



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 555 OF 2014**

**MUTUA MULONZYA.....CLAIMANT**

**AND**

**FELLOWSHIP OF CHRISTIAN COUNCILS & CHURCHES**

**IN THE GREAT LAKES & HORN OF AFRICA.....RESPONDENT**

**JUDGEMENT**

1. The claimant pleaded that he was employed by the respondent from 1<sup>st</sup> January, 2009 and rose to the position of Regional Advocacy Governance and Public Accountability Co-coordinator until 31<sup>st</sup> December, 2013 when the respondent terminated his service in a manner he considered vindictive biased and unfair. The claimant's gross monthly salary was Kshs 306,747/=. The claimant was further entitled to twenty four working days of leave each year and pension contributed at 10% by employer and 5% by the employee from the annual basic salary for 5 years. Further, the respondent's General Assembly held on 23<sup>rd</sup> October, 2013 at Kampala approved that the claimant be paid one week salary for every year served as a token of appreciation for the five years.
2. According to the claimant, he performed well with dedication and excelled in his role. The annual appraisal rated him highly and to have met expectations. The claimant was therefore aghast when he received a termination of employment letter dated 27<sup>th</sup> November, 2013 immediately after appraisal process where he had been rated highly and had applied to proceed on annual leave.
3. The claimant contended that the termination and non-renewal of his contract was vindictive, biased against him and actuated by malice. According to the claimant, he faced open negative bias from the Executive who was hostile and spiteful towards him during the 2013 appraisal process. The claimant further stated that he gave notification to the Executive Director on 9<sup>th</sup> November, 2013 indicating his response to the appraisal in accordance with section 14 of the respondent's Human Resource Policies and Procedures. The claimant further wrote to the respondent's Chairperson on 9<sup>th</sup> November, 2013 expressing his concerns over the appraisal conducted by the Executive Director.
4. According to the claimant the termination on account of limited funding was baseless and untrue since he was part of the team that worked on the organizations budget for the year 2014 and the strategic plan. The budgets went through a series of revisions to ensure they were within the expected core and earmarked funding from ecumenical and other funding partners. The said budget was presented to the executive committee and approved. The budget had allocation of governance in the thematic area together with planned programme activities and also salary allocation for the position the claimant served.
5. The claimant further stated that whereas he was dismissed on grounds among others of poor behavioral attitude, towards work and team, he was never notified of the said charges against him and was never given an opportunity to be heard.
6. The respondent on its part pleaded that the claimants contract was a fixed term contract commencing from 1<sup>st</sup> January, 2013 to 31<sup>st</sup> December, 2013. The claimant according to the respondent, served his full term of the contract and there could not be a premature termination of an already served contract and which terminated by effluxion of time. Upon full service of the contract, it was the responsibility of the respondent to make a decision whether or not to renew the claimant's contract and the key parameters were the availability of funding and performance.
7. The respondent denied that the general assembly of the respondent ever approved the payment of any monetary token of appreciation to the claimant as alleged.
8. According to the respondent, a look at the performance review of 5<sup>th</sup> February, 2013 that partly led to the renewal of the claimant's contract, the same had areas where the claimant was found not to have performed well, which were behavioral and rotational in nature and key to his performance on the remarks the review was emphatic that the claimant needed to work in a consultative manner and share timely information with immediate supervisor. The claimant's in his comments agreed with the observations in the review and specifically under

took to rectify the situation. Hence it was on the basis of the assurance that the claimant's contract was renewed for another one year.

9. A performance review had to be conducted before the conclusion of the claimant's contract and the claimant was assessed as exhibiting poor working relations with rest of team members. He was not a team player and undermined the authority of his immediate supervisor. During the performance appraisal, the claimant did not listen and accept the weak areas or points.

10. The respondent denied its Executive Director was biased or hostile towards the claimant. The claimant did not want to be properly assessed especially on the areas that he had not done well in the year 2013. Regarding funding and budgets the respondent averred that its secretariat prepares the budget for funding purposes and have the same approved by the executive committee before forwarding to donors in the form of funding proposals. The budgets even after approval by the executive committee remain just proposals and unless or until a specific donor agrees and executes a contract with the respondent for funding, it could not be said the project was already funded.

11. The respondent further stated that the fact that the governance program struggled financially in the year 2013 was evidenced by the claimants own admission at page 3 of his performance appraisal where the claimant admitted that implementation of planned project activities in the 3<sup>rd</sup> quarter of 2013 did not take place due to the changed priority of the Norwegian Church aid (NCA). None of the activities under governance programme was founded by the NCA in 2014. In his oral evidence in Court the claimant repeated the averments in his statement of claim and further stated that he was initially appointed on 1<sup>st</sup> January, 2009 as a regional advocacy, governance and public accountability coordinator.

12. He was later on in July 2011 appointed as acting Executive Director and served until 30<sup>th</sup> April, 2012. His contract was renewed in 2013 for one year unlike earlier ones which were for two years. According to the claimant during the period he worked, he fundraised for the respondent and increased its profile. His last pay was Kshs 306,747/= gross. According to the claimant, he was underpaid his pension hence a general assembly meeting held in Kampala on 23 October, 2013 which he attended, discussed, strategic issued and policy and appreciated him by recommending that a token be paid to him.

13. It was the claimant's evidence that he performed exemplarily well for the respondent and took part at times in risky peace building initiatives. He however stated that his last appraisal was done in a soiled environment. The executive director was spiteful of him and he had a disagreement with him over the appraisal. He gave notice that he was going to appeal against the appraisal and subsequently complained to the respondent's chair. He was thereafter issued with a termination letter. He conceded that the respondent had discretion to renew or not to renew his contract and that the renewal was subject to funding and performance. According to him he was terminated due to poor behavioral attitude towards work team which he did not agree with. He denied there was any problem with funding. In his view, the Swedish Church Organization increased their funding.

14. The claimant further stated that he was never informed of the poor working attitude and that he never received any warning letter.

15. In cross-examination he stated that the was on a fixed term contract and that his last contract commenced on 1<sup>st</sup> January, 2013 to 31<sup>st</sup> December, 2013 and that renewals depended on performance and availability of funding. It was further his evidence that the program he headed had projects in it though he could not remember how many projects there were. Renewal of contract was not stringent from 2009 until 2012 when a new Executive Director came. It was then when renewal was made subject to availability of funds and projects. It was his evidence that the respondent was donor funded but also supported by member's funds.

16. He stated that human relations was cited a part of reasons for termination. It was one of the parameters for appraisal. Although he wrote "agree" on the appraisal form but claimed he was quoted out of context. The claimant also stated that his contract was not renewed due to limited funds however there was no indication that his post would be abolished. It was further his testimony that if budgets were approved, they would be used to run the organization and that donors dictated the funding of projects. He denied there was any problem with funding in his docket.

17. The respondents witness Mr Philemon Okeyo informed the court that he worked for the respondent as Finance and Administration manager. It was his evidence that the claimant was on a fixed term renewable contract. The renewal was based on funding and performance. There was performance appraisal before renewals and one of the parameters was human relations with other staff being sensitive to people's feelings. There was concern over the claimant's relationship with the team. The claimant agreed with the observation. The next appraisal in November, 2013 human relations was once again considered and concern raised over the same. The claimant's conduct degenerated to insubordination.

18. Regarding budget, it was his evidence that this was a fundraising document and 15% of the claimant's salary came from recurrent expenditure with co-funding of the 85% from project funding. Mr Okeyo further stated that D. K. Austria reduced their funding on governance. NCA also changed their priority. The respondent was therefore unable to raise 85% of the claimant's salary.

19. In cross-examination he stated that he never participated in the claimant's appraisal. He however stated that he attended the Kampala meeting it was his evidence that the claimant's contract was not renewed and he gave notice of intention to appeal the non-renewal and appraisal. It was further his evidence that there was no formal complaint against the claimant's human relations.

20. The basis of the claimant's complaint is that he was unfairly and unlawfully terminated from employment. The respondent however has denied the allegation stating that the claimant's contract expired and was not renewed by the respondent due to lack of funding and claimant's poor behavioral attitude towards work and team. The reason the claimant felt he was unfairly terminated was due to vindictive, biased, unfair attitude of the respondent's CEO who was his supervisor and the one who appraised him. The claimant further felt that the termination of his contract due to reduction in funding was not true because the respondent's donors continued to fund programmes under his docket by the time he was terminated.

21. The respondent on its part justified the claimant's termination on grounds that there was no or reduction in funding by donors for

projects and programmes which fell under the claimant's docket. The respondent signed out Norwegian Church Aid (NCA) and DK- Austria who were the main donors and had a shift in funding policy which led to no funding or significant reduction in funding for programmes and projects under the claimant's docket. The respondent further cited the claimant's poor relations component as one of the reasons for non-renewal of his contract. According to the respondent there were complaints about the claimant's human relations however the respondent's witness Mr Okeyo stated that there was no documented formal complaint against the claimant.

22. The claimant was initially hired on 1<sup>st</sup> January, 2009 for a period of two years. This was renewed for a further period of two years on 10<sup>th</sup> Decembr, 2010 which was terminated by end of 2012. On 12<sup>th</sup> February, 2013 the claimant was issued with a one year contract which was to end on 31<sup>st</sup> December, 2013. It is this last contract which was not renewed on grounds of lack of funding and the claimant's poor performance and mainly human relations function.

23. The issue of the claimant's human relations function arose for the first time during his appraisal in early 2013 before being given a one year contract when terminated on 31<sup>st</sup> December, 2013. They arose again during his appraisal in November, 2013 just before the expiry of his running contract. Soon thereafter on November 2013 the respondent was issued with a notice of non-renewal of this contract which was set to expire on 31<sup>st</sup> December, 2013. The reason for non-renewal was stated as limited funding and the claimant's poor behavioral attitude towards work and team.

24. In the appraisal form dated 8<sup>th</sup> November, 2013 the claimant's supervisor observed that the claimant was advised to improve on the weak areas and reflect on his human relations with rest of the team members. The claimant was further advised to improve on keeping regular working hours and meeting deadlines. The claimant did not agree with these observations by his supervisor and he felt they were vindictive, biased and unfair assessment by the Executive Director who was his supervisor. The claimant as a result gave notification to the Executive Director on 9<sup>th</sup> November, 2013 of his intention to notify the Executive Committee of the respondent of the unsatisfactory conduct of the performance appraisal.

25. As a general principle, there is no obligation on any party to a fixed term contract to renew the same. However the conduct of the parties to such contract may create a legitimate expectations on the party to be advantaged by the renewal to expect a renewal or reasons why the renewal could not happen. The conduct of the parties could be deduced from subsequent matte of course renewals or the nature of the work to be performed which inevitably demands that a renewal be done to complete the work. These are however general outlines and not fixed parameters. Each case must be assessed on its own merits and circumstances.

26. The intention of the revised Labour Laws including the current Employment Act was to create some form of job security and an ordered separation from employment. This is the rationale of section 3(6) of the Employment Act which provides as follows:

*“the terms and conditions of the employment set out in this Act shall constitute minimum terms and conditions of employment of an employee and any agreement to relinquish, vary or amend the terms herein shall be null and void”.*

27. Whereas as observed above there is no obligation for renewal of a fixed term contract, its termination upon expiry must align to the minimum requirements as set out in the Employment Act. That is to say parties must give notice as provided in the contract or in the absence as provided in the Employment Act. In the case of an employer, the reason for non-renewal should be stated and the employee called upon to make representation if necessary.

28. The court states so because it is not unusual to find several renewals with notice to employees on fixed term contracts. It would therefore be mischievous and unfair to hold that parties to a fixed term contract not being considered for renewal should sit tight and wait to disappear from each other upon the toll of the end of contract bell without bidding each other a decent goodbye. This could not have been the intention of the law on fixed term contracts.

29. Back to the matter before me, the claimant's contract was not renewed due to shortage of funding and also due to what the respondent considered his poor behavioural relation with his supervisor and team.

30. The claimant disputed these reasons. On the issue of funding the claimant stated that he was part of the budget preparation team and there was funding for his projects. On his behavioral issues, he disputed this and considered it a personal problem between him and the Executive Director who was his supervisor. Besides Mr Okeyo who gave evidence on behalf of the respondent stated that there was no formal complaint against the claimant over his behaviour. Further, the claimant's supervisor made recommendations that the claimant improves on his weak areas and reflect on his human relations with rest of the team members. The improvements and reflections expected of the claimant could only be achieved in the context of continuation of his engagement with the respondent.

31. From the foregoing and to comply with the minimum requirements of the Act as outlined above, it was necessary to hear the claimant on the reasons why his contract could not be renewed more so in the context that there had been previous renewals. To this extent the court finds and hold that there was unfair termination of the claimant's contract.

32. Regarding the quantum of compensation, the court takes into account that the claimant was on a fixed term contract and had no guarantee of automatic renewal. The court therefore awards the claimant as follows:

Kshs

a) Two months' salary I lieu of notice of

termination (as per contract)

613,494

b) Four months salary as compensation unfair

termination 1,226,988

1,840,482

c) Costs

d) Items (a) and (b) shall be subjected to taxes and statutory deductions

33. It is so ordered.

**Dated at Nairobi this 14<sup>th</sup> day of May, 2020**

**Abuodha Jorum Nelson**

**Judge**

**Delivered this 14<sup>th</sup> day of May, 2020**

**Abuodha Jorum Nelson**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

**Abuodha J. N.**

**Judge**