was underpaid is without evidence. Under the HR policy movement through the ranks is based on written appointment and not based on what the previous holder for the position was paid. He was not in the same grade as Obanda to claim under his contract and each position had a grade with an entry level and further there was a fixed term contract with set remuneration for plant engineers.

The redundancy dues claimed do not apply. The retirement was voluntary and there was no application by any claimant.

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

The Claimants submitted that the gist of their claims is that they were discriminated against by the respondent. Counsel on the threshold in discrimination claims cites the case of **Collins Osoro Likhale v AAA Growers Limited [2014] eKLR**, where the court held that;

*On the question as to whether there was discrimination against the claimant, where a person is treated differently from others similarly situated like him, this amounts to discrimination. If this treatment in differentiation is on a specified ground, then whether there is discrimination will depend upon whether, objectively, the ground is based on reasons which have the potential to impair the fundamental rights of a person or to affect them adversely in a comparably serious severance pay for each completed year of work, and appreciation pay for each completed year of work, and appreciation pay (golden handshake)*

The 1<sup>st</sup> claimant held several acting positions but he was not paid acting allowance as mandated by the HR manual. That the averment by the Respondent's witness that he could not verify whether the 1<sup>st</sup> claimant acted in those positions must fail as Section 74 of the Employment Act is clear that the employer shall keep the employment records. Further that acting allowance is provided for under clause 5.2 of the Human Resource Manual.

The 3<sup>rd</sup> claimant claims were not contested and the respondent did not have any documentation to demonstrate that he was paid his acting allowances and as such the amounts sought are therefore due and payable.

That the rest of the claims detailed therein have also not been disputed and are therefore payable as claimed.

The Respondent submitted that the 1<sup>st</sup> - 5<sup>th</sup> Claimants herein were employed by the Respondent at managerial levels under a fixed term employment contract of service and that their contracts of employment provided for the terms and conditions in which both parties were bound to. Further that the contracts for all the Claimants expired and none of them applied for renewal. That the Claimants have no cause of action against the Respondent and have failed to establish a *prima facie* case with any probability of success.

That a contract can only be renewed by mutual consensus. To buttress this argument counsel cites the case of **Margaret A Ocheing v National Water Conservation & Pipeline Corporation (2014) eKLR**, where the court held that:

*If the Court upholds the position that if the contract was automatically renewable, it would lead to absurdities. Fixed term contracts would become contracts renewable ad infinitum. It would defeat the meaning and purpose of fixed term contract. It would stifle the managerial prerogative of the Respondent to evaluate the Claimant at the end of the contract and impose new obligations on the Claimant for continued service.*

Counsel further cited clause 3.2.3.4 of the Kenya Meat Commission Human Resource Policy, Regulations and procedures Manual which provides as follows:

*The employee shall communicate to the employer in writing the intention to renew or not to renew the contract at least three months before and not more than six (6) months to the expiry of the Contract. Upon Receipt of the Application of the employee for renewal of contract, the employer will communicate its decision on the Application within a period not less than 60 days to expiry of the contract.*

On the issue of legitimate expectation, Counsel relied on the holding in **John Nduba v Africa Medical and Research Foundation (AMREF Health Africa) [2020] eKLR** where the court cited with approval the case of **Teresa Carlo Omondi Vs Transparency International Kenya (2017) eKLR** where the court expressed itself as follows;

*It must be shown that the employer, through regular practice, or through an express promise, leads the employee to legitimately expect there would be renewal. The expectation becomes legally protected, and ought not to 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 of reasonableness and fair dealing between employers and employees.*

The Respondent further relied on the case of **Pius Kimaiyo Langat versus Co- operative Bank of Kenya Ltd [2017] eKLR**, where the court held that:

*We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved.*

On the allegation of discrimination, the respondent submitted that no evidence was adduced to prove discrimination as required by Section 107, 108 and 109 of the Evidence Act, Chapter 80 of the Laws of Kenya. That the Claimants have failed to prove they were discriminated against. Redundancy did not apply. The roles of the Claimants were not abolished. The Claimants failed to apply for renewal of their contracts out of their indolence and thus cannot fault the Respondent for hiring new persons to occupy the offices they held.

### **Determination**

On the pleadings, evidence and written submissions the issues which emerge for determination can be summarized as follows;

Whether there was discrimination against the claimants by the respondent;

Whether the non-renewal of the employment contracts for periods shorter than 3 years was unfair labour practice, unlawful and invalid;

Whether acting positions held by the claimants for periods of over 6 months should be remunerated with back pay;

Whether an order of reinstatement should issue and/or the claimants are entitled to the other remedies sought.

Each claimant has attached a contract of employment or letter confirming the period of employment. The details are that;

The 1<sup>st</sup> claimant's contract was renewed and expired on 5<sup>th</sup> February 2016; 2<sup>nd</sup> Claimant contract was renewed and expired on 31<sup>st</sup> December 2015; 3<sup>rd</sup> Claimant contract was renewed and expired on 31<sup>st</sup> December 2015; 4<sup>th</sup> Claimants contract was renewed and expired on 31<sup>st</sup> April 2016; and

The 5<sup>th</sup> claimant's contract was renewed and expired on 31<sup>st</sup> December 2015.

The 1<sup>st</sup> claimant's claims shall be analysed and where applicable be applied on all the claimants to avoid duplication.

The 1<sup>st</sup> claimant was appointed Chief Internal Auditor vide letter dated 4<sup>th</sup> November, 2009 and clause 3 provided that the term was for 3 year's *renewable contract*. The employment was confirmed by a letter dated 24<sup>th</sup> August, 2010.

By a letter dated 30<sup>th</sup> January, 2012 the 1<sup>st</sup> claimant was redeployed as chief manager sales and marketing. By a letter dated 20<sup>th</sup> July, 2012 the 1<sup>st</sup> claimant was redeployed as chief finance officer and by a letter dated 1<sup>st</sup> August, 2012, noting his work performance, the salary due was increased.

The 1<sup>st</sup> claimant contracts of employment were subsequently renewed;

On 2<sup>nd</sup> September, 2013 the contract expiring on 27<sup>th</sup> December, 2012 was renewed for one year ending 27<sup>th</sup> December, 2013;

On 4<sup>th</sup> October, 2014 contract ending 27<sup>th</sup> December, 2013 was renewed to 30<sup>th</sup> February, 2015 with instructions that *as we await for the recommendations of the Kenya School of government study on restructuring of the Kenya Meat Commission*; and

On 4<sup>th</sup> November, 2015 the contract ending 20<sup>th</sup> February, 2015 was renewed for the period of 21<sup>st</sup> February, 2015 to 5<sup>th</sup> February, 2016, a period of one year.

Each appointment and renewal of appointment was for a given term. Upon lapse of term, there was renewal in writing.

At this point the KSG had completed the ongoing study on the restructuring of the respondent. Various positions including the position held by the claimant was advertised vide a public notice dated 23<sup>rd</sup> October, 2015. All the claimants including the 1<sup>st</sup> claimant did not apply for any of these vacancies.

The claimant was sent on leave ending 16<sup>th</sup> March, 2016 and his contract term ended on 5<sup>th</sup> February, 2016.

The 1<sup>st</sup> claimant is seeking the following;

- a. Taxi refund Ksh.3,000;
- b. Mileage claim Ksh.5,000;
- c. Gratuity pay for the period of 5<sup>th</sup> February, 2016 to 16<sup>th</sup> March, 2016 Ksh.85,448;
- d. Underpayment of gratuity Ksh.1,054,000;
- e. Acting allowance as HR manager 12<sup>th</sup> July, 2011 to 1<sup>st</sup> December, 2011 Ksh.120,000;
- f. Acting allowance as GM commercial division 3<sup>rd</sup> June 2012 to 16<sup>th</sup> March, 2016 Ksh.1,020,000;
- g. Retrenchment package ksh.3,804,000;
- h. Unpaid salary per court order of December, 2015 Ksh.493, 333.

As set out above, the 1<sup>st</sup> claimant was under fixed term contract for the entire period of his employment with the respondent. Fixed term contract is a lawful and legitimate mode of employment pursuant to section 10 (3) (c) of the Employment Act, 2007;

*where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end;*

A fixed term contract hence has a start and end date and lapses on its provisions. The end date is given. Notice to terminate is not required as such provision is agreed upon by the parties.

In the letter dated 30<sup>th</sup> November 2015 the Respondent gave notice on the non-renewal of the contracts held by the Claimants and subsisting at the time. Such notices were to take effect upon the lapse of the contracts of employment as follows;

1<sup>st</sup> claimant on 5<sup>th</sup> February 2016;

2<sup>nd</sup> claimant on 31<sup>st</sup> December 2015;

3<sup>rd</sup> claimant on 31<sup>st</sup> December 2015;

4<sup>th</sup> claimant on 31<sup>st</sup> April 2016; and

5<sup>th</sup> claimant on 31<sup>st</sup> December 2015.

The 1<sup>st</sup> claimant though on leave was notified of the end date of his employment.

In **Apex Steel Limited v Dominic Mutuamuendo [2020] eKLR** the court held that the general principle is that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry. And in the case of **Amatsi Water Services Company Limited v Francis Shire Chachi [2018] eKLR** the Court of Appeal held that;

*.....a fixed term contract will terminate on the sun set date unless it is extended in terms stated in the contract. A court cannot rewrite the terms of a contract freely entered into between the parties. Once there is a written contract, the court will seek to give meaning to such contract giving ordinary meaning to its terms in determining any issue that may arise. ..., 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.*

Once the event agreed to between an employer and its employee takes place or materializes, there would ordinarily be no dismissal. The law is that the expiry of the fixed term contract of employment does not constitute termination of the contract by any of the parties. There is an automatic termination of the contract by operation of law and not a dismissal or unfair termination of employment as alleged by the claimants.

The 1<sup>st</sup> claimant's fixed term employment contract naturally terminated on the expiry date on 5<sup>th</sup> February, 2016.

The taxi and mileage claims made are subject to approval by the employer before payment. In this case the 1<sup>st</sup> claimant had no prior approval by his supervisor with regard to the expense for taxi and mileage claims. He cannot rely on the applicable government rates for other departments outside of approval and authorisation by the employer, the Respondent.

Gratuity claim for the period of 5<sup>th</sup> February, to 16<sup>th</sup> March, 2016 is a period outside employment. Such is not due.

The claims for underpayments of gratuity when the claimant asserts he was supposed to be confirmed as general manager commercial, the claimant testified that he was appointed acting HR manager from 12<sup>th</sup> July, 2011 to 31<sup>st</sup> December, 2011 and was acting General manager, commercial division from 3<sup>rd</sup> June, 2013.

As noted above, for every appointment, the 1<sup>st</sup> claimant was issued with written instruction, letter or contract(s) each contract period ended and was renewed. Each contract formed a separate and distinct relationship in law. The remuneration for such appointment was set. The claimant was not confirmed as *GM Commercial* to claim there was underpayment. His employment was contractual and terms agreed upon.

Claims relating to acting allowances as HR manager from the year 2011 ought to have been addressed under the provisions of section 90 of the Employment Act, 2007.

Under the various employment contracts, at the end of each contract, the relationship terminated. Upon renewal of each contract, a new employment relationship formed.

The claim herein was filed on 17<sup>th</sup> December, 2015. Claims going back to 2011 are time barred.

Claims relating to acting allowance, general manager, commercial division and due from 3<sup>rd</sup> June, 2013 to 20<sup>th</sup> February, 2015; as set out above, the claimant was redeployed and issued with letters to confirm the same.

On 12<sup>th</sup> July, 2012 the 1<sup>st</sup> claimant was appointed acting chief finance officer from 13<sup>th</sup> July, 2011. The end date to this appointment is not stated.

On the claim for allowance for acting position from 3<sup>rd</sup> June, 2013 to 20<sup>th</sup> February, 2015 as general manager commercial division, the records filed relates to redeployment of the 1<sup>st</sup> claimant. Redeployment is unlike an acting position. An employee is removed from his

substantive position and allocated new duties. In this regard, the claimant was redeployed on the same terms and conditions as held at the time. To claim for acting allowances in such circumstances is to seek an unjust enrichment.

On the claim for a retrenchment package, the claimant's position was not declared redundant during the subsistence of his employment. He was allowed to serve the full term of his fixed term contract ending 5<sup>th</sup> February, 2016. Where there was an offer for early retirement so as to earn a package, he did not apply or seek to be considered under the same. To claim a retrenchment package under his fixed term employment is without foundation.

On the claim for unpaid part salary for February to March, 2016 the interim orders issued on 17<sup>th</sup> March, 2016 in my view did not confer, extend or in any manner confer employment beyond the fixed contract term ending 5<sup>th</sup> February, 2016. To claim outside the fixed term contract would be contrary to fair labour practices.

The 2<sup>nd</sup> Claimant was issued with fixed a term contract for the period of 12 months covering 1<sup>st</sup> September, 2006 to 31<sup>st</sup> August, 2007 as the IT technician. His contract was renewed from 1<sup>st</sup> September, 2007 to 31<sup>st</sup> August, 2008.. The contract was renewed for the period of 1st September, 2010 to 31<sup>st</sup> August, 2013 (a period of 3 years) and on 2<sup>nd</sup> October, 2013 the contract was renewed for year. On 27<sup>th</sup> July, 2012 he was issued with a letter of appointment as an ICT and Communication officer. Contract was renewed for the period of 1<sup>st</sup> September, 2013 to 31<sup>st</sup> august, 2014 and then from 11<sup>th</sup> April, to 4<sup>th</sup> February, 2015.

Employment termination notice issued and taking effect on 31<sup>st</sup> December, 2015.

By notice dated 24<sup>th</sup> May, 2016 the respondent invited all employees to apply for early retirement. Such was after the 2<sup>nd</sup> claimant term contract had lapsed.

The totality of the employment relationship was regulated

The claimant is seeking the following due;

- a. underpayments in lieu of accrued leave days for 9 years and 4 months ksh.54,920;
- b. gratuity for 2014 to 2015 Ksh.89,165.79;
- c. salary deduction from final dues Ksh.328,200;
- d. medical expenses not paid Ksh.28,090;
- e. Retrenchment package Ksh.3, 207,800.

On the claim for underpayments on accrued leave days, for the period of 9 years and 4 months, on the different employment contracts, the claim filed in December, 2015 what is due shall apply 3 years back to 16<sup>th</sup> December, 2012 only. These dues shall be tabulated at the shop floor and paid.

Gratuity pay is admitted by the respondent at paragraph 57 of the defence. There shall be clearance and payment of gratuity due and going back to 16<sup>th</sup> December, 2012.

Salary deduction from final dues with regard to January and February, 2016 and March half pay is a period outside employment. Employment ended on 31<sup>st</sup> December, 2015. No notice is due as the contract automatically ended on its own terms.

The medical expenses claimed are not approved by the employer.

On the retrenchment package claimed, the claimant's position was not declared redundant. Employment ended upon the lapse of the fixed term contract. The claimant did not apply for early retirement so as to be considered for any package.

The 3<sup>rd</sup> claimant was employed on 1<sup>st</sup> September, 2006 as an engineer trainee on a 12 months contract; the contract was renewed for a year from 1<sup>st</sup> September, 2007 to 31<sup>st</sup> August, 2008; he was confirmed as a mechanical engineer by letter dated 11<sup>th</sup> March, 2008 and his contract renewed for a year from 1<sup>st</sup> September, 2008 to 31<sup>st</sup> August, 2009. The contract was renewed for a year ending 31<sup>st</sup> August, 2010 and by letter dated 30<sup>th</sup> August, 2010 the contract was renewed for 3 years ending 31<sup>st</sup> August, 2013 as plant engineer. By letter dated 2<sup>nd</sup> October, 2013 the contract was renewed for a year covering 1<sup>st</sup> September, 2013 to 31<sup>st</sup> August, 2014. The contract was renewed for a year from 1<sup>st</sup> September, 2014 to 26<sup>th</sup> August, 2015. The last contract was for the period of from 27<sup>th</sup> August, 2014 to 31<sup>st</sup> December, 2015.

The 3<sup>rd</sup> claimant seeks the following dues;

- a. Underpayment of salary from 1<sup>st</sup> August, 2012 to 31<sup>st</sup> December, 2015 total 41 months Ksh.2,870,000;
- b. Underpayments of gratuity 41 months Ksh.508,400;

- c. Salary from 1<sup>st</sup> January, to 17<sup>th</sup> March, 2016 Ksh.662,500;
- d. Gratuity Kh.131,440;
- e. Salary for the balance of contract ending 18<sup>th</sup> March, 2016 Ksh.1,385,000;
- f. Leave, underpayments thereof Ksh.111,827;
- g. Staff rationalization package due Ksh.

The underpayments are made on the basis that the claimant's predecessor, one Hudson Obanda, was at job grade 2 but he was placed at job grade 3. The defence that each employee had an entry level grade and Hudson Obanda had moved over the ranks is found reasonable and plausible. The claimant had a specific contract spelling out his terms and conditions. He has not produced Obanda's contract and period of service for a contradiction. Even where this was done, the specificity of the claimant's fixed term contract is lawful and binding and he cannot rely on another employee's work particulars in disregard of his contract of service. Such would create chaos at the shop floor.

The underpayment on gratuity is set on the alleged underpayment of salary. Such is not due. Save the owed gratuity over the employment period shall be paid upon assessment at the shop floor as admitted by the respondent.

The claim for salary from January to 17<sup>th</sup> March, 2016 is on the basis of the interim court order. Such order did not extend employment contract which lapsed on 31<sup>st</sup> December, 2015. No payment of salary is due after such date.

Salary for the balance of contract is made on the grounds that the claimant's contract ought to have been for 3 years and not one year. As set out above with regard to the 1<sup>st</sup> claimant, a fixed term contract starts and ends on the terms automatically. It is lawful and legitimate and cannot be applied to seek any payment outside its term.

The leave and underpayment thereof are claimed based on the expectation that employment was extended beyond the contract term and after 31<sup>st</sup> December, 2015. This is not the case. Save the leave due and pending prior to 31<sup>st</sup> December, 2015 for 2.5 days shall be tabulated at the shop floor and paid.

The retrenchment package is claimed on the grounds that the 3<sup>rd</sup> claimant was declared redundant. The claimant did not apply for the early retirement and his position was not declared redundant so as to claim under the package. Such is not due.

The 4<sup>th</sup> claimant was employed in July, 2007 on a contract for 3 years. On 1<sup>st</sup> November, 2010 the contract was renewed for a period of 3 years ending 31<sup>st</sup> October, 2013.

By letter dated 2<sup>nd</sup> September, 2013 the 4<sup>th</sup> claimant's contract of employment was renewed for the period of 1<sup>st</sup> November, 2013 to 31<sup>st</sup> October, 2014 a period of one year.

By letter dated 4<sup>th</sup> October, 2014 the contract for the 4<sup>th</sup> claimant was renewed for the period of 1<sup>st</sup> November, 2014 to 31<sup>st</sup> April, 2015 a period of 6 months.

By a letter dated 4<sup>th</sup> November, 2015 the respondent wrote to the 4<sup>th</sup> claimant that;

*RENEWAL OF EMPLOYMENT CONTRACT*

*Reference is made to letter dated 4<sup>th</sup> October, 2014 on renewal of your employment contract from 1<sup>st</sup> November to 31<sup>st</sup> April, 2015.*

*I am pleased to inform you that the Board has decided to renew the above referenced contract with effect from **1<sup>st</sup> May [year not stated] to 4<sup>th</sup> February 2016.** ... [Emphasis added].*

The letter is hazy. The period of 1<sup>st</sup> May is not stated in which year it was to commence. If the intention was to apply the year 2015, this is not stated and is left ambiguous.

By letter dated 30<sup>th</sup> November, 2015 the respondent wrote to the 4<sup>th</sup> claimant that;

*RE: RENEWAL OF EMPLOYMENT*

*Refer to letter ... dated 4<sup>th</sup> November 2015.*

*This is to convey the decision of the Board to give notice of not renewing your employment contract which ends on 31<sup>st</sup> April, 2016. ...*

By letter dated 17<sup>th</sup> November, 2015 the 4<sup>th</sup> claimant had written to the respondent and noted that;

*RE: RENEWAL OF EMPLOYMENT CONTRACT*

*I acknowledge receipt of your letter dated 4<sup>th</sup> November 2015 on the above subject.*

...

*However, the Commission's letter of 4<sup>th</sup> November 2015 on my employment contract renewal is rather confusing because it does not advise as to whether my contract was renewed to April 2015 before a further renewal from May 2015 to 4<sup>th</sup> February, 2016. The letter has not categorically advised me whether renewal was done between November, 2014 and April 2015.*

*Further, it would appear that the initial period of three (3) years has been reviewed without my consent. ...*

Letter dated 4<sup>th</sup> November, 2015 is ambiguous. What is clear is that the 4<sup>th</sup> claimant contracts term reduced from 3 years to one year and eventually to 6 months.

There is a grey period from 1<sup>st</sup> May 2015 to 30<sup>th</sup> November, 2015 when the claimant was issued with letter dated 30<sup>th</sup> November, 2015 advising him that his contract would not be renewed after 4<sup>th</sup> February, 2016.

The contract allegedly due and ending 31<sup>st</sup> April, 2016 is not attached. The renewal of contract ending on such date is not part of the court record and noting the letter dated 4<sup>th</sup> October, 2014 the respondent written communication to the 4<sup>th</sup> claimant was clear to the extent that his contract had been renewed for a 6 month term ending 30<sup>th</sup> April, 2015.

Paragraphs 13, 15 and 16 of the 4<sup>th</sup> claimant's witness statement and his oral evidence in court where he testified that on 28<sup>th</sup> September, 2015 he was directed to proceed on his pending annual leave days and also directed to hand over his duties. While on annual leave, on 23<sup>rd</sup> October, 2015, his position was advertised. And while on leave the claimant was issued with a shorter term contract vide letter dated 4<sup>th</sup> November, 2015, referenced above.

The 4<sup>th</sup> claimant ended up having two different letters from the employer with conflicting information. The letter dated 4<sup>th</sup> November, 2015 extended a contract for an ambiguous period and ending on 4<sup>th</sup> February, 2016 and letter dated 30<sup>th</sup> November, 2015 issued notice purporting to end employment on 31<sup>st</sup> April, 2016 on a date that does not exist in law or in fact.

What is apparent to the court is that the 4<sup>th</sup> claimant remained in the employment of the respondent without his employment status being on a fixed term contract from 1<sup>st</sup> May, 2015 to April, 2016. The claimant had no written terms and conditions. There is no written contract regulating his employment as analysed above.

There is however notice issued terminating employment on a non-existent date of 31<sup>st</sup> April, 2016. Such shall apply to the benefit of the 4<sup>th</sup> claimant.

The 4<sup>th</sup> claimant is seeking the following;

- a. Acting allowance as company secretary from June, 2013 to April, 2016;
- b. Acting allowance as HR manager August, 2013 to February, 2015
- c. Gratuity;
- d. Underpayment of salary June, 2013 to April, 2016
- e. Underpayment of gratuity June, 2013 to April, 2016;
- f. Leave allowance for 4 years Ksh.120,000;
- g. Retrenchment package.

Employment was terminated in April, 2016. The instant suit was filed in December, 2015. The 4<sup>th</sup> claimant was on an acting capacity for the position of Company secretary of July, 2011 to December, 2011 and May, 2013 to April, 2016. For the initial period of July to December, 2011, is time barred.

An acting allowance is due to the 4<sup>th</sup> claimant for acting as company secretary for the period of May, 2013 to April, 2016. Gratuity pay is admitted by the respondent as due and is payable upon the tabulation of the acting allowance.

For the period of February to June, 2012 the claimant was acting HR and Administration manager and then on August, 2013 to February, 2015.

The claim for acting allowance for the period of February to June, 2012 is time barred.

The acting allowances in the position of HR and administration manager for the period of August, 2013 and February, 2015 is due and shall be tabulated and paid and on the due pay the gratuity payable shall be addressed.

The leave allowance payment is not defined as to which period this covered.

On the claim for a retrenchment package and a severance pay, golden handshake, mileage claims and transport, the claimant testified that while on leave he noted that his position was advertised. He did not apply. He had addressed his ambiguous contract extension in his letter of 17<sup>th</sup> November, 2015. His position was therefore not rendered redundant to claim a severance pay or a golden handshake.

However the notice not to renew employment being ambiguous, as addressed above, a proper notice ending employment in terms of section 35 and 36 of the Employment Act, 2007 ought to have issued to the 4<sup>th</sup> claimant. Without any defined contract, the 4<sup>th</sup> claimant became protected under the law.

Notice pay is due at one (1) month's basic salary all at Ksh.340, 000.

The claims for mileage and transport allowances are not lawfully due and are not approved by the employer as due.

The 5<sup>th</sup> claimant was employed as the livestock field officer on 31<sup>st</sup> March, 2011 on a 3 year contract and by letter dated 4<sup>th</sup> October, 2014 the contract was renewed for the period of 11<sup>th</sup> April, 2014 to 4<sup>th</sup> February, 2015.

Vide a letter dated 4<sup>th</sup> October, 2015 the 5<sup>th</sup> claimant was informed that her contract had been renewed from 5<sup>th</sup> February, 2015 to 31<sup>st</sup> December, 2015.

By letter and notice dated 30<sup>th</sup> November, 2015 the respondent informed the 5<sup>th</sup> claimant that her employment contract ending 31<sup>st</sup> December, 2015 would not be renewed.

Notice was published on 23<sup>rd</sup> October, 2015 for the position but she did not apply.

The 5<sup>th</sup> claimant is seeking the following dues;

- a. Payment of difference in payment for acting position February, 2014 to February, 2016;
- b. Salary difference upon confirmation of employment;
- c. Gratuity pay underpaid while in acting position;
- d. Underpayment of leave allowance;
- e. Leave allowance in 2015;
- f. Unnerved period up to April, 2017;
- g. Leave allowance for 2016;
- h. Severance pay; and
- i. Notice pay.

On the claim for payment variance for the acting period, the 5<sup>th</sup> claimant was issued with a letter dated 27<sup>th</sup> February, 2014 for acting in the position of Livestock manager effective 27<sup>th</sup> January, 2014. The claim is the acting allowance is due for payment from February, 2014 to February, 2016.

By letter dated 27<sup>th</sup> October, 2015 the 5<sup>th</sup> claimant was advised to resume her substantive position.

The acting allowance as livestock manager is only payable for the period of 27<sup>th</sup> January, 2014 to 27<sup>th</sup> October, 2015 if this has not been paid.

The 5<sup>th</sup> claimant had specific term contracts. The terms and conditions were spelt out. The claim for the difference in payment while she earned an acting allowance is without good foundation.

Similarly, the claims for difference in gratuity payments and leave allowances while serving under an acting position are not due.

Leave allowances for the year 2015 is due, where not paid.

The claim for pay unto the year 2017 on the grounds that the 5<sup>th</sup> claimant expected her contracts to be extended for 3 years on the face of the findings above is not due. Leave allowance for 2016 on the face of term contract and notice dated 30<sup>th</sup> November, 2015 that the contract term would not be renewed is not payable.

On the claim for severance pay, such payment is not due. The claimant's case did not relate to a redundancy. Her term contract lapsed and notice not to renew issued a month in advance. There was no obligation on the part of the respondent to renew the contract.

On the findings above, on the case that the claimants were discriminated against in termination of employment when other employees were awarded a retrenchment package and such a package was not paid to them as was the case of Ms. Muhoro and Mr. Nyaribo who enjoyed such package. The claimants' case was also that out of the 130 employees who contracts as were on renewable employment at 30<sup>th</sup> April, 2015 only 7 employees, including the claimants, had their contracts terminated. That as of 30<sup>th</sup> November, 2016, out of the 38 employees with renewable contracts had been retrenched following the KSG report and recommendations and over 38 employees of the respondent whose contract had long lapsed are still under ongoing employment. This is discriminatory and the claimants were not treated in equal terms.

Discrimination against a person is defined by the Supreme Court in the case of **Law Society of Kenya v The Hon. Attorney General & COTU Petition No.4 of 2019** as the unjust or prejudicial treatment of different categories of people in the same circumstances. The court goes on to define discrimination as;

*.....a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available members of society*

The court further refers to the Court of Appeal in defining discrimination in the case of *Barclays Bank of Kenya LTD & Another v Gladys Muthoni & 20 Others* [2018] eKLR that;

*.....discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions... whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description...*

*Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age; sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.*

The ingredients of discrimination against a person as against the other to exist there must be a differentiation that is not justified and such unjustified differentiation must impose a disadvantage, unfair treatment or denial of equal terms which is unreasonable.

The claimants were under fixed term contract. Each contract was distinct and separate. The allegations that out of 130 employees on renewable contracts as at 30<sup>th</sup> April, 2015 only 7, including the claimants, had their contracts not renewed on the face of the term contracts ending on their terms as analysed above, such cannot be discriminatory. The terms under which the 130 term contracts save for the 7 not renewed is not addressed. To show unreasonable differential treatment, the 130 fixed term contract must be addressed.

With regard to the 38 employees with renewable contracts as at 30<sup>th</sup> November, 2016 and whose contracts were affected by the alleged retrenchments, as of 30<sup>th</sup> November, 2016 none of the claimants were in the employment of the respondent. The circumstances prevailing at the shop floor as of such date cannot apply so as to claim there was discriminatory treatment.

The allegation that currently there are 85 employees whose employment contracts expired years ago and such employees are still in the employment of the respondent speaks for itself. There is freedom of contracting between parties in an employment relationship. The respondent as an employer has a right to recruit its employees. Upon advertisement of positions on 23<sup>rd</sup> October, 2015 no claimant submitted an application. The respondent was at liberty to employ according to its needs and availability of employment within the enterprise. Such cannot be held to be discriminatory against the claimants. On whether the right to fair labour practices was violated, the claimants had fixed term contracts. Under the HR policy the respondent was allowed to issue fixed term contracts for *up to 3 years*. Such left room for issuance of monthly fixed term contract and up to 3 years period. In any event, section 10(3) (c) of the Employment Act, 2007 as addressed above, allow for issuance of fixed term contract giving a start and end date. This is lawful and cannot be defined as an unfair labour practice to issue a term contract for a less period than 3 years.

Whereas being unionisable is a term not properly applied here, the context is understood to be that the claimants were in management level and were not unionized. They had not joined a trade union even though under Article 41 of the Constitution, 2010 everyone has the right to unionise. The staff rationalization programme undertaken by KSG and its report recommendation was to the respondent to restructure its operations towards productivity. Where the claimants were offered an early retirement package, such was voluntary. Despite being in management level, a staff rationalization programme is an aspect of an organizational operationalization prerogative. The claimants did not offer or apply to enjoy under such programme whether as unionised or unionisable employees. Such cannot apply to claim there was discriminatory treatment. With regard to alleged non-renewal of term contracts for 3 years being on the grounds that the claimants had made complaints with regard to the internal operations and conduct of the managing commissioners, such are matters which to have been reported to the appropriate government agency for investigations. The allegations that the salary payable to the newly recruited Managing Commissioner which was above the government's approved salary structure for parastatals; that there were questions regarding the procurement of consultancy services for modernization when this had not been provided for in the annual procurement plan and the budget;

Refusal to pay recurrent expenditure from capital grants and escalation of the matter to the Permanent Secretary in the State Department of Livestock; questions regarding the misuse by the Respondent's Managing Commissioner of the Respondent's vehicles; questions regarding the lodging of false per diem claims by the Respondent's Managing Commissioner; refusal to make payment for bodyguards attached the Respondent's Chairman and Managing Commissioner as this was not a benefit they were entitled to; refusal to raise a Local Purchase Order (L.P.O) in favour of a company the Respondent's Chairman was using to trade with the Respondent; and that the 4<sup>th</sup> Claimant reported that his signature had been forged by the Chairman of the Respondent's Board at the Athi River Police Station under OB No 11/19/6/2015. These are matters which ought to have been addressed with the parent ministry of Agriculture, the Kenya Anti-Corruption Commission and the police for investigations. The court is not the right forum to address these particular allegations.

On this basis, there are no constitutional violations to justify the claim for payment of damages. On the claim for payments for the period the claimants held acting positions, each individual claims are addressed and redressed above.

The remedy of reinstatement is not available to the claimants. The basis is that the order of reinstatement can only issue on a finding that there is unlawful and unfair termination of employment and even where such conditions apply, the court must be satisfied that there exist exceptional circumstances under which the order for specific performance is the appropriate remedy. In this case, the claimants served under fixed term contracts. Save the 4<sup>th</sup> claimant whose last phase of employment was different, which is addressed separately, each claimant contract ended on its term and there was notice not to renew the contract. Section 35 and 36 of the Employment Act, 2007 allow either party to an employment contract to issue notice terminating employment and in this case, parties bound under fixed term contracts, each ended on its terms.

**Accordingly, the claims made are found without merit save the following orders hereby issue;**

**1. Gratuity due for each claimant shall be tabulated and paid at the shop floor;**

**2. Individual claimants dues;**

**a. 2<sup>nd</sup> claimant is entitled to the following dues;**

**i. Leave days due for the period of 16<sup>th</sup> December, 2012 until employment terminated, if this has not been paid.**

**b. 4<sup>th</sup> claimant is entitled to the following dues;**

**i. acting allowance for acting as company secretary for the period of May, 2013 to April, 2016 and shall be tabulated at the shop floor;**

**ii. acting allowance in the position of HR and administration manager for the period of August, 2013 and February, 2015 and shall be tabulated at the shop floor; and**

**iii. Notice pay equivalent one (1) months gross salary KSH.340, 000.**

**c. 5<sup>th</sup> claimant is entitled to the following dues;**

**i. An acting allowance as livestock manager for the period of 27<sup>th</sup> January, 2014 to 27<sup>th</sup> October, 2015 if this has not been paid.**

**3. Each party shall bear own costs.**

**DELIVERED IN COURT AT NAIROBI THIS 10<sup>TH</sup> DAY OF JUNE, 2021.**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Okodoi

.....and .....

1. Unionisable employee is defined in section 2 of the Labour Relations Act to mean **the employees eligible for membership of that trade union.**