REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 894 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

ANN KISESE MUSAU.....1ST CLAIMANT

PHYLLIS MBOGO.....2ND CLAIMANT

JANE NJOKI MWANGI.....3RD CLAIMANT

CECILIA WAMBUI KARIUKI.....4TH CLAIMANT

GRACE GATHONI KAMUNYO.....5TH CLAIMANT

ROSE NYAMBURA MWANGI.....6TH CLAIMANT

NANCY CHUNZIRA KAYERE.....7TH CLAIMANT

JANE KAMENE MUSYOKA.....8TH CLAIMANT

DORCAS SIKULU KAMAU.....9TH CLAIMANT

RITA OMONDI.....10TH CLAIMANT

CHARITY MUTHONI.....11TH CLAIMANT

JACKSON KINYANJUI NJERI.....12TH CLAIMANT

MICHAEL JUMA.....13TH CLAIMANT

VERSUS

LAWRENCE GELMON.....1ST RESPONDENT

JOSHUA KIMANI.....2ND RESPONDENT

UNIVERSITY OF MANITOBA.....3RD RESPONDENT

PARTNERS FOR HEALTH AND

DEVELOPMENT AFRICA.....4TH RESPONDENT

KENYA AIDS PROJECT.....5TH RESPONDENT

UNIVERSITY OF NAIROBI.....6TH RESPONDENT

SEX WORKERS OUTREACH PROGRAM (SWOP).....7TH RESPONDENT

JUDGMENT

The Claimants herein were the employees of the 4th and 6th Respondents at different points in time.

The 1st Respondent is an employee of the 3rd Respondent is a university involved in teaching and research work, established in Canada. The 2nd Respondent is a board member of the 4th Respondent and an associate Professor of the 3rd Respondent. and has a partnership with the 6th Respondent. The 6th Respondent is a university established in the Republic of Kenya and is involved in research work.

The 4th Respondent is a non-profit organization duly registered under section 10 of the NGO Coordination Act. The 5th and 7th Respondents are programs undertaken in the Republic of Kenya.

The Claimants have filed this suit to challenge the termination of their employment. They seek the following reliefs jointly and severally against the Respondents-

a. General damages for unlawful termination of employment.

b. Certificate of service.

c. Terminal dues.

d. Interest on (i) above.

e. Any other relief that this Court deems fit to grant.

Only the 1st, 2nd, 4th and 6th Respondents filed responses to the claim. The 1st, 2nd and 4th Respondents filed their Statement of Response on 15th June 2017 while the 6th Respondent filed its Statement of Response on 11th December 2017.

The Claimants' Case

The Claimants aver that the Respondents changed their operating platform from University of Nairobi Department of Microbiology, to University of Manitoba, to Kenya Aids Control Project, to SWOP and finally to Partners for Health and Development in Africa (PHDA).

It is the Claimants' case that towards the end of 2016, the 4th Respondent organized interviews with the sole intention of terminating their employment. They aver that the Respondents' acts are unlawful, unfair, actuated by malice and contrary to the principles of natural justice.

The 5th Claimant, GRACE GATHONI KAMUNYO, testified on behalf of the Claimants as CW1. She stated that she had worked for 18 years and it was her testimony that her employment was terminated unlawfully and without notice vide the email issued on 21st September 2016. According to her, the reason given for the termination was that there were little funds. It was her evidence that she was not issued with a certificate of service.

She testified that she was not selected as she had been unsuccessful but contended that her position still existed to date. She explained that the reason the 1st Respondent had been joined to these proceedings was because he had been the link between the 3rd and 6th Respondents while the 2nd Respondent had been enjoined because he was the clinical director. It was further explained that the 3rd Respondent had been joined because it paid their salaries while the 6th Respondent had been sued because they had entered into an employment contract.

It was her testimony that their last contract had been issued by the 4th Respondent but that the 7th Respondent is the program that led to their employment by the 4th Respondent.

Upon cross examination, it was her testimony that the letter of appointment at page 63 of the Claimants' bundle of documents was the last contract of employment that she was issued. She conceded that the 6th Respondent was not a party to the contract. It was also her testimony that she served the entire term under her contract. She admitted that she was paid gratuity not just for that contract but also for the preceding terminated contracts. She admitted that at the end of her contract period, there was no contract in existence as such her employment could not be terminated.

She denied receiving a non-renewal contract letter from the 6th Respondent. She testified that she did not have evidence to prove the existence of a partnership between the 4th and 6th Respondents. She testified that she did not receive any salary from the 6th Respondent.

Upon re-examination, it was her testimony that she was not aware of when the 6th Respondent ceased to be her employer but maintained that the job was the same.

The 8th Claimant, JANE KAMENE MUSYOKA, testified as CW2. She adopted her witness statement of 27th June 2016. She stated that she served from 1985 up until 2016. It was her testimony that her contract term was to end on 30th September 2016. She stated that she applied for the interview but was not successful.

She reiterated CW1's testimony that the 3rd Respondent paid their salaries and that there was a collaboration between the 3rd and the 6th Respondent. She stated that the project in Majengo, which was her last station of employment, was still ongoing and that someone else had replaced her. She contended that contract renewals were automatic.

During cross examination, it was her testimony that she was last paid by the 6th Respondent in 2014 and conceded that the 6th Respondent had not been a party to her last contract. She admitted that she was employed under a fixed term contract which was for the period of 1 year and stated that she understood that her contract had come to an end. She admitted that she was paid her gratuity and that the 6th Respondent paid all her dues during the subsistence of their employment relationship. It was her concession that she never went for any interviews.

Upon re-examination, it was her testimony that she never downloaded a copy of her email.

The 4th claimant, CECILIA WAMBUI KARIUKI, testified that she was employed in July 2008 and her employer at the time was the 5th Respondent and she was stationed at the 7th Respondent clinic. She stated that the 3rd Respondent was the donor of the projects.

She stated that the email she received informed her that there had been an interview and she had not been successful. She reiterated the testimonies of CW1 and CW2 that her position still existed and that the contract was still up and running.

During cross examination, it was her testimony that she was issued with contracts between it and the 5th or 4th Respondents and not the 6th Respondent. She confirmed that she was paid gratuity after the lapse of each of her employment contracts and that she was paid notice pay. She admitted that when her contract for the year 2015 lapsed, it was renewed from March up until September 2016. According to her, the Respondents ought to have informed them that their contracts would not be renewed.

Upon re-examination, it was his testimony that due to the constant renewals, he had the legitimate expectation that his contract would be constantly renewed.

The Respondents' Case

The 1st, 2nd and 4th Respondents deny changing their operating platforms as alleged by the Claimants. They aver that 4th Respondent's only connection with the 3rd, 5th, 6th and 7th Respondents is that it took over a programme previously ran by them and employed the Claimants who had previously worked for the Respondents.

The 1st, 2nd and 4th Respondents aver that the Claimants were employed by the 4th Respondent on 1st October 2014 on a fixed term employment contract of 1 year. The contracts were renewed in 2015 and 2016. It is their case that the Claimants' contracts ended on 30th September 2016. They posit that the 4th Respondent had the right of opting not to renew the contracts.

The 1st, 2nd and 4th Respondents aver that the Claimants were appointed under the PEPFAR program and it was a term of their respective contracts that their employment would be terminated as a result of reduction or withdrawal in donor funds that supported the 4th Respondent's activities. The PEPFAR grant ended on 29th September 2016 and was not renewed.

As a result, the management and running of the programs was taken over by the Centre for Disease Control (CDC) Partners. As such, they contend that the Claimants contract lapsed by effluxion of time. They deny the allegation that the Claimants' employment was terminated unlawfully.

It is deposed that the Claimants resumes were forward to CDC Partners and the Claimants were asked to make fresh applications for positions that were available in other programs run by it. The applications were considered by the 4th Respondent and some of employees were hired on merit.

On the other hand, the 6th Respondent denies having a partnership with the 1st, 2nd, 3rd, 4th, 5th and 7th Respondents. The 6th Respondent further denies being the Claimants' employer and contends that it has no knowledge of who terminated the Claimants' contracts.

The 6th Respondent deposes that it had a collaboration with the 3rd Respondent in 1980 on research and study of pathogenesis and transmission of sexually transmitted bacteria which expanded to include the study of HIV/AIDS virus. They recruited employees for that purpose, who served on renewed contracts until 2008 and 2010 when the 5th Respondent took over the research projects and the said employees. Thereafter, the 4th Respondent took over the project and absorbed the employees.

The 1st Respondent, LAWRENCE GELMON, testified as RW1. He stated that he worked under the 6th Respondent but was later employed by the 3rd Respondent and was tasked with directing its programs. He adopted his witness statement dated 20th July 2017, as his evidence.

During cross examination, it was his testimony that there had been an MOU between the 3rd and 6th Respondents to collaborate on research, training and academic affairs with the latest renewed in 2014 and is scheduled to lapse in 2020. Under the MOU, money was allocated to individual projects and rarely would it come from the two universities. Further, the 3rd Respondent issued grants to the 6th Respondent who

repaid in kind.

It was his testimony that each employee was attached to a project. According to him, the 3rd Respondent's projects were taken over by local agents, being, the 4th and 5th Respondents. He stated that some of the Claimants had worked on different projects under different contracts. He confirmed that some of the employees had worked in the projects since the 1980s.

He explained that the grant they had been operating on since 2005 was not renewed in 2016 which affected the operations of the 11 clinics forcing them to reduce the number of clinics and staff. He stated that the employees were told to re-apply for jobs as there were few vacancies. He denied issuing the Claimants with termination letters and contended that their contracts were not renewed. It was his testimony that the information was communicated to all the employees.

According to him, the jobs available were the old ones but with fewer openings and some job descriptions were reviewed. It was his testimony that people were hired to fill the positions. However, he was unsure of whether new people were hired.

He admitted that some of the employees were informed that if they failed to receive an email, their applications had not been successful. However, he did not know whether interviews had been conducted.

Upon re-examination, it was his testimony that he was not the Claimants' employer. He clarified that the 3rd Respondent only gave funds for the projects but did not deal with the employees.

The 2nd Respondent, JOSEPH KIMANI, testified as RW2. He stated that he was a board member of the 4th Respondent and an associate Professor of the 3rd Respondent. It was his testimony that the 4th Respondent was fully owned and supported by the 3rd Respondent. He stated that the contracts were renewed based on the availability of funding. He contended that clauses 6.1 (c) and (d) provided for automatic expiry of the contracts and that there was no provision for renewal.

It was his testimony that he sent an email on 7th September 2016 to explain to the staff that their funding had reduced from USD 300 million to USD 1.6 million.

Upon cross examination, it was his testimony that the 6th Respondent bore the administrative costs of the contracts. It was his testimony that the 5th and 7th Respondents were projects and not an entity. He denied being an owner and contended that he was a director and an employee. He admitted that some of the jobs carried out by the Claimants still existed but were performed by different persons. For instance, Jane Kamene's duties still existed but were performed by peer educators. He admitted that he had no knowledge of whether interviews had been done. He stated that they reduced the number of staff, the laboratory was closed and the number of clinics reduced due to lack of funding.

He explained that his use of the term "retrenchment" was his attempt at informing employees that things were going to change and there would be reduction in jobs. He stated that contracts were not renewed automatically and those who wished to have their contracts renewed made application and those who didn't wish for the same wrote an email to that effect but later conceded that he had no knowledge of whether contracts were renewed automatically.

Upon re-examination, he stated that they reduced the number of employees and did not create new jobs.

PETER WATI MWAURA testified as RW3. He stated that he had been the CEO in 2016. It was his testimony that their funding was reduced, as such, they could not absorb everybody. He stated that they used the performance appraisals of employees and recommendations from the Head of Department to determine who they would retain.

During cross examination, he maintained that the Claimants' contracts were not terminated, they lapsed. He stated that previously, the contracts were renewed because there were funds to cater for their employees' salaries. It was his testimony that the Claimants' resumes were sent to CDC and some of the employees were selected.

Upon re-examination, it was his case that no dues were owing to the Claimants. He stated that they issued 1-year contracts due to the unreliability of funding that depended on their performance.

The Claimant's Submissions

In their written submissions filed on 4th July 2019, the Claimants submit that though the Claimants' contracts were renewed, their employment converted to permanent on account of the cumulative number of years that they had worked.

The Respondents' Submissions

The 1st, 2nd, 3rd and 4th Respondents filed their submissions on 9th October 2019. They submit that the Claimants were never the employees of the 1st, 2nd and 3rd Respondents. It is their position that the Claimants had contracts with the 6th, 5th and 4th Respondents whose terms run sequentially and not concurrently. As such, there was no concurrent employment contract obligations upon the 1st, 2nd and 3rd Respondents.

It is submitted that the allegation that the Respondents changed their operating platforms variously thus inferring that the Claimants had been employed for a continuous period has no factual or legal basis as the Claimants fail to indicate who their employer was during the 20-year period. Further, they submit that the Claimants' periods of employment varied from employee to employee yet the Claimants have not adduced any evidence of each Claimant's duration of employment.

They submit that the 3rd, 4th, 5th and 6th Respondents are separate and distinct legal entities and that the only connecting factor between the 4th, 5th and the 6th Respondents is that they were involved in administration of a medical research and intervention program funded by the 3rd Respondent at different times. It is further submitted that each individual was in charge of its own hiring and firing of the employees needed to execute their projects.

That the Claimants' employment was not unlawfully terminated as they contract lapsed and could not be renewed as the PEPFAR grant upon which their employment was based on was not renewed. Further, that the Claimants employment was funded by PEPFAR program and were fixed term contracts with clear termination dates and were not automatically renewable hence there was no legitimate expectation to have the same renewed.

They relied on the cases of **Margaret A. Ochieng vs. National Water Conservation and Pipeline Corporation [2014] eKLR** and **Bernard Wanjohi Muriuki vs. Kirinyaga Water and Sanitation Company Limited & Another [2012] eKLR** where the respective Courts held that an employee under a fixed term contract should not expect an automatic renewal.

It is further submitted that the Claimants have not adduced enough evidence to justify the existence of a legitimate expectation that their contracts would be renewed. They also cited the case of **Teresia Carlo Omondi vs. Transparency International [2017] eKLR** where the Court held that the burden of proof was upon the employee to prove that they had legitimate expectation to have their contract renewed but even where there were elements to justify their expectation, the same were not taken as conclusive proof of legitimate expectation.

It is submitted that the Claimants are not entitled to the reliefs sought as they have not established a case to warrant an award of the same. It is further submitted that the Claimants' witnesses testified that they were paid their dues in full as per the contract including their gratuity which would be paid at the end of every contract.

The 6th Respondent filed its submissions on 11th October 2019 where it submits that the Claimants' claim against the 6th Respondent is time barred as the Claimants last worked for them in 2014.

The 6th Respondent urges that the Claimants' employment contracts indicate the 4th Respondent as their only employer. The case of **Shadrack Dei Kinyili vs. National Cash Registers (NCK-R) [2018] eKLR** has been cited where the Court held that there was no employment relationship between the parties as no evidence was tendered to ascertain which of the two companies paid the employees their salaries.

It is submitted that the claim against the 6th Respondent is time barred by dint of section 90 of the Employment Act. It is further submitted that the claim against the Respondents is baseless, vexatious and an abuse of the court process and ought to be dismissed with costs.

It relies on the case of **Arthur Njuguna Karogi vs. National Government Constituencies Development Fund Board [2018] eKLR** where the Court declined to grant the Claimant the reliefs sought and dismissed the suit with costs since the contract had lapsed by effluxion.

Determination

I have considered the pleadings filed by the parties, the evidence adduced before this Court and their written submissions and find that the following are the issues for determination-

a. Whether there exists a claim against the 3rd Respondent.

b. Whether there existed an employment relationship between the Claimants and the Respondents.

c. Whether the claim against the 6th Respondent is time barred.

d. Whether the Claimants' employment was unlawfully terminated.

e. Whether the Claimants are entitled to the reliefs sought.

Claim against the 3rd Respondent

The 1st, 2nd, 3rd and 4th Respondents have submitted that since the 3rd Respondent was not served with summons to enter appearance then the suit against it ought to be struck out. They urge that in the event the Court delivers judgment in favour of the Claimants, then the same should not be enforceable as against the 3rd Respondent.

Rule 11(2) of the Employment and Labour Relations Court Rules requires that a claimant shall serve the summons to the Respondent together with the statement of claim. However the Claimants' failure to serve the 3rd Respondent with the summons does not render the claim against it a nullity. In the case of **Boyes vs. Gathure 1969 E.A 385** the Court held that-

> *"Where summons to enter appearance though not filed with the plaint was subsequently filed and served and the defendant has not demonstrated any prejudice save for non-compliance with the rules, it cannot be said that the suit is invalid as Courts should not treat any incorrect act as a nullity with the consequences that everything founded thereon is itself a nullity, unless the incorrect act is of a fundamental nature and matters of procedure are not normally of a fundamental nature."*

In the case of **Industrial and Commercial Development Corporation vs. Sum Modez Industries Ltd C.A Civil Appeal No. 229 of 2001** the Court of Appeal addressed itself as follows-

> *"Service of summons to enter appearance though important, a failure to do so within the stipulated period does not necessarily render proceedings null and void. It will depend largely on the circumstances of each case".*

I find that the 3rd respondent having been aware of the suit, is not prejudiced by non-service thereof. The court declines to strike out the case against it.

Employment Relationship between the Parties

The 1st, 2nd, 3rd and 4th Respondents have submitted that the Claimants have not adduced any evidence to show that the 1st and 2nd Respondents, who are natural persons, became their employers.

On the other hand, the 6th Respondent has submitted that that there is no employment relationship between it and the Claimants as they have not adduced evidence to prove that there existed such a relationship at the time of the termination of their contract. The 6th Respondent submits that the Claimants have no claim for damages against it as their last contracts ended in 2014 by effluxion of time.

As regards the 5th and 7th Respondents, the Respondent's witnesses led evidence to the effect that these Respondents were projects and not legal entities. They also testified that the 3rd Respondent's role in the Claimants' employment relationships was that it funded the projects undertaken by their employers.

I agree with the above position. This is because although the Claimants' employment largely depended on the 3rd Respondent's funding, the Claimants did not adduce any evidence that the 3rd Respondent was privy to their contracts. Further, the Claimants have not adduced evidence to prove that the above Respondents were their employers at the time their contracts lapsed. The contracts annexed by the Claimants in their bundle of documents indicate that only the 4th Respondent was their employer at the time of the termination of their contract. As such, I find that there only existed an employment relationship between the Claimants and the 4th Respondent.

Limitation of Time

It has been submitted that the claim against the 6th Respondent is time barred by dint of section 90 of the Employment Act. The said section provides as follows-

> **Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.**

The Claimants have not adduced any evidence to prove that the 6th Respondent was their employer in September 2016 when their employment was terminated. The 6th Respondent's evidence that the last employment contract that it had with the Claimants was in 2014, has not been controverted. As such, I find that the claim against the 3rd Respondent is time barred having been filed more than 3 years after their employment was terminated. In any event and as I have held hereinabove, the 6th Respondent was not a party to the Claimants' employment at the time of termination.

Termination of the Claimants' Employment

The Claimants have not refuted that their contracts lapsed. What they disputed was the mode of termination. It has not been disputed that the Claimants' employment had been renewed after each lapse up until 2016 when they received emails that their employment contracts would not be renewed. Clauses 1.1 and 1.3 of the 5th Claimant's contract at page 63 of the Claimants' bundle reads as follows-

> *"1.1 The employee has been appointed to the position of Nurse under PEPFAR program...*
>
> *1.3 The term of this contract is from 1st April 2016 and shall continue to 30th September 2016 unless and until termination as provided in clause 6 of the contract."*

Further clause 6.1 of the said contract provides as follows-

> *6.1 This contract of employment may be terminated as follows –*
>
> *a. by either party giving one month's notice of their intention to terminate the contract or by either party terminating the contract with immediate effect and paying to the other party one moth's wages instead of notice.*
>
> *b. immediately without the requirement of prior notice or payment in lieu of notice by the employer if in the reasonable opinion of the employer the employee has ben incompetent, performed poorly, grossly negligent and/or has committed any act or omission that constitutes gross misconduct.*

c. If upon expiry of the period no intention of the period of time provided for the contract under Clause 1.3 of this contract, no notice of the intention to renew the contract is issued by the employer.

d. Reduction or withdrawal of donor funds supporting PHDA program activities: As this contract is dependent on the continued availability of funds from external sources, employment can only be continued as long as funding is available. Termination of funding by the said sources may result in termination of employment or adjustment in the employee's remuneration and other terms of employment."

From the above, the terms of the Claimants' employment termination were clear. Further, clause 6.1(d) it was evident that the Claimants' employment was dependent upon funding and in the absence of that it stood terminated. All the Claimants' witnesses testified that they received an email informing that their contracts stood terminated as at 30th September 2016 due to lack of funding. Further, RW3 admitted that they had to reduce the number of staff, clinics and close the laboratory due to lack of funding. This has not been controverted.

As such, I find that though their contracts had been previously renewed, they have not proved a case of legitimate expectation as the terms of their contract provided that it stood terminated by effluxion of time or in the absence of funds. As such, the contracts were not unlawfully terminated as the circumstances under which the Claimants' employment was terminated do fit the definition of unfair termination outlined in section 45 (2) of the Employment Act neither was the 4th Respondent required to follow the procedure under section 41 of the Employment Act.

Further, in my view, the interviews conducted after the lapse of the Claimants' contract have no bearing in this case as the 4th Respondent was not bound to renew their contracts or employ them after the lapse of the same.

This court cannot read extrinsic terms into the contract. I am guided by the Court of Appeal decision in **Amatsi Water Services vs. Francis Shire Chachi [2018] eKLR** where the Court stated as follows-

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

Reliefs Sought

Having found that the Claimants' employment was not unlawfully terminated, I find that the Claimants are not entitled to the claim for general damages for unlawful termination of employment.

This court declines to award the claim for terminal dues as the Claimants failed to specify the dues they wanted to be awarded. Further, the Claimants witnesses admitted to being paid all their dues which included gratuity. No evidence was adduced to controvert the 4th Respondent's assertion that their dues had been paid.

The 4th Respondent is ordered to issue the Claimants with certificates of service as prescribed in Section 51(2) of the Employment Act 2007 as they are entitled to the same.

Each party shall bear the costs its suits.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF MARCH 2020

MAUREEN ONYANGO

JUDGE