



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. E038 OF 2021

IN THE MATTER OF: ARTICLES 2, 3, 10, 41, 47, 50, 159, 162 (2),

165 (5) (B), 232 AND 236 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND

FUNDAMENTAL FREEDOMS UNDER ARTICLES 10, 27, 41, 47, 48, 50 (1),

73, 75, 513, 232 AND 236 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: THE ENFORCEMENT OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: SECTION 41 OF THE EMPLOYMENT ACT 2007

AND

IN THE MATTER OF: SECTION 45 (3) OF THE PUBLIC SERVICE COMMISSION ACT, 2017

AND

IN THE MATTER OF: SECTIONS 4, 10, 11, 22, 23, & 24 OF

THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND

FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

DR. GEORGE MWONGELA MUIA.....1ST PETITIONER

SIMON KIPLANGAT.....2ND PETITIONER

JOANNE WAMUYU.....3RD PETITIONER

ENG. GEORGE KINYANJUI.....4TH PETITIONER

BEATRICE KOSGEL.....5TH PETITIONER

VERSUS

JUDGMENT

Introduction

1. The Petitioners instituted the suit vide a Petition dated 16.3.2021 seeking the following reliefs:

- a) **A declaration that the Respondent's actions in declining to renew the Petitioner's contract of 5 years as General Manager of the Respondent and variation of the contractual terms of employment of the Petitioners amounts to constructive dismissal for no reasonable cause or at all is unfair, unlawful and constitutes breach of the Petitioners' constitutional rights to fair labour practice and fair administrative action.**
- b) **An order compelling the Respondent to renew the Petitioners' terms of contract for a further term of 5 years as provided for under section 2.5.3 of the Respondent's Policy and section 45 (3) of the Public Service Commission Act No. 10 of 2017 and other enabling provisions of law: or**
- c) **Alternatively and without prejudice to prayer (b) above, an order that the Petitioners' contract of service was constructively renewed for 5 years with effect from 1.2.2021.**
- d) **The Honourable Court be pleased to issue a permanent stay order in respect of Clauses 7, 8, 18, 19, 20, 23 and 32 or any part of the Clauses thereof of the Petitioners' contract of employment dated 1.2.2021.**
- e) **The Honourable Court be pleased to issue a permanent injunction restraining the Respondent either by itself, employees, servants and/or agents from removing the Petitioners' names from the pay roll or refusing, failing and or neglecting to pay the Petitioners' salaries or any part thereof.**
- f) **The Court issues a permanent injunction restraining the Respondent either by itself, employees, servants and/or agents from debaring the Petitioners ingress and egress from their offices situated at Kawi House, South C Bellevue Red Cross Road Off Mombasa Road and intimidating harassing and intimidating or interfering with the performance of the Petitioners as employees of the Respondent.**
- g) **The Court issues a permanent injunction restraining the Respondent either by itself, employees, servants and/or agents from taking any steps to terminate the contracts of employment of the Petitioners or having so taken to be restrained from acting thereupon or otherwise in any other manner.**
- h) **General damages for the constitutional violations of the Petitioners fundamental rights.**
- i) **The Honourable Court do issue any other orders and give such directions as it may deem fit to meet the ends of justice.**
- j) **Costs of the Petition**
- k) **Interest on the above at court rates**

2. The Petition is supported by the affidavit of Beatrice Kosgei sworn on even date, on her own behalf and that of the other 4 Petitioners.

3. The Respondent opposed the Petition through a Replying Affidavit sworn by Eng. Jared Othieno the Respondent's Managing Director (MD) and Chief Executive Officer (CEO) on 18.4.2021. In reply, the Petitioners filed a Further Affidavit sworn by Beatrice Kosgei on 3.5.2021.

4. The Petitioners proceeded by way of written submissions.

Petitioners' case

5. The Petitioners were vide letters dated 1.1.2017 and 23.12.2016 appointed to the positions of General Managers Grade GD1 on 4 year renewable contracts. The contract was subject to the respondent's regulations as amended from time to time. Section 3.1.6.4 of the Human Resource Manual 2016 provided for renewal of contract with an open ended tenure. However, in 2018 the Respondent published the Human Resource Policy & Procedures Manual 2018 (the HR Manual) which varied the tenure from 4 to 5 years and their grade from GD1 to GD2.

6. They further contended that the HR Policy 2018 and the section 45 (3) (e) of the Public Service Commission Act requires that an employee must request for a contract renewal 6 months prior to the expiry of the contract and the renewal or lack thereof must be communicated 3 months prior to the expiry of the contract. Therefore, in July 2020 they wrote letters to the Respondents' CEO requesting renewal of their contracts of employment and the CEO informed them that their requests would be considered by the Respondent's Board of Directors. However, no response to their requests for renewal of contracts was received from the Board until 4.12.2020 which was 2 month to the end of their contracts, when the Chairman informed them that their suitability would be established after they had gone through an appraisal process for the 4 year employment period. They were promised an opportunity to present their evidence on their performance but the failure to consent to the process would result to the immediate advertisement of their positions.

7. All the petitioners were then presented with the self-assessment tool and a letter backdated 4.11.2020 from the CEO requiring them to give consent to their participation in the “End of Contract Appraisal Process” and they confirmed acceptance on or about 14.12.2020. They submitted their End of Year Assessment tool with cover letters informing the CEO that they would continue to gather evidence for the 4 years and submit it; and that on 18.12.2020, the Petitioners were informed that their appraisal interviews would take place on 11.12.2020 and 12.2.2020.
8. They contended that before the commencement of the appraisal by the *ad hoc* committee, they sought clarification on whether the process was an interview or appraisal and they were informed that it was an appraisal. However, in their view the Committee asked them questions that were mundane and did not relate to the appraisal.
9. They averred that on 25.1.2020, they received letters of renewal of their contract by the Board dated 22.1.2020 stating that the Board had resolved to grant them 1 year contracts with a proviso that they would be redeployed to any role or station within the Respondents; that they would be put on a Performance Improvement Program (PIP); and that they were to consent to the requirements by 28.1.2021. They responded through letters dated 28.1.2021, seeking clarification on the new contracts but the Respondent informed them on 5.3.2021 that should they execute the contracts by 8:00am on 8.3.2021 or else they would be assumed to have declined the offer.
10. They responded again stating that the issues raised in their letters had remained unresolved but instead of addressing the said issues the respondent issued them with renewal of contract letters dated 1.2.2021 on similar terms. Therefore they protested but thereafter proceeded to withdraw the protest and signed the contracts of employment as drawn.
11. However, they contended that the letters dated 1.2.2021, did not provide for job portfolios and job description, and it gave the Respondent the power to transfer them from Nairobi to any station and deploy them to any other role within the organization.
12. They contended that the Respondent’s policy has a methodology to be followed for the renewal of contracts and that the policy provides that the renewal was to be based on good performance. They averred that they had maintained a score of between 80-91% and the Respondent good score is above 75%.
13. It was their case that the Respondent had failed to renew their contracts for 5 years but renewed the contract of Mr. Conel Ofwona also a General Manager whose performance in terms of Divisional/Departmental score was 80.41% which was below their performance. It was their case that the renewal of Conel’s contract was an infringement of Article 27 of the Constitution.
14. They averred that the Respondent had made a commitment to them that it would renew their contracts in accordance with Clause 6 of their employment contract, sections 2.5.3 and 2.5.4 of the HR Policy and section 45 (3) of the Public Service Commission Act. Therefore, it was their legitimate expectation that they would continue to serve the Respondent as employees in the positions of General Managers for 5 years until the end of their new contracts.
15. They contended that the renewal of their contracts is tantamount to abuse of office, is actuated by malice and is contrary to the provisions of Articles 10, 41, 50 (1) and 236 of the Constitution.

Respondent’s case

16. The Respondent averred that on 8.8.2018, it was given a concurrence by the Ministry of Energy to implement the reviewed human Resources Policies and Procedures Manual 2018 which had been approved by the State Corporations Advisory Committee (SCAC) on 4.6.2018. That one of the changes in the Policy was the review of tenure of General Managers from 4 to 5 years.
17. It averred that in 2018, the Board was desirous of transferring 3 general managers to project areas but the transfers were not effected because their contracts specified that their duty station was at the headquarters in Nairobi. That the Board on 10.12.2019 resolved that all future employment contracts would be open ended and some General Managers offices would be located in Nakuru.
18. It confirmed that 6 months prior to the expiry of their contracts, the General Managers requested for reappointment. It averred that its Board deliberated on the re-appointed and resolved to appoint a Human Resource Consultant to assist the Ad hoc Committee, formed by the Board, and the Board in the contract renewal process. Consequently, an invitation to participate in the performance appraisal interview on 11-12.1.2021 was sent to all General Managers and the assessment interviews were held as communicated and the Ad hoc Committee made its recommendations.
19. It averred that the Ad hoc Committee resolved that Cornel Ofwona be offered a fresh an employment contract as General Manager for a period of 5 years and that the other 6 General Manager would be offered fresh contracts for the for a period of 1 year on condition that they sign a PIP. They contended that the Committee also resolved that all contracts be generic and include a clause that provides for deployment to any job, role or station within the Respondent.
20. It contended that this was the first renewal undertaken under the 2018 HR Policy and the Board had approved a renewal procedure and process for the head of directorates on 6.11.2020 to guide the process in line with the requirements of Clause 2.13.3 of the HR Policy. It further contended that the allegation that the Board had no role in evaluating the Petitioners is unfounded and unmeritorious.
21. It averred that based on the scores from the evaluation, Mr. Ofwona qualified for express contract renewal for 5 years while the remaining 6 General Managers including the Petitioners scored below 60 thus falling into a pre-defined bracket of one year contract.
22. It contended that the basis for the renewal was not the annual appraisal but the end of contract appraisal that was conducted by the Board; that the PIP is recognized under Clause 9.15 of the HR Policy; that the Board identified deficiencies in the actual performance of the General

Managers after taking each through a fair and comprehensive evaluation exercise; and that the plan is not discrimination but an indication of good will by the Respondent to grant the Petitioners a chance to improve the deficiencies.

23. It averred that pursuant to Clause 2.5.3 of the HR Policy, the board retains the discretion based on exigencies and prevailing facts to determine the suitable tenure for each staff taking into account the best interest of the corporation and laws.

24. As regards the failure to pay salaries, the respondent contended that it had no basis to pay the Petitioners without contracts of employment. With respect to transfers, it contended that the HR Policy provides that an employee can be deployed to any work station.

25. Finally, it averred that the Petitioners are underserving of the orders sought including the prayer seeking to extend the contract period to 5 years since that amounts to rewriting the contracts entered into by the parties. Consequently, it urged the court to dismiss the Petition.

Petitioner's Rejoinder

26. The Petitioners averred that the Respondent has introduced the term 'fixed term' which is not provided for in the General Managers' contract. They further averred that the 2019/2020 performance was low due to exogenous factors such as the stopping of further drilling of wells in Menengai Geothermal Project and reduction in annual budget.

27. They contended that the reason the transfers were not progressed was not only due to section 7 of the General Managers contract but also section 10 (5) of the Employment Act; that there is no provision in the public sector for recruitment of a Human Resource Consultant for staff performance appraisal or renewal of contract under the Public Service Commission; the appointment of a Human Resource Consultant is an abuse of office as the PSC/SCAC can provide the service at no cost.

28. They denied that interviews were carried out and stated that it was a discussion where the Board was to appreciate the General Managers' performance for the period of their contract. They averred that if it was an interview for recruitment, section 2.15 to 2.23 of the HR Policy 2018 provides for an elaborate guideline.

29. They contended that the use of the PIP was misplaced and malicious as no deficiency in the individual Manager's performance had been identified and communicated to them and that all of them were appraised by the Managing Director and Chief Executive Officer and scored above 80%. They contended that it is unreasonable to commence a new contract on a PIP.

30. They averred that they were locked out of all company activities and their roles assigned to other staff in acting capacity. They contended that this demonstrates that there was a malicious intent to unfairly dismiss the petitioners from employment.

31. They averred that the Board abandoned the company policy that dictates that renewal is based on performance only. They averred that the instrument for assessing performance is provided for in Section A and B of the approved 'Staff Performance Appraisal Form' and negating their annual appraisals of the Petitioners amounted to discrimination.

32. They averred that they are not requesting for an automatic renewal of their contracts but the renewal provided for in their contracts based on their performance.

Petitioner's submissions

33. The Petitioners submitted that the document used by the Board's Ad hoc Committee is strange since its policy has not been amended and the only policy in existence is that which was approved by the SCAC in June, 2018.

34. They argued that the Respondent is bound by its own regulations, the HR Manual of 2018. In support of this position, it relied on **Gregory Otieno Owuoth v Mumias Sugar Co. Limited [2016] eKLR** where the Court held that the Respondent could not put an employee on indefinite suspension against the provisions of its own regulations.

35. They argued that if the Respondent was not going to renew the Petitioner's contract they would have informed them within 3 months as stipulated under section 45 (3) of the Public Service Commission Act which required that they proceed on terminal leave.

36. It was their submission that the Respondent did not follow due process and contravened the provisions of Articles 10, 27, 28, 41, 47, 50 (1) and 236 (a) of the Constitution, sections 5 and 41 of the Employment Act and section 2.5.3 of the Respondent's HR Policy and Procedure Manual.

37. They argued that their contracts were not fixed term as there was an expectation of renewal. They submitted that in **Margaret A Achieng v National Water Conservation Corporation** the court held that the purpose of a fixed term contract is not to renew it automatically but that it can only be renewed in exceptional circumstances.

38. They argued that the Respondent has not denied that it unilaterally varied the contracts by converting the term from contracts of 5 years to one year. They further argued that the Respondent did not suggest that the variations involved consultations with the Petitioners which goes against fair labour practice. They reiterated that they had legitimate expectation that their contract would be renewed for 5 years based on section 2.5.3 of the Respondent's policy, 2018 and Clause 6 of their previous employment contract.

39. They relied on **Keroche Industries Limited v Kenya Revenue Authority & 5 Others [2007] eKLR**, **John Nduba v Africa Medical and Research Foundation (AMREF Health Africa) [2020] eKLR** and **Teresa Carlo Omondi v Transparency International Kenya**

[2017] eKLR where the courts discussed the principles of legitimate expectation and the factors to be considered in determining whether an employee had a legitimate expectation that their contract would be renewed.

40. They argued that the Respondent made an express promise to the Petitioner under Clause 6 that of their previous contracts of employment that their contracts would be renewed subject to their satisfactory performance. It was their submission that the failure to renew their contracts was a breach of their fundamental expectation.

41. They further argued that their contracts are terminable on 31.1.2022 and this shall lead to their constructive dismissal. They relied on the Court of Appeal decision in **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR** where the Court laid out the rules governing a claim for constructive dismissal.

42. They further argued that an administrative action cannot be procedurally fair where a decision is arrived at based on an opinion formed after considering one side of the story. They submitted that in the instant case, the Respondent did not give written reasons instead it proceeded to give them contracts of service dated 1.2.2021.

43. They submitted that the purported action by the Respondent is a flagrant violation of their fundamental rights and freedoms enshrined in Articles 10, 22, 28, 41, 47, 50, 73 and 232 of the Constitution and that Articles 23 (3) of the Constitution and section 12 (3) of the Employment and Labour Relations Court Act provides for appropriate remedies for enforcement of fundamental rights.

44. They argued that the Respondent's action was vitiated with a lot of irregularities and based on fictitious authority thus their rights were violated. Therefore, they submitted that they deserve to be paid damages as it happened in **Petition No. 116 of 2013 Mundia Njeru Gateria v Embu County Government & 3 others** and **Miriam Wambui Thiriku v Bomas of Kenya [2017] eKLR** where the Courts awarded Kshs. 5,000,000 and Kshs. 500,000 respectively.

45. Finally, they submitted that they are entitled to all the prayers sought in the Petition. They relied on section 12 (3) of the Employment and Labour Relations Court Act and **Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR** to urge the Court to award them costs and interest of the suit.

Respondent's submissions

46. The Respondent argued that the Petitioners failed to bring forth the court's attention that the policy documents stipulate that renewal of contracts is dependent on performance. It submitted that the Petitioners had returned their end of contract performance below 60% which informed their placement under PIP and one year contract.

47. It denied that Clause 6 of the Petitioners' employment contract and clause 2.5.3 of its policy amounted to an express promise. It argued that a fixed term contract cannot be automatically renewed and denied that the Petitioners' contracts carried an expectation of renewal. For emphasis, it relied on the findings in **Johnstone Luvisia v Allpack Industries Limited [2019] eKLR** and **Rajab Barasa & 4 others v Kenya Meat Commission [2016] eKLR**.

48. It denied that it led the Petitioners to believe that their contracts would be renewed on similar terms and maintained that they were well aware that the renewal was subject to satisfactory performance. It reiterated that, the Board having been dissatisfied with the performance, and in accordance with the policy in place, they were offered one year contract in addition to placing them on PIP.

49. It submitted that the Petitioners have failed to demonstrate how the expiry of the contract of employment by effluxion of time was tantamount to constructive dismissal. They further submitted that the Petitioners have neither pleaded nor sought to prove mistake, duress, undue influence or unconscionability in their contracts and therefore urged that the court cannot rewrite the contract between the parties. It also submitted that the Petitioners withdrew their conditional acceptance letters dated 12.3.2021 and unconditionally signed the contracts of employment for one year.

50. It submitted that in conducting the end of contract performance review, it accorded the Petitioners adequate opportunity to make self-assessment and provide evidence of performance over the past 4 years and to attend an oral interview.

51. It relied on **Hamoud Mwinyi Mguza v Mombasa Water Supply & Sanitation & Co. Ltd [2014] eKLR** where the court held that it could not concede to the invitation that the Claimant was discriminated against on the basis of the material placed before it.

52. It submitted that the Petitioners have not proved specifically how they were discriminated against since the decision to award them the one year contract based on their performance review. It relied on the **Violet Wanjiru Kanyiri v Kuku Foods Limited [2020] eKLR** where the Court held that in a claim founded on discrimination an employee must prove differential treatment between the himself and other employees.

53. It submitted that the Petitioners allegation that it infringed their rights under Article 47 of the Constitution is unmerited because the process and procedure it took before arriving at its final decision was above board, expeditious, fair, lawful and reasonable. It relied on **Bernard Wanjohi Muriuki v Kirinyaga Water and Sanitation Company Limited & ano [2012] eKLR** where the Court held that an employer has no obligation to give reasons to an employee why a fixed term contract should not be renewed.

54. It relied on Clause 9.3.3 of the Contract Approval Procedure and Process to submit that it was within the purview of its Board and the Policy to appoint a consultant and a committee to assist in the performance evaluation process.

55. With regards to the reliefs sought, it argued that the Petitioners have not proved with particularity that it acted oppressively or that its

actions caused them distress or humiliation. It relied on **Obongo & ano v Municipal Council of Kisumu [1971] EA** where the court held that in awarding damages, the court is to take into account factors such as malice or arrogance on the part of the defendant having caused the plaintiff injury such as causing humiliation or distress.

56. Finally, it submitted that the Petitioners are undeserving of the orders sought in the Petition and relied on **Cecilia Karuru Ngayu v Barclays Bank of Kenya & ano [2016] eKLR** to oppose the prayer for costs.

Issues for determination

57. The dispute upon which the petition turns on is the failure by the respondent to renew the petitioners' contract of employment for 5 years from which the I have framed the following questions for determination:

- a. Whether the Petitioners had legitimate expectation of the renewal of their contracts for a period of 5 years.**
- b. Whether the Petitioners' contracts of employment were unlawfully varied.**
- c. Whether the petitioners were constructively dismissed.**
- d. Whether the petitioners' fundamental rights and freedoms were violated.**
- e. Whether the Petitioners are entitled to the reliefs sought.**

Whether the Petitioners had legitimate expectation of the renewal of their contracts for a period of 5 years

58. It is now established general principle of law that fixed contracts do not carry expectancy of automatic renewal. There are however exceptions to that general principle which have been discussed by Courts in Kenya and abroad. In **Teresa Carbo Omondi v Transparency International Kenya [2017] e KLR**, the court held that:

“It must be shown that the employer, through regular practice, or through an express promise, leads the employee to legitimately expect there would be a 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 as anticipation, desire or hope. It is a principle based on a right, grounded on the large principles of reasonableness and fair dealings between employers and employees... the claimant had legitimate expectation that her contract would be renewed. It was not a merely a wish, a hope or desire for continuity; it was legitimate expectation, rooted in the contract of employment. There was a promise for renewal, subject to fulfilment of certain condition. These conditions were fulfilled. The claimant performed satisfactorily.”

59. The Petitioner contended that they had a legitimate expectation that they would continue serving the Respondent as General Managers for 5 years until the end of their contracts. They further contended that the Respondent made a commitment vide Clause 6 of their employment contracts that their contracts would be renewed. The said clause provided that:

“Should you wish to be re-appointed in the same position, you will be required to make a written request at least 6 months before the expiry of this contract.”

60. Further, Clause 2.6.1 of the HR Manual provides for renewal of contract in the following terms:

“An employee serving under a contract and wishing to be considered for a further term is required to notify the Managing Director & CEO in writing six (6) months before the expiry of the contract....”

61. In view of the foregoing clauses from the petitioners' contracts of employment and the respondent's HR Manual, I agree with the petitioners' case that the respondent had given an express promise for a renewal of their contracts subject performance and provided that they made a request 6 months before expiry of their contracts.

62. The question that arises is whether the petitioners met the conditions set by the employer for a renewal. The first and the most obvious condition was a request or notification in writing to the Managing Director/CEO 6 months before expiry of the contract of which they did.

63. The other condition which is contested is whether the petitioners met the performance condition. The petitioners contended that they met the performance requirement and submitted that paragraph 18 of the Respondent's Replying Affidavit was confirmation of their stellar performance. The said paragraph sets out the summary of the Petitioners performance for the 4 years showing that the average performance was 87.3, 83.06, 83.39, 79.46 and 84.57 for the 1st -5th petitioners respectively. The said ratings by their supervisor, shows that the Petitioners' performance was "Good".

64. The Respondents averred that the basis of the renewal was not the annual appraisal but the end of contract appraisal that was conducted by the Board. It further contended that while past performance appraisals showed that individual staff scored highly, the overall performance rating of the company remained low.

65. Clause 2.6.2 of the respondent's HR Manual gives a clue of what is expected, thus:

“If such notification is not made, the employee will be deemed to have completed his term on the date specified in the contract and the contract shall not be renewed or extended. However, the Company, upon review of the performance appraisal reports of such an employee, may request him to seek renewal of his term if the performance has been satisfactory.” [Emphasis added]

66. There is no ambiguity in the foregoing clause that the information to consider for purposes of renewal of the petitioners’ contracts subject was their performance appraisal reports. The foregoing view is fortified by Clause 9.5.2 (h) of the HR Policy which provides that one of the objectives of the performance appraisal is to:

“Provide information for decision-making on administrative and human resource issues such as renewal of contracts, promotions, delegation of duties, training, deployment, reward and sanctions.”

67. In view of the said express terms of the contract of employment, I reiterate that the performance of the petitioners as provided in their annual appraisals was the information upon which the Board was to exercise discretion to renew the contracts, and not to engage in a strange process outside the express provisions of the HR Manual. The information from the petitioners’ reports of Appraisals showed that they had good performance and as such use the end of contract appraisal report was a deliberate breach of an express term of the contract of employment.

68. Even if the Board felt the need for engaging experts to assist in the end of contract appraisal, the same was subject to the reports of petitioners’ appraisals by their supervisor as ring-fenced by clause 2.6.2 of the HR Manual.

69. The next question that arises is whether the contract ought to have been renewed for 5 years as opposed to one year. The petitioners contended that they expected and indeed sought for renewal for 5 years as provided under Clause 6 of their contracts and clause 2.6.1 of the HR Policy 2018. However, the Respondent averred that an employer has no obligation to grant similar terms to an employee who wishes to renew his contract.

70. Clause 2.5 of the HR Manual 2018 provides as follows:

“2.5.3. Based on best practice, Officers in Grade GD2 may be appointed on a contract of five (5) years renewable once subject to performance while officers in Grade GD3 may be appointed on a contract of five (5) years subject to performance.

2.5.4. Unless otherwise provided in this manual, all other appointments on contract will normally be for a period of at least 12 months (one year) but not exceeding three (3) years and may be renewed once subject to performance.

2.5.5. Officers serving on contract terms are subject to the retirement age for public servants and shall be eligible for payments of service gratuity based on prevailing Government guidelines.”

71. In accordance with Clause 2.5.3 of the HR Policy above, the contracts for the petitioners were for 5 years renewable once subject to the Petitioners’ performance and retirement age for public servants. The HR Manual was part of the petitioners’ contract of employment and the respondent was bound to renew the contract for 5 years unless there was evidence of poor performance or age limit as per clause 2.5.5. The discretion given to the respondent’s Board was therefore to be exercised reasonably and fairly within the express provisions of the HR Manual, and not capriciously or whimsically.

72. Having found that the respondent had given an express promise of renewal for 5 years under clause 6 of the petitioners’ contracts and clause 2.5.3 of its HR Manual, and that the petitioners met the conditions set by the respondent, there was a legitimate expectation of a renewal of the contracts for 5 years just as it happened for their colleague Conel Ofwona ,and not one year.

Whether the Petitioners’ contracts of employment were unlawfully varied.

73. The Respondent averred that after the assessment interview, the *ad hoc* committee recommended that the Petitioners be offered fresh employment for 1 year on condition that they sign a PIP. It is now very clear that the contract period provided in all the contracts dated 1.2.2021 was contrary to section 2.5.3 of the HR Policy. Initially, the petitioners protested against the variation of the terms of their contracts but afterwards they withdrew the protest and executed the contracts as drawn.

74. The question that arises is whether or not the new contract was freely executed by the petitioners. The burden of proving of that the contract was not voluntarily signed, lies with the petitioners. Having carefully considered the evidence and the circumstances of the case, I find that the petitioners have not demonstrated that there was any vitiating factors at the time when they executed the one year contracts. They did not show that they signed the same under duress, mistake, misrepresentation or fraud. They all had opportunity to consider the benefits contained in the contract and proceeded to sign the same willingly. Consequently, I proceed to hold that the petitioners consented to the variation of the terms of their contracts from five years to one year and as such the variation was lawfully done.

Whether the petitioners were constructively dismissed

75. The Petitioners submitted that the Respondent’s failure to renew their contracts for employment for 5 years and having varied their contractual terms of employment was tantamount to constructive termination. However, the Respondent contended that the initial contracts were fixed term contract which expired and urged the court to find that the Petitioners have not demonstrated how expiry of time would be tantamount to constructive dismissal.

76. I have already made a finding of fact that the petitioners voluntarily executed the one year contracts and thereby waived their right to sue

for constructive termination. Had they rejected the one year contracts, there case would be on all fours with the case of **John Nduba v AMREF supra**, where this court held that renewing the employee's contract for three months instead of the minimum two years provided in the HR Policy Manual was tantamount to constructive termination.

77. Further, I find that the circumstances of this case do not meet the principles on constructive dismissal set out in **Coca Cola Case [supra]** because although the employer's conduct entitled the petitioners to exit and sue for constructive termination, they voluntarily condoned the said conduct by accepting the new contracts. Consequently, I find and hold that the variation of contract term from five years to one year in the circumstances of this case did not amount to constructive termination.

Whether the petitioners' fundamental rights and freedoms were violated.

78. I have already made a finding that the respondent acted contrary to the petitioners' legitimate expectation by renewing their contracts for one year instead of 5 years as provided in the HR Manual. At the same time it renewed the contract for their fellow General Manager, Conel Ofwona for a period of 5 years. Section 5 of the Employment Act provides that:

“(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee-

(b) in respect of recruitment, training, promotion, terms and condition of employment, termination of employment or other matters arising out of the employment.

(4) It is not discrimination to –

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job;”

79. The treatment of the petitioners differently from their colleague was based on irrelevant consideration during the renewal of the contracts and it was therefore unjustified. Had the respondent complied with its HR Manual by relying on the reports of the annual performance appraisals, the petitioners could have been given 5 year contract like their colleague Conel Ofwona. Consequently, I am satisfied that the petitioners have proved that they were discriminated against by the respondent with respect to the terms and conditions of employment despite meeting the conditions required for renewal of their contracts for 5 years.

80. Likewise the petitioners have proved that their right to fair labour practices under Article 41 of the Constitution was violated by the respondent through the manner in which the Board of directors deliberately assessed the suitability of petitioners' for a renewal. As already observed above, the Board was supposed to consider the reports of the petitioners' annual performance appraisals but it ignored all that and came up with a strange performance review tool. Obviously the respondent acted contrary to its own HR Manual with impunity, and I so hold.

81. As regards violation of their rights under Article 47 of the constitution, I agree with the petitioners that an administrative action was taken against them by the respondent which included variation of the terms of employment including job title and station, and condemning them to PIP and one year contract. The said action was not founded on reports of their appraisals and they were not accorded a fair hearing before the action which had detrimental effect on them. Their request for clarification on issues of concern in the one year contracts was ignored. Consequently, I find that their right to fair administrative action was also violated.

Whether the Petitioners are entitled to the reliefs sought

82. In view of the foregoing findings, I make declaration that the petitioners' right to fair labour practices, right to fair administrative action and freedom from discrimination were violated by the respondent. However, having found that the petitioners consented to the new contract of employment with inferior terms, I further find that they are not entitled to any compensation. Further, and for the same reason, the claim for constructive dismissal fails.

83. Again for the same reasons, I decline to grant the alternative prayer that the new contract signed be deemed to be for a 5 year term or that clause 7,8,18,19,20,23, and 32 or any other part of the said contracts be stayed. As observed above, the petitioners voluntarily signed their respective contracts of one year and they are enjoying the benefits from the same. Consequently, the court cannot rewrite the contract for the parties to correct a bad bargain.

84. The prayers for injunction against removal of the petitioners from the payroll, or denial of access to their offices at Kawi House or from terminating their employment contracts are also declined for lack of merits since the petitioners are still in employment and they have not demonstrated that the respondent is contemplating any of the said actions.

85. In the end, save for the declarations made above, the petition is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.

ONESMUS N. MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE