



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 388 OF 2016**

**DR. JOHN NDUBA.....CLAIMANT**

**VERSUS**

**AFRICA MEDICAL AND RESEARCH FOUNDATION**

**(AMREF HEALTH AFRICA).....RESPONDENT**

**JUDGMENT**

1. The Claimant's suit herein is contained in Amended Memorandum of Claim dated 14<sup>th</sup> May 2019 and seeks the following reliefs:
  - a) A declaration that the Respondent's failure to renew the Claimant's employment for a period of 2 years constituted an unfair labour practice and an unfair and unlawful termination of the Claimant's employment through unlawful redundancy;
  - b) Maximum compensation of 12 months' salary inclusive of benefits for unlawful, illegal, malicious and unfair termination of employment.
  - c) Severance pay at the rate of 15 days' pay, based on the Claimant's last basic salary, for each of the Claimant's 32 completed years of service;
  - d) General damages for unfair labour practices;
  - e) Costs of this suit.
2. The salient facts of the suit are that the Claimant was employed by the Respondent on 6<sup>th</sup> May, 1983 as a regular contract staff and worked continuously for a total period of 32 years and 2 months holding various positions within the organization but under separate contracts. His last contract was for a period of two years commencing on 1<sup>st</sup> July, 2013 and ending on 30<sup>th</sup> June, 2015. The contract was renewable subject to his satisfactory performance and the respondent soliciting sufficient funds for her operations. The contract was also terminable prior to its expiry under the terms provided therein including service of 2 months' notice or payment of 2 months' salary in lieu of notice. The contract was also subject to the Respondent's Human Resources Procedures and Policy Manual 2012 which provided that the respondents' regular contract staff members would hold at least 2 years' renewable contracts and if they are employed in a project lasting less than 2 years, their employment is pegged on the project life. The HR Policy Manual further provided for end of contract clause requiring the employer to notify the employee whether or not the contract would be renewed.
3. On or about 11<sup>th</sup> May, 2015, the claimant was verbally advised by Dr. Lennie Kyomuhangi- Igbodipe, his Supervisor and acting Director-General, that his performance appraisal was successful and that his contract would be renewed for a further period of 2 years. The same verbal promise was repeated to the claimant on 19<sup>th</sup> May, 2015 by the respondent's Director of HR and Administration, Ms Nancy Muriuki after receiving his performance appraisal report.
4. However, on 1<sup>st</sup> June, 2015 Dr. Githinji Gitahi reported to work as the respondent's new Chief Executive Officer (CEO) and in the following day he held a meeting with the claimant and Ms Muriuki where he informed the claimant that he had planned to create a new position of Chief Programme Officer (CPO). He further told him that the new position would be occupied by Dr Lennie Kyomuhangi to whom the claimant would henceforth be reporting as opposed to of the Director-General. The claimant raised his concern that there would be overlap of his roles with the CPO and that the new reporting hierarchy meant that his role would be downgraded.
5. Subsequently, another meeting of the same persons was convened where at, the CEO told the claimant that the respondent was facing

financial constraints and offered him a contract of 3 months from 1<sup>st</sup> July 2015 instead of the required minimum period of 2 years. However, the claimant declined the offer but continued working for the respondent. On 30<sup>th</sup> July, 2015, the respondent wrote to the claimant informing him stop attending work from 31<sup>st</sup> July 2015 and offered to pay the claimant 2 months' salary in lieu of notice to end the 3 months' contract but again the claimant refused. On the same day the respondent disconnected the claimant from her email system and the claimant complied with the order to stop attending work.

6. The Claimant contends that the Respondent's decision to offer him a fixed term contract for three months was highly irregular and unfair and constituted an unfair labour practice that is contrary to the provisions of the Employment Act, 2007 and the Respondent's Human Resource Manual. However, the Respondent denied that the Claimant's services were terminated unfairly and averred it was terminated in accordance with the terms of his contract. She further averred that the Claimant was paid all his dues at the time of separation and as such he has no claim against her. She therefore prayed that the suit be dismissed with costs.

#### **Claimant's Case.**

7. The Claimant testified as CW1 and basically adopted his written statement dated 9<sup>th</sup> March, 2016 as his evidence in chief. He further produced the 43 documents attached to the said Statement as his exhibits. In brief he stated that his fixed term contract was scheduled to end on 30.6.2015 but it was renewable subject to satisfactory performance and availability of funds. He further testified that in May 2015 he was taken through the process of performance appraisal by the acting CEO Dr Kyomuhangi and his performance was found to be satisfactory. The acting CEO promised him that his contract would be renewed for 2 years and recommended the same to the HR Director, Ms Muriuki.

8. The claimant further contended that following his successful appraisal he met with the Respondent's Human Resource Director who assured him that his contract would be renewed based on his exemplary performance. Again on 1<sup>st</sup> June, 2015, while in a meeting with the Respondent's new CEO Dr Gitahi, he was informed that a new position of Chief Programs Officer (CPO) had been created and that henceforth he was to report to the holder of the said office as opposed to the earlier structure where he was reporting directly to the CEO. The Claimant viewed the new arrangement as down grading of his role and raised his concern because the new post created was doing the same duties he was engaged in.

9. The claimant further testified that he was called to yet another meeting on 23.6.2015 with the new CEO Dr Gitahi, Dr Kyomuhangi and HR Director Ms Muriuki at which the CEO informed him that the Respondent was facing financial constraints and offered him a contract of employment for 3 months starting 1.7.2015 but he declined. He contended that a lot of pressure was exerted on him thereafter but he completely declined the offer of 3 months' contract and he continued working until the CEO wrote a termination letter dated 30.7.2015 stopping him from attending work from 31.7.2015 and offered two months' salary in lieu of notice and terminal dues.

10. Upon cross examination, CW1 admitted that the Respondent's Human Resource Manual allowed for termination of a contract by notice by either the employer or employee. However, he contended that he was not served with any notice prior to his termination. He further admitted that after the expiry of his two year contract he was offered another contract for a period of three months. He also admitted that on 1<sup>st</sup> July, 2015 he announced to the executive committee that he was leaving the Respondent as his contract was only renewed for a period of 3 months which offer he had declined. He contended that thereafter the Respondent, through her HR officer, engaged him on his separation dues vide email dated 20<sup>th</sup> July, 2015. He maintained that failure to renew his contract amounted to unfair termination on account of redundancy and urged this Honourable Court to allow his Claim as prayed.

#### **Defence Case.**

11. Mr. John Mwangi, The Human Resources Officer for the Respondent testified as RW1. He similarly adopted his Witness Statement dated and filed in Court on 21<sup>st</sup> March, 2019 and documents filed by the respondent on 21<sup>st</sup> March 2019 and 12<sup>th</sup> June, 2019 as his evidence in chief. In brief he testified that upon the claimant's performance appraisal recommendation, was made for renewal of his contract for a fixed term of three months. He further testified that the Claimant declined the offer and instead communicated to members of the Executive Committee that he was leaving the Respondent because he had declined the offer of 3 months' contract. However, he stated that the claimant continued working for one month and then left the Respondent's employment.

12. RW1 further testified that although there were changes in the organizational structure, the Claimant was not declared redundant as his position still remained and another person subsequently replaced him when he left employment. RW1 insisted that the Claimant's contract lapsed automatically after its term expired. He further contended that the Claimant is not entitled to the reliefs sought in his suit and urged the Court to dismiss the same with costs.

13. On cross examination RW1 admitted that he was not handling Human Resource issues for the Headquarters as at the time of termination of the claimant's services, and stated that his evidence herein is based on documents in the Respondent's possession. He further confirmed that all communication between the Respondent's and her employees was made in writing and that there was no written communication from her to the Claimant indicating that his employment contract would be renewed for a further period of two years as alleged by the Claimant. He maintained that the contract renewal that was offered to the claimant was only for a period of three months and which was supported by the recommendation letter dated 23<sup>rd</sup> June, 2015. Finally, he contended that the Claimant was paid all his dues up to 30.9.2015 and maintained that the suit should be dismissed with costs to the Respondent.

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

14. The Claimant submitted that he had legitimate expectation of the renewal of his employment contract because the contract provided for renewal subject to certain conditions. He further submitted that all the requirements for the renewal were met including satisfactory performance and he was verbally promised that the contract would be renewed for 2 years. He further submitted that the Respondent's witness being absent in the said meeting cannot attest to this promise. For emphasis the Claimant cited the provisions of Section 62 as read

with sections 64, 65, 66, 67, 68 and 69 of the Evidence Act.

15. To fortify his contention that he had legitimate expectation of the renewal of his contract, he relied on **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.”*

16. He further submitted that having been part of the Respondent’s regular contract staff members and forming the core of the Respondent’s staff, the Respondent was bound to renew his contract for a further period of two years in accordance with the HR Policy Manual. He further contended that the offer by the Respondent of a three month fixed term contract to him, was unprecedented under the HR Policy Manual and was therefore unfair because he was a regular contract staff.

17. To fortify the foregoing argument, he relied on the Court of Appeal decision in **Heritage Insurance Company Limited Vs Christopher Onyango & 23 Others (2018) eKLR** where the court held that a Staff Manual is incorporated in a contract of employment if the contract of employment contains a clause to the effect that orders or directions issued from time to time through the Staff Manual shall be obeyed.

18. Based on the foregoing, the Claimant submitted that the 3 month contract offered by the Respondent was unlawful as it was contrary to the express terms of clause 1.5.1 of the Respondent’s HR Policy Manual and therefore of no legal effect. He further submitted that his contract came to an end on 31<sup>st</sup> July, 2015 the respondent purported to pay him two month’s salary in lieu of notice and denied that the same lapsed by effluxion of time as contended by the Respondent because he did not accept the offer of three months’ contract.

19. The Claimant further submitted that his termination was unfair, invalid and unlawful as it was done contrary to the provisions of Sections 35, 41, 43 and 45 of the Employment Act, 2007 and the Respondent HR Policy Manual. He contended that the termination was not grounded on a valid and fair reason, and a fair procedure was not followed. For emphasis he relied on **George Onyango Akuti Vs G4S Security Services Kenya Ltd (2013) eKLR** and **Kenya Domestic, Hotels and Educational Institutions & Hospitals Workers Vs Mombasa Sports Club (2014) eKLR**.

20. He submitted that the termination being done on account of redundancy, the Respondent did not follow the mandatory procedure for redundancy set out under Section 40 of the Employment Act, 2007. To buttress this argument, the Claimant relied on **Thomas Odol Ojwang Vs Kenol Kobil Limited (2015) eKLR** where the court held that there is no justification for an employer to circumvent the procedure of redundancy under the provisions of section 40 by applying the procedure of termination by notice under section 35 of the Employment Act.

21. He urged that on the basis that there was no valid reason for the termination and that fair procedure was not followed by the Respondent, the termination of his employment was unfair and therefore he is entitled to the reliefs as sought in his Memorandum of Claim. For emphasis, he relied on **Peter Wambua Nzioka Vs ASL Limited (2017) eKLR**, **Kenfright (E.A) Limited Vs Benson K. Nguti (2016) eKLR**, **Daniel Omosa Machuki Vs Salama Beach Hotel Limited (2017) eKLR**, **H. Young & Company EA Limited Vs Javan Were Mbango (2016) eKLR** and **Domitila Wanzila Muvanya Vs Insurance Regulatory Authority & 6 Others (2016) eKLR**.

#### **Respondent’s Submissions**

22. The Respondent on the other hand submitted that her contracts with her employees are on fixed term basis and are guided by the Human Resource policy and Procedure Manual. She further submitted that the Claimant’s contract of employment was terminated by effluxion of time on 1<sup>st</sup> July, 2015 and that the renewal was subject to clause 3 of the said contract.

23. The Respondent further submitted that Clause 9.2.4 of the HR Manual provides inter alia that **the employee will be given notice of renewal and/or no- renewal in accordance with the service agreement and that such a notice will be in writing**. She further submitted that pursuant to clause 3.8 of her HR Manual, the Claimant was duly informed of the imminent termination of his 2 year contract. She therefore denied the allegation that there was an assurance made to the Claimant that his contract was to be renewed for a further period of 2 years.

24. On the issue of the admissibility of the evidence tendered by RW1, the Respondent submitted that the same is admissible by dint of Section 33 of the Evidence Act and also Section 62 of the Evidence Act. To buttress that argument, the Respondent relied on **Italian Market Kenya Limited v Fidelity Commercial Bank Ltd & another [2014] eKLR**, **Samson Makamu Luvutse v Nakuru Spare House Ltd [2015] eKLR** and **David Kithinji Magiri v Unga Group Limited [2018] eKLR** where the courts admitted evidence of witnesses who gave evidence based on information read from employment records or narrated to them.

25. She further submitted that the claimant had no legitimate expectation that his contract would be extended for 2 years because she notified him in writing that his contract would only be renewed for a period of 3 months. She relied on **Teresa Carlo Omondi v Transparency International-Kenya [2017] eKLR** where the court held that the burden of proof of legitimate expectation is on the employee and that the employee must demonstrate some rational and objective reason for her expectation. She contended that, whereas the Claimant’s performance was not in dispute, she was experiencing financial challenges hence her decision to offer the Claimant a 3 month’ renewal of his contract.

26. According the Respondent, the Claimant did not establish grounds for legitimate expectation as highlighted in **George Onyango Vs The Board of Directors of Numerical Machining Limited & Others (2014) eKLR**.

27. She submitted that the decision not to renew the Claimant's contract was not premised on any ill or improper motive. She further submitted that the decision not to renew the 2-year contract was not 'window dressed' as a redundancy as insinuated by the Claimant and denied that there was conflict or overlap between the claimant's role and that of the Chief Programmes Officer.

28. She submitted that the Claimant's continued performance of duties after it was explicitly communicated to him that any relationship would be on a 3-month basis is evidence of his agreement to abide by the terms of the 3-month contract. She relied on the provisions Section 120 of the Evidence Act to urge that, Courts have held that contracts can be accepted by conduct, regardless of whether the parties appended their signatures thereto. To buttress that argument, she relied on **Attorney General v NK Brothers Ltd & 2 Others [2019] eKLR**.

29. Again to emphasize the said concept of acceptance of contract by conduct, the Respondent further relied on **Peesh Mahajani vs Yashwant Kumari Mahajan HCCC571 of 2015** Onguto J held;

*"...As I understand it, one of the core functions of a signature is to indicate that the parties whose signatures are applied to the document have read, understood and agreed to the terms of the Agreement. A signature is one of the factors which prove and establish both offer and acceptance but not necessarily validity of a contract.*

30. The respondent further relied on **Reville Independent LLC vs Anotech International (UK) Limited [2015] EWHC 726 (Comm)** where the court held that:

*"The signature of parties to a written contract is not a precondition to the existence of contractual relations, as a contract can equally be accepted by conduct."*

*"...In spite of the parties not signing as the Ministry failed/refused to have the document signed by parties to the Agreement; the conduct of parties depicted intention to create legal relations and there was privity of contract between them"*

31. Regarding the separation, the respondent submitted that the termination of the Claimant's employment was justified and done fairly in accordance with the terms of his employment contract and the provisions of the Employment Act. She contended that the Claimant was issued with a notice of intended termination of his contract by effluxion of time vide the letter dated 23<sup>rd</sup> June, 2015 and that he was presented with the option of renewal of his contract for a further period of 3 months which he duly accepted by conduct.

32. She submitted that the Claimant did not discharge the burden of proving the unfair termination as required by section 47 (5) of the Employment Act. She therefore contended that the Claimant is not entitled to any damages for unfair termination of his employment and urged the court to dismiss the suit.

33. She further submitted that the breakdown of the Claimant's salary culminating to USD 17,503.20 as indicated in his submission was neither pleaded in his claim nor proved by evidence. She urged this Court to disregard the breakdown and be guided by the decision in **Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR** where the Court held that evidence which tends to be at variance with pleadings is to be rejected.

34. She submitted that no evidence was adduced to support the claimant's alleged salary increment and contended that his salary including allowances were paid in full after the termination of his employment. She therefore urged that the award of compensation sought including the said payments would be tantamount to reinstatement.

35. On the other hand the respondent submitted that the claims for Provident Fund contribution and Pension were also not pleaded in the claimant's claim hence it should not be entertained. She further submitted that this Court has no jurisdiction in pension matters and relied on **Rift Valley Railways Workers Union (K) v Kenya Railways Staff Retirement Benefist Scheme & another [2007] eKLR**.

36. As regards the claim for severance pay, the respondent submitted that the Claimant is not entitled to the same because he was not terminated through redundancy. She further submitted that the Claimant is not entitled to an award of general damages because the award is capped under section 49 (1) (c) of the Employment Act. In support of this, it relied on the Court of Appeal case in **D.P. Bachheta v the Government of the United States of America [2017] eKLR**.

37. In conclusion, she urged the Court to dismiss the claim with costs because the Claimant did not prove his case on a balance of probability.

#### **Issues for determination**

38. There is no dispute from the pleadings, evidence and submissions that the Claimant was employed by the Respondent for a continuous period of 32 years and 2 months. There is further no dispute that the said period of service was made up of separate fixed term contracts which ran consecutively and the last one being for two (2) year from 1<sup>st</sup> July, 2013 to 30<sup>th</sup> June, 2015. There is also no dispute that the said contract was renewable subject to his satisfactory performance and the Respondent's ability to solicit enough funds for its operations. The issues for determination are:

- a) Whether the Claimant had a legitimately expectation of renewal of his contract of employment for a further period of two (2) years
- b) Whether the failure to renew the contract for 2 years amounted to unfair termination of his employment contract.

c) Whether the Claimant is entitled to the reliefs sought in his Claim.

## **ANALYSIS AND DETERMINATION**

### **(a) Whether claimant had a legitimate expectation of renewal of his contract of employment for 2 years.**

39. The Claimant contended that he had a legitimate expectation that his contract would be renewed for a further 2 years because Clause 3.2 of his last contract of employment provided for renewal subject to his satisfactory performance and the respondent's ability to solicit enough funds for its operations. He further contended that the said conditions were met and indeed the respondent, through the acting CEO, Dr Kyomuhangi and the HR Director, Ms Muriuki, assured him that his contract would be renewed for a further 2 years. He denied the allegation that the respondent was facing financial constraints and submitted that the issue of funding was not a valid and fair reason to justify termination of his services. He urged that an employee under a fixed term contract can have a legitimate expectation of renewal of the contract if the required threshold is met.

40. The respondent denied that the claimant had any legitimate expectation that his contract would be renewed and contended that she had notified him that the contract would be renewed for only 3 months only but he declined. She further denied that the claimant was promised that his contract would be renewed for 2 years. She submitted that there is no legitimate expectation of renewal of a fixed term contract and relied on several precedents which support that proposition.

41. I have carefully considered the evidence and the rival submissions presented and I agree that the jurisprudence emerging from this court is that there is no legitimate expectation of renewal of a fixed term contract. However, in my view, the foregoing is just but the general rule which is subject to exceptions like the practice by the employer, previous renewals, promise by the employer in the contract that the contract will be renewed upon fulfilment of certain conditions by the employee and the employee fulfils the conditions, and the conduct of the employer that leads the employee to expect a renewal. As correctly contended by the claimant, courts have held that an employee under a fixed term contract can indeed have a legitimate expectation that the contract will be renewed based on certain conditions being met.

42. In **Teresa Carlo Omondi Vs Transparency International Kenya (2017) eKLR** this 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.”***

43. The court went on to set out the factors that ought to be considered in determining whether the employee had a legitimate expectation of renewal of the contract, thus

***“The court is satisfied that the claimant had legitimate expectation that her contract would be renewed. It was not merely a wish, a hope or a desire for continuity; it was legitimate expectation, rooted in the contract of employment. There was a promise for renewal, subject to fulfilment of certain conditions. These conditions were fulfilled. The claimant performed satisfactorily. She was appointed as an independent consultant for a key partner. There is no doubt her services were still required by the respondent. Another employee took up the position of Head of Programmes, 8 days after the claimant was ejected.”***

44. The foregoing precedent is on all fours with the facts of the instant case. The employer made an express promise to the claimant under clause 3.2 of the last contract that the contract would be renewed subject to his satisfactory performance and the respondent soliciting enough funds for its operations. The respondent further promised the claimant under Clause 1.5.1 of her HR Policy Manual that the contract period for regular contract staff, like him, was not less than 2 years except where the life of the project is shorter than 2 years in which case the contract period would be aligned to the project period. Finally, the respondent promised the claimant under Clause 9.2.4 of her HR Policy Manual that when the contract expires, she would give a notice to him whether or not the contract would be renewed and if there is no renewal a written notice would be served as required under the service agreement and in default, pay him salary in lieu of the notice.

45. Clause 9.2.4 provided as follows:

#### **“END OF CONTRACT**

***When an employment contract expires, notice will be given to the employee that the contract will or will not be renewed. This will be in accordance with the service agreement and the country labour laws. Employees will be notified of termination of employment by AMREF in writing. The HR unit will sign the notice of termination. Where full notice is not given, payment of basic salary will be made in lieu of the notice, which cannot be serviced.”***

46. The claimant's performance was appraised by the acting CEO Dr. Kyomuhangi and was found to be satisfactory. The only issue raised for not renewing his contract for 2 years was financial constraints. However, I agree with the claimant that the reason cited was not genuine because first, the respondent was willing to renew the contract for 3 months. Second, when the claimant declined the 3 months' contract and was stopped by the CEO from continuing to attend work, a new person was appointed to replace him. Third, the respondent created a new and more senior position of CPO to supervise the claimant and appointed Dr. Kyomuhangi to that position when the claimant's contract was due for renewal. Finally, the respondent never served the claimant with termination notice as required under the said End of Contract Clause 9.2.4 of the HR Policy manual but a letter offering 3 months' contract.

47. In view of the foregoing observations, I am satisfied that the claimant has discharged his burden of proving that he had legitimate

expectation of the renewal of his contract for 2 years and not 3 months. He has proved on a balance of probability that all the conditions required for the renewal of the contract under clause 3.2 of the last contract were fulfilled including his satisfactory performance and availability of funds to the respondent to sustain her operations. He has also proved on a balance of probability that under clause 1.5.1 of the respondent's HR Policy Manual, his contract period could not be for less than 2 years except where the project life is less than that period in which case the contract period would be aligned to the project period. In this case there is no evidence adduced to show that the claimant was to serve in project whose life was shorter than 2 years.

**(b) Whether the failure to renew the contract for 2 years amounted to unfair termination of his employment.**

48. Flowing from the foregoing holding, it is clear that the respondent had the obligation to renew the claimant's contract for the 2 years contemplated under Clause 3.2 of the HR Policy Manual and if she chose to terminate, do so fairly under the terms of the contract and/or the Employment Act as provided in clause 9.2.4 of the HR Policy Manual. Clause 18.1 of the Service Agreement dated 26.7.2013 provides that the contract could be terminated by either party giving to the other party two (2) months' notice in writing to that effect or by either party paying to the other, the equivalent of two (2) months' salary in lieu of such notice.

49. According to the evidence before the court, the respondent neither renewed the contract for the mandatory 2 years nor followed the route of termination by notice under clause 9.2.4 of the HR Policy Manual. However, she decided to offer the claimant a 3 months' contract on account of challenging financial situation within the organization. Of course the claimant refused the offer and continued serving under the expected 2 years contract until the CEO stopped him from continuing to attend work with effect from 31.7.2015. The net effect of the respondent's actions and omissions is that the contract was never renewed but terminated.

50. The question that begs answer is whether the failure to renew the contract was grounded on valid and reason(s), and whether fair procedure was followed. The claimant contended that the termination of his contract of service was not founded on valid and fair reason as required by section 45 (2) (a) and (b) of the Employment Act, and the procedure followed was not in compliance with the mandatory procedure provided under section 40 (1) of the Act because the termination was on account of redundancy.

51. However, the respondent was of a contrary view and contended that the claimant accepted the 3 months' contract by his conduct when he continued working after declining to sign the service agreement, and as such the payment of 2 months' salary in lieu of notice under the new contract was fair and within the terms of his contract of service.

52. It is a well settled jurisprudence from this court and the court above that termination of employment of an employee is unfair unless the employer proves that it was grounded on a valid and fair reason(s), and that a fair procedure was followed. The said jurisprudence is founded on the provisions of section 45(2) of the Employment Act which traces its origin from the ILO Convention 158 on the Termination of Employment Contracts. Section 43 of the Act puts the burden of proof on the employer in legal proceedings like the instant case, to prove on a balance of probability the reason for the termination and in default, the termination is unfair within the meaning of section 45 of the Act.

53. The reason for termination of the claimant's contract herein was financial challenges in the respondent organization, which meant that she could no longer afford to pay salary to the claimant. It follows therefore from that explanation by the employer, that the reason for the termination was redundancy. However as I have already found herein above, the alleged financial challenges were not true and did not constitute a valid and fair reason for terminating the claimant's contract of service. I have already observed that the respondent admitted that she created a new and senior position of CPO to oversee the claimant's role, and further that she appointed another person to replace the claimant after he exited. In the circumstances, I agree with the claimant that the reason cited for not renewing his contract for two (2) years was not valid and fair. Consequently, I return that the respondent has failed to discharge her burden of proving that she terminated the claimant's contract on ground of a valid and fair reason and as such the termination was unfair within the meaning of section 45 of the Employment Act.

54. Even if the reason was valid, which is not the case, the termination would still be unfair because the employer has not proved that she complied with the mandatory redundancy procedure laid down under section 40 of the Act. However, in view of the finding that the termination was not founded on genuine redundancy, I see no need of delving on the issue of procedural fairness.

**(c) whether the claimant is entitled to the reliefs sought.**

55. In view of the aforesaid matters, I make a declaration that the Respondent's failure to renew the Claimant's employment for a period of 2 years constituted an unfair and unlawful termination of the Claimant's employment through unlawful redundancy.

56. Flowing from the foregoing declaration I award the claimant 12 months' gross salary as compensation for the unfair and unlawful termination of his employment contract. In awarding the said compensation, I have considered the fact that the claimant served the respondent for over 32 years without any disciplinary issues and that he did not contribute to the termination through misconduct. I have also considered the fact that he had legitimate expectation of future earnings for further two (2) years were it not for the unfair termination of his contract. The gross pay awarded includes the fixed monthly salary of US\$ 10851 and house allowance of US\$ 1570 based on the salary in the service Agreement signed in 2013.

57. However, I dismiss the claim for severance pay because I have found that the separation was through unfair termination disguised as redundancy. Accordingly, the compensation awarded above is sufficient remedy for the unfairness visited on him by the employer.

58. Likewise, the claim for General damages for unfair labour practices is declined because the sum total of the alleged violation, in my view, amounted to a breach of contract and section 45 of the Employment Act.

**Conclusion and disposition**

59. I have found that the claimant had a legitimate expectation of renewal of his fixed term contract for two years. I have further found that the failure by the respondent to renew the claimant's contract for 2 years amounted to unfair termination. Consequently, I enter judgment for the claimant against the respondent in the sum of **US\$ 149,052 plus costs and interest** from the date hereof. The award is subject to statutory deductions if any.

**Dated and delivered at Nairobi this 7<sup>th</sup> day of February, 2020.**

**ONESMUS N. MAKAU**

**JUDGE**