



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1405 OF 2018**

**TOM UKIRU KAMALIKI.....CLAIMANT**

**VERSUS**

**CENTRES FOR INTERNATIONAL PROGRAMS KENYA.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued his erstwhile employer seeking various reliefs as captured in his Amended Memorandum of Claim filed on 11<sup>th</sup> February 2019. The Claimant alleges that his contract of employment was unlawfully and unfairly terminated by the Respondent. The brief facts of the case are that on 18<sup>th</sup> April 2011, the Claimant was employed by the Respondent on a contractual basis initially as the Human Resource and Administration Manager, earning a monthly salary of Kshs. 280,000/- and reporting to the Finance and Administration Director. That the claimant avers that whereas he entered into the respondent's employment on 18<sup>th</sup> April 2011, and the Respondent being a Kenya Country program under the Global ICAP at Columbia University, New York, there was by custom and practice established a continuity of the Claimant's employment which gave the claimant a legal and legitimate expectation for the continuity of his employment albeit on contracts renewable on set principles and known provisions.

2. The Claimant averred that this position is buttressed by the following facts: (a) That the Claimant was employed first as HR & Administration Manager and due to his exemplary performance, he was later promoted to the position of HR Director on 1<sup>st</sup> October 2015. (b) That the claimant's letter of original engagement and the follow-up contracts had an express provision that the employment contract was to be renewed and/or extended subject to satisfactory performance and continued funding. The Claimant avers that this contractual provisions made it mandatory for the Respondent as a diligent employer to give justification to him before termination of contract or before giving notice of non-renewal to justify that either the Claimant had not satisfactorily performed in his duties or that there was no funding to cover the Claimant's position and duties. The Claimant avers that indeed during the period before termination of his contract, the Respondent vide a Senior Management Team (SMT) meeting held on 1<sup>st</sup> August 2018 had expressed the fact that funding in the third year beginning 1<sup>st</sup> October 2018 had reduced and therefore the management had identified some four staff for termination and redundancy from the following departments and units; Administration, Procurement, Human Resources and Finance but the Claimant was not among them. The Claimant avers that in the SMT meeting mentioned above, the management gave him the responsibilities of providing support in Community Mobilization for the KENPHIA project and also issuance of notices of termination to the four affected staff by mid of August 2018. The Claimant avers that as was the custom before the said employees were declared redundant, they had to be taken through a de-briefing and counselling process and a joint assessment of their redundancy package. The Claimant avers that in the period December 2015 to February 2016, he had been part of a team that had applied and successfully lobbied for funding for the Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH) programme and had been able to get a contract signed with the US Centre for Disease Prevention & Control (CDC) for the said project which was a five-year project with funding to the tune of USD 10,500,000 per year for 5 years which amounts to USD 52,500,000. This translates to Kshs 5,250,000,000/-. The Claimant further avers that the Respondent used his Bio-data as a supporting document to source for the above funds as a key staff responsible for implementing the Five year JOOTRH project which was a requirement by CDC. The Claimant averred that the other fellow Directors and Heads of Department that the Respondent also engaged on the same assignment were: (a) Matthew Kimani – Former Director-Finance who left and was replaced by Damaris Ng'ang'a, who by then was Finance Manager (b) Doris Odera - Director-Strategies & Partnerships (c) Duncan Chege - By then Director M&E but currently Director-KENPHIA (d) Dr. Peter Mwangi – Former Director of Programs (e) Dr Wekesa Barasa - Former Regional Director – Nyanza replaced by Dr Chris Ouma. The Claimant avers that the funding for the said project incorporated the Human Resource Management segment and specifically his remuneration had been included as part of the administrative component of the said project budget as a key staff.

3. The Claimant further avers that the Respondent sent CDC the JOOTRH organization structure bearing the names of the key staff responsible for overseeing the program implementation and other operational staffs who will be working under the key staff to support the JOOTRH Program implementation. This was a requirement by CDC and that the Claimant's name and his position of HR Director are on this organization structure. Towards that end, and due to the Claimant's good performance, the Claimant's salary had on 17<sup>th</sup> July 2018 been raised by the Respondent from Kshs. 515,188/- to Kshs. 540,947/- with the assurance from the Respondent's Country Director that they would continue working together with the Claimant in the same spirit of service. He averred that the Respondent's superior, the Kenya Country Director had at no time notified the Claimant of any chance of termination of his contract until 6<sup>th</sup> August 2018 when the Claimant

went to brief him on some Human Resource challenges in the KENPHIA Project that the Respondent's Country Director as an afterthought and in a shock statement broached the issue of the non-renewal of the Claimant's contract due to reduced funding. This was exactly six (6) days after the Claimant had received the earnings of the raised salary due to his good performance. The Claimant could therefore not comprehend what had happened in six days, hence the decision was not logical at all. The Claimant averred that whereas the Respondent's Country Director even assured the Claimant to take up one of the two Community Mobilization positions under KENPHIA the Country Director then instructed that the same be advertised on 22<sup>nd</sup> August 2018. To make the matter worse, interviews were conducted on 20<sup>th</sup> September 2018 when the Claimant was admitted at the Nairobi Hospital. The Claimant avers that he officially sent his written request to be considered if at all the redundancy was not targeting him as an individual. He even stated clearly that he was willing to get a pay cut, but the Claimant never got any response despite meeting the job's requirements. The Claimant averred that on 7<sup>th</sup> August 2018, he mitigated against the intended termination but the Respondent chose to keep quiet. The Claimant averred that the Respondent equally chose again as a separate cause to declare the Claimant redundant with no basis and background and without due process in a most discriminatory manner since other than Duncan Chege who was removed from JOOTRH by virtue of being appointed to head the KENPHIA Project, the other three Directors i.e Doris Naitore Odera – Director Strategies & Partnerships, Damaris Ng'ang'a – Director Finance and Dr. Chris Ouma – Regional Director – Nyanza, none of these Directors, who are Key Staffs in the JOOTRH Program, suffered such fate and the Claimant avers that his declaration of redundancy was based on other ulterior reasons and not funding or unsatisfactory performance since all the Directors had been covered in the JOOTRH Program running up to 2021. The Claimant averred that there was no reason and/or justification for the Claimant's declaration of redundancy as against the others and that no principle governing redundancies were applied in his case. The Claimant also avers that he was not the highest paid Director and that he was actually the second last paid Director. There are some Directors with differential salary of more than Kshs. 200,000/- above his and that there are even some non-Director staff in a job group below the Claimant's top level 12, who are earning more than himself e.g. Technical Advisor – Differentiated Service Delivery, Technical Advisor-KENPHIA, Technical Advisor – Project Optimize, Program Officer – Project Optimize. The Claimant does not therefore understand how reduced funding was affecting his contract. The Claimant averred that the law requires that if an employee does not fully understand the redundancy process, the employer is required to explain to him in a way that he can fully understand. The Claimant avers this did not happen in his case. The Claimant in addition avers that he has never been involved in any in-disciplinary issue during his 7.5 years' service with the Respondent. He avers he has therefore not been given any warning letter and that he has also never misguided the Respondent on any labour issue which could have landed the Respondent in litigation. As a result, no substantive justification for the termination and/or redundancy can be found all around. The Claimant further avers that the letter the Respondent purports to have written to the Ministry of Labour on 31<sup>st</sup> August 2018 is a mere fabrication to prove that there were other staffs caught up in the redundancy. The Claimant avers that other than staff number 2, 3 and 4 who were discussed in the SMT of 1<sup>st</sup> August 2018, the rest of the Staffs from number 5 to 21 are KENPHIA staffs who got renewal letters up to their respective contract end dates with a specific clause that their contracts will not be renewed because KENPHIA National Survey will be coming to an end. The Claimant averred that there is also inconsistency between the letter of 31<sup>st</sup> August 2018 to the Ministry of Labour and the one written to the Claimant on 7<sup>th</sup> September 2018 whereas the one to the Ministry of Labour bears the Claimant's send-off package as Kshs. 3,249,652/-, the one to Claimant written on 7<sup>th</sup> September 2018 bears a send-off package as Kshs. 3,885,908/-. The Claimant averred that the Respondent's Country Director by law was also supposed to have simultaneously written letters of notification to both the Labour Office and the Claimant and this did not happen. The Claimant avers that the continuity of his contracts was so safe guarded that at one point on 11<sup>th</sup> August 2016, the Respondent issued notices of termination to almost 198 staff pending the outcome of RFA's 1619 (Nyanza) and 1701 (Eastern) that the Respondent had been implementing but the same had been re-advertised by CDC for competitive bidding. The Claimant averred that the Respondent's Country Director via an email communication in the month of August 2016 made official announcement of winning the five year JOOTRH Program which was coming in to effect from 1<sup>st</sup> October 2016 and that the same announcement was made by the Respondent's Head Office in New York. The Claimant averred that the Respondent terminated most staff as a result of losing Nyanza (RFA 1619) and Eastern (RFA 1701) but the Claimant's contract was renewed; first on 3 months' extension from 1<sup>st</sup> October to 31<sup>st</sup> December 2016 to close out the Nyanza (RFA 1619) and Eastern (RFA 1701) that the Respondent had lost. Thereafter, the Respondent continued to renew the Claimant's contracts beginning 1<sup>st</sup> January 2017. This was a clear sign of the Claimant's employment continuation on the 5 year JOOTRH program. The Claimant further avers that, other than the Five Year JOOTRH Program, his budget was also charged to all other projects by virtue of his position cutting across all departments, programs and projects, the notable one being the multi-million US Dollar PHIA project, commonly known in Kenya as KENPHIA. In this KENPHIA Project which is an HIV Survey in all 47 counties, the Respondent partnered with the Ministry of Health, Kenya National Bureau of Statistics and National Council for Population & Development for implementation but the Respondent is responsible for paying all salaries and allowances.

4. The Claimant averred he was responsible for coordinating the recruitment and selection of staff for this project where he brought on board 430 field based staff. The Claimant coordinated their 4 months residential training in Nakuru at Waterbuck & Eagle Palace Hotels. He further developed the e-staff data base, final contracting and deployment to all 47 counties from 25<sup>th</sup> May to 2<sup>nd</sup> June 2018, development of all HR operational templates, just to mention but a few. The Time Line for this project according to the Respondent's official website is 30<sup>th</sup> September 2019. It is therefore not logical and justifiable that three months in to the project which is slated to end on 30<sup>th</sup> September 2019 (with probable extension) that the Claimant's contract is terminated and his position declared redundant while other Key Staff on the same KENPHIA project are retained up to 30<sup>th</sup> September 2019. To make it simpler, the Claimant's contract was terminated when the survey of the KENPHIA project had just started. The Claimant further avers that he could not have been eligible for redundancy during the life of JOOTRH Program since he had been incorporated into the project budget as a key staff to anchor the project and the winning of the project bid was anchored on his competence, skills and experience by virtue of the Respondent using his Claimant) Bio-Data as part of the BID Documents. The Claimant further avers that, during the bidding process, the country Director had specifically asked him to amend his salary information for purposes of the donor budgeting effectively and precisely to give buffer for any future salary increments in the life of the project, which the Respondent practically demonstrated by raising the Claimant's salary vide a letter dated 17<sup>th</sup> July 2018. Further the claimant avers that part of the bid documents included the JOOTRH organogram which incorporated the claimant's person and position and the claimant avers that CDC to his knowledge have not sought for the cutting out of the Claimant and his position from the project as to necessitate his redundancy. Further to the Claimant's knowledge his position remains existent in the organization to-date and that it is illegal and in bad faith for the Respondent to use his Bio-data as Key Staff to obtain a five-year funding and two years down the line, the Respondent terminates his contract and finally declares his position redundant. The Claimant avers that key staff salaries are ring-fenced after their competencies are accepted by the Donor for the life of the project funding and as such the allegation as to reduced funding affecting other projects and programmes which the claimant equally serviced as HR- Director including the Nairobi office staff operations, reduced funding could not be a cause for the declaration of redundancy. In addition to JOOTRH & KENPHIA, the other projects that supported the Claimant's contract are Project-OPTIMIZE, Project ECHO, Project HOPE, Quality Improvement (QI), CQUIN (Test & Start). The Claimant

avers that all these projects came on board, while he was in the employ of the Respondent and that he is the one who recruited all the staff on these respective projects. In fact, the time line for a project like CQUJIN in 2020. Further the Claimant avers that weighty decisions like one in which an employee is declared redundant are decisions taken by the SMT comprising of Directors who are Heads of Department after analyzing the status and the requirements of the organization but not a unilateral decision made by one person. For example, before the 4 staff members being the Procurement Manager, the Administrator Nyanza, the Administrative Assistant – Front Office in Human Resources and the Grants Accountant Nyanza were identified for redundancy, the Senior Management Team had to meet on 1<sup>st</sup> August 2018 and deliberated on all circumstances of the matter. The Claimant avers that the Country Director alone did not hold the power to unilaterally declare any of these employees redundant, in as much as these were junior positions compared to the HR Director position. Further, the Claimant states that in order to give weight to the programme of community mobilization as decided in the SMT of 1<sup>st</sup> August 2018, and the fact that the Country Director had officially promised him a letter for a position in Community Mobilization, and that the Country Director subsequently approved the Claimant's 3 weeks Community Mobilization assignment starting 9<sup>th</sup> August 2018, the Claimant had already been incorporated into and working with the community mobilization team. The Claimant thus sought the slew of reliefs against the Respondent as contained in paragraph 2 of the amended memorandum of claim to include one month's salary in lieu of notice – Kshs. 540,947/-, severance pay – Kshs. 2,017,065/-, prorated salary for the 13<sup>th</sup> month up to 30<sup>th</sup> September 2018, unpaid leave days – Kshs. 436,622/-, compensation for the unlawful termination – Kshs. 6,491,364/-, exemplary damages – Kshs. 6,491,364/-, interest on the sums as well as costs of the suit.

5. In response to the claim, the Respondent filed an Amended Replying Memorandum on 18<sup>th</sup> June 2019, the list and bundle of documents filed on 21<sup>st</sup> November 2018 and a witness statement sworn by Dr. Mark Hawken the Respondent's Country Director filed on 21<sup>st</sup> November 2018. The Respondent avers, and this is not in doubt, that the Claimant was employed under a fixed term contract which automatically expired by effluxion of time on 30<sup>th</sup> September 2018. Consequently, the claims made to the effect that his contract was unfairly terminated and or that his position was declared redundant as set out in the Amended claim have no basis and should be dismissed.

6. The Claimant and the Respondent's witness Dr. Mark Hawken testified. The parties thereafter filed submissions which the Court need not reproduce in their entirety save to capture some salient facets thereof. The Claimant submitted that the principle of legitimate expectation for renewal of contract and the attendant rights was applicable in his case. He cited the case of **Teresa Carlo Omondi v Transparency International- Kenya [2017] eKLR** in which the Rika J. observed and set the following preconditions;

- (a) Where there is a promise to renew
- (b) Where the actions of the employer lead the employee to believe the contract would be renewed.
- (c) Where the decision not to renew is based on improper motive
- (d) Where there are countervailing militating against non-renewal.

The Claimant submitted that the above principles clearly illustrate that for the principle to find life, the contract of employment must in itself make a promise for renewal over and above the employers conduct and custom. He submitted that Rika J. stated:-

*"The burden of proof, in legitimate expectation claims, is always on the Employee. It must be shown that the Employer, through regular practice, or through an express promise, leads 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 Employee must demonstrate some rational and objective reason, for her expectation. The representation underlying the expectation must be clear and unambiguous. The expectation must be induced by the decision maker. The decision maker must have the authority to renew. Repeated renewals, extended service beyond the period provided for in the fixed term contract, and promise of renewal, are some of the elements that would amount to objective reasons underlying expectation of renewal. The presence of these elements however, is not to be taken as conclusive proof of legitimate expectation."*

The Claimant submitted that he had worked for the Respondent cumulatively for a period of 7.5 years and that in itself is a recognition by the Respondent that the contracts were only administrative documents but by expectation and intention even the Respondent expected its employment with the Claimant to be and was continuous.

7. The Court has considered the submissions of parties, the pleadings and authorities cited and the Court isolates that the issue that is focal is that it has to determine whether the termination on 30<sup>th</sup> September 2018 was unlawful. Put another way, this Court has to consider where there was a valid legitimate and lawful expectation for the renewal and extension of contract, whether there was unlawful and unfair termination of contract and/or non-renewal of contract or whether there was unlawful and unfair declaration of redundancy. The Claimant asserts that he was dismissed unfairly while the Respondent had conducted itself to suggest a renewal of his contract and his continued engagement in the JOOTRH project that the Respondent ran on behalf of its US affiliates and donors. The Respondent's testimony given by Dr. Mark Hawken during the hearing suggests that the Claimant's contract came to an end and therefore there was no legitimate expectation for a renewal. It is accepted as fact that funding for the Respondent's projects from the Donor fluctuated from year to year depending on budget allocations for a particular financial year and the projects being undertaken. It is noted that as a result, the Respondent hires its staff on fixed term contracts which are renewed depending on the availability of funding. The effect of this is that where there has been significant reduction in funding, the Respondent would from time to time restructure its functions and reduce its workforce by non-renewal of the fixed term contracts to be within the funding available in that particular financial year. The Claimant himself had renewals over the years and handled different projects.

8. In instances where the donor subsequently increases the funding, the Respondent may from time to time employ more staff depending on the particular needs of that financial year. In the relevant period for this case, it is apparent that owing to the reduction in funding,

the Respondent reorganized its functions including reduction of staff in various departments. The Respondent asserted that it consequently earmarked various roles cutting across various departments whose employee's fixed term contracts that were scheduled to expire in the year 2018/2019, including the Claimant's contract, would not be renewed. From the evidence before me, it is apparent that on 1<sup>st</sup> August 2018 during a senior management meeting (SMT meeting) in which the Claimant was present, the Respondent's Country Director who testified for the Respondent, informed the SMT of the reduced funding and that one of the effects was the decision to reduce staff in various departments specifically in the 3 departments of Administration, Procurement & Human Resource and the Finance Department. The Claimant was serving as the HR Director in the Finance Department. The evidence adduced before the Court revealed that the Respondent's Country Director held a subsequent meeting with the Claimant on 22<sup>nd</sup> August 2018 during which meeting the Claimant was notified that his contract would not be renewed after 30<sup>th</sup> September 2018 due to the reduced funding in both KENPHIA and JOORTH projects. This of course caused the Claimant some distress and he indicated in his testimony as well as pleadings that he was utterly shocked by this development. The Respondent issued the Claimant with a notice of non-renewal of his contract on 29<sup>th</sup> August 2018. The Court has carefully perused the said notice and finds that the notice clearly indicated that the Claimant's contract would not be renewed after 30<sup>th</sup> September 2018 as a result of the reduced funding. In furtherance of the decision not to renew, the Respondent issued the Claimant with a letter dated 7<sup>th</sup> September 2018 setting out the terminal dues that would be payable to the Claimant upon lapse of his contract on 30<sup>th</sup> September 2018. By a subsequent letter dated 24<sup>th</sup> September 2018, the Respondent sought to clarify the contents of the letter of 7<sup>th</sup> September 2018 by correcting the amount of severance pay payable against the amount of gratuity already paid to the Claimant up to 30<sup>th</sup> September 2018. It is not disputed that following expiry on his contract on 30<sup>th</sup> September 2018 the Claimant left the Respondent's employment. He was from the record before me paid terminal dues as set out in the clarification letter of 24<sup>th</sup> September 2018.

9. The Claimant exhibited his contract which indicated that he would be on a fixed term contract. As held in the case of **Amatsi Water Services Company Limited v Francis Shire Chachi [2018] eKLR** the Court of Appeal as follows:-

*In the case of National Water Conservation & Pipeline Corporation vs Jayne Kanini Mwanza, Civil Appeal No. 178 of 2014 (UR), this Court stated as follows:*

*"The general principle, as we understand it, is 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. The principle has been considered by several Judges of the Industrial Court (now the Employment and Labour Relations Court) and they are generally in agreement. Indeed this Court was in agreement in the Oshwal Academy (Nairobi) case (supra) when it decided as follows:-*

*"Termination of fixed term contracts has received judicial consideration by the Industrial Court. In Bernard Wanjohi Muriuki vs Kirinyaga Water And Sanitation Company Limited & Another [2012] eKLR, Rika, J, held as follows:-*

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

*The Court also stated thus:*

*"A general principle that a fixed term contract will continue if not terminated would be a contradiction to the very definition of a fixed term. There is a definite start date and an end date. The contract would logically end automatically without more otherwise it would no longer be a fixed term contract. See the case of SA Rugby (Pty) Ltd vs CCMA & Others (2006) 27 ILJ 1041 (LC) at 1044 par 6).(emphasis mine)*

10. This Court is persuaded by the reasoning of Rika J. whose decision in the case of **Bernard Wanjohi Muriuki v Kirinyaga Water And Sanitation Company Limited & Another [2012] eKLR** was cited with approval by the Court of Appeal in the case cited by the Respondent. The Courts have repeatedly held that fixed term contracts end by effluxion of time and that there is no scope for a court to rewrite the parties contract. As such I find and hold that the Claimant's contract expired on 30<sup>th</sup> September 2018 and despite the suggestions that there was funding for his role without a renewal there is nothing for him to recover from the Respondent for the non-renewal of his fixed term contract. The suit is dismissed however each party will bear their own costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2021.**

**NZIOKI WA MAKAU**

**JUDGE**