



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. 1284 OF 2013**

**JAMES MBARAWA DUDAH**

**PETERSON MUTUNGA MUSILI**

**ELIZABETH NYABOKE**

**DORCAS WANGUI KIMEU**

**(suing on behalf of themselves and 83 others) ..... CLAIMANTS**

**VERSUS**

**HONOURABLE ATTORNEY GENERAL.....1<sup>st</sup> RESPONDENT**

**P S MINISTRY OF HEALTH ..... 2<sup>nd</sup> RESPONDENT**

**NASCOP.....3<sup>rd</sup> RESPONDENT**

**JUDGMENT**

1. The Claimants were severally offered employment from 2003/2004 by the Ministry of Health as Data Entry Clerks under a CDC-MoH cooperative agreement after approval by the Directorate of Personnel Management.
2. The contracts were subject to terms of service applicable within the civil service, and to yearly renewal with an option to terminate upon notice.
3. On 23 April 2013, the Principal Investigator and Head of Department of Disease Prevention and Control wrote to notify the Claimants of the non-renewal of their contracts upon lapse on 14 September 2013 because the Kenya Health Sector was undergoing devolution and the CDC-MoH cooperative agreement would not fund their positions effective that date.
4. The letter further advised the Claimants that their contracts had been renewed for the period 1 October 2-12 to 14 September 2013 (backdated).
5. The Claimants were also advised to commence procedures for handover before payment of their terminal dues.
6. On 13 August 2013, the Claimants instituted these proceedings against the Respondents and they stated the Issue in Dispute as Unfair and illegal intended termination of employment due to begin on 15 September 2013.
7. At the same time, the Claimants filed a motion under a certificate of urgency seeking orders interdicting the intended terminations of employment (on 6 September 2013, the Claimants filed an *Amended Memorandum of Claim*).
8. On 9 September 2013, the Court granted interim order(s) stopping the terminations (but when the Claimants failed to attend Court for *inter partes* hearing on 1 October 2013, the application was dismissed). An attempt by the Claimants to have the application reinstated was declined on 3 December 2013.
9. The Respondents filed a *Memorandum of Response* on 27 September 2013.
10. The Cause came up for hearing on 23 January 2015 and 2 of the Claimants testified before the hearing was rescheduled to 12 March

2015 to enable the calling of additional witnesses. The Claimants however closed their case on 12 March 2015 as they could not present the further witnesses.

11. The Cause next came up for hearing on 6 April 2017 but because the Claimants and their advocate were not in Court, the Respondents applied to have the Cause dismissed. The Court acceded to the request.

12. Upon an application by the Claimants, this Court on 11 October 2019 set aside the dismissal order (the Claimants had closed their case by the time of dismissal and it the Respondents case pending by date of dismissal) and directed that the Respondents prosecute their defence.

13. The Respondents case was taken on 13 February 2020 when a Human Resource Manager with the Ministry of Health testified.

14. The Claimants filed their submissions on 12 March 2020 while the Respondents filed their submissions through email on 17 March 2020.

15. The Court has considered the pleadings, evidence and the submissions on record, and condensed the Issues for determination as examined hereunder.

### **Unfair termination of employment/Expiry of contracts by effluxion of time**

16. The Claimants asserted that their contracts were unfairly terminated because they were not given notices of termination and because the reason(s) given by the Respondents were not valid or fair as the contract between CDC-MoH continued to run beyond September 2013. The Claimants further alleged redundancy.

17. The Claimants further contended that they were replaced by other persons and that some of their colleagues continued in employment after September 2013.

18. The Respondents, on the other hand, resisted the plea for unfair termination of employment by contending that the contracts expired by effluxion of time and were not renewed thus not falling under the unfair termination of employment jurisdiction or redundancy.

19. The Court finds the assertion by the Claimants that notices were not issued without merit for the notices dated 23 April 2013 was given to each one of them.

20. The notices not only informed the Claimants that their services would not be required after the expiry of contracts on 14 September 2013 but were issued for more than the 30 days agreed in the employment contracts.

21. The reasons which were given by the Respondents would qualify as operational reasons (both in law and in fact).

22. The separation of the Claimants with the Respondents was therefore involuntary. The separation(s) were not on the grounds of *misconduct, poor performance or physical incapacity*.

23. Despite giving the reason(s), the Respondent let the Claimants contracts to run their full course. The contracts did not have automatic renewal clauses or the need to give reasons for non-renewal. The Claimants, in any case, did not prove that the cooperative agreement between CDC-MoH run beyond September 2013 or that any of their colleagues served beyond that date.

24. The Court, in circumstances, is unable to accept the contention by the Claimants of unfair termination of contract(s) even on account of redundancy because the contracts expired by effluxion of time.

25. The mere failure to renew a fixed-term contract under the prevailing statutory framework unlike in some jurisdiction such as South Africa does not lead to unfairness.

26. The Court finds that the contracts expired by effluxion of time.

### **Breach of contract**

#### **Gratuity**

27. The Claimants were paid gratuity for the contracts from 2009 to 2013. They contended that they were entitled to gratuity from 2003/2004 to 2008.

28. The copies of the initial contracts filed in Court did not provide for payment of gratuity. There was express provision for gratuity in the contracts post-2009.

29. The Claimants did not draw the attention of the Court to any terms and conditions of service applicable within the civil service which provided for payment of gratuity in their circumstances.

30. Without any contractual, evidential or legal foundation to the heads of claim for gratuity from 2003 to 2008, the Court finds this head of the claim was not proved.

## **National Social Security Fund and the National Hospital Insurance Fund benefits**

31. Benefits under the National Social Security Fund and the National Hospital Insurance Fund operated and still operate under express statutory frameworks.
32. The Claimants did not prove that that the Respondents did not deduct and make contributions towards the respective Funds or that Funds declined to allow them to enjoy any of the benefits due to them.
33. In terms of evidence the Claimants only produced Account Statement from the National Social Security Fund in respect of 2 of the Claimants.
34. The Claimants should have produced Account Statements from the Funds and copies of payslips for all the Claimants to prove this head of the claim.
35. The statutes establishing the two Funds also have elaborate provisions to deal with non-complying employers. If there were instances of non-compliance, the Claimants may formally follow-up with the two Funds.

## **Conclusion and Orders**

36. From the foregoing, the Court finds no merit in the *(Amended) Memorandum of Claim*. It is ordered dismissed. No order on costs.

**Dated, signed and delivered through video/email in Nairobi on this 8<sup>th</sup> day of May 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimants Mr. Musyoka instructed by Githongori & Harrison Associates Advocates

For Respondent Ngumi/Mr. Odukenya instructed by the Office of the Attorney General

Court Assistant Judy Maina/Sikulu