



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1409 OF 2020**

**HENRY MUEMA KIMANTHI.....CLAIMANT**

**-VERSUS-**

**NAIROBI CITY WATER AND SEWERAGE COMPANY LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 26<sup>th</sup> June, 2020)

**JUDGMENT**

The claimant's case is based on the further amended memorandum of claim filed on 30.08.2019 through M'Njau & Mageto Advocates. The claimant's case is as follows:

1. He was verbally employed by the City Council of Nairobi as a Messenger on 05.05.1979. On 31.12.1979 he was promoted to a meter reader. In 2001 he was trained at the CID Training School in investigations and prosecutions. In July 2002 he was promoted to a senior accounts clerk. On 22.04.2004 transferred the water and sewerage functions to the respondent. On 06.11.2004 the respondent appointed the claimant and on 15.09.2005 the claimant received a letter of employment in the respondent's service as investigation supervisor at Kshs.47, 279.30 and house allowance of Kshs.13, 500.00 per month. In September 2005 the respondent unilaterally transferred the claimant's pension funds from Laptrust to Madison Insurance and were returned to Laptrust in October 2010 by a court order but the amount transferred to Madison Insurance has never been fully remitted to Laptrust. In October 2010 the claimant was appointed to act as a security officer having graduated with a diploma in security management.
2. On 05.06.2014 the respondent appointed the claimant as security officer on five years' specific term contract expiring on 14.07.2019 at basic pay of Kshs,77, 727.00 up to a maximum of Kshs, 115, 607.00 per month with a monthly house allowance of Kshs.23, 000.00.
3. In January 2015 the claimant received the respondent's retirement notice dated 18.12.2014 showing that the claimant was due to retire on 28.08.2015. The claimant replied. It is the claimant's case that the retirement notice was illegal, unlawful and malicious because the contract entered into between the parties on 05.06.2014 was for 5 years ending on 04.06.2019 and the mandatory retirement was not a term or condition in the five years contract of service.
5. By an interlocutory order the court granted the claimant orders keeping him in office until 04.06.2019 when the respondent was expected to renew the claimant's contract for a further 5 years. Clause 4.3.2 of the respondent's Human Resource Policy and Procedures Manual 2013 as a security officer he was entitled to renewable four term 5-year contract which renewal was pegged on performance. The contract lapsed on 04.06.2019 but the respondent in breach of clause 4.3.2 of the 2013 Manual has refused or neglected to renew the same for the 2<sup>nd</sup> term of 5 years. It is his case that save for performance he is entitled automatic renewal of the contract of service per clause 4.3.2 of the Manual and for a term of 5 years.
5. On 25.06.2019 without any notice from the respondent, the claimant discovered that his name had been removed from the system and register. His case is that he never applied to retire early than the expiry date of 5 years ending in July 2019 stipulated in the contract.
6. In April 2019 he received a letter titled NOTICE OF EXPIRY OF CONTRACT dated 12.02.2019 stating the contract was due to expire on 04.06.2019 and the respondent did not intent to renew the same. Nor reason for non-renewal was given. At that time the claimant had a bank loan being repaid from his monthly salary. The claimant's case is that the letter of 12.02.2019 breached clause 4.8 of the Manual prescribing non-renewal is preceded by job performance appraisal, clause 8.27.4 requiring one-year notice and exit interview, and instead the claimant was removed from staff register on 25.06.2019 and paid Kshs. 23, 165.35 instead of Kshs.123, 165.35 for June 2019 salary.

The claimant claimed:

- a. Basic salary for 15 years (3 terms of 5 years each renewal denied) Kshs.119, 042.00 x 12 x 15 thus Kshs. 21, 427, 560.00.
- b. House Allowance for 15years at 28, 000.00 x 12 x 15 Kshs.5, 040, 000.00.
- c. Gratuity at 31% of basic salary x 12 x 15 years thus Kshs. 6, 642, 543.60.
- d. Fuel allowance for 15 years Kshs. 6, 120, 000.00.
- e. Leave allowance for 15 years Kshs. 1, 785, 630.00.
- f. Leave days basic for 15 years Kshs. 5, 122, 125.00.
- g. 3 months' notice pay Kshs.357, 126.00.
- h. House allowance Kshs. 84, 000.00.
- i. Gratuity Kshs.110, 709.06.
- j. Fuel allowance Kshs. 102, 000.00.
- k. Loss on account to transfer to Madison Insurance Kshs. 2, 382, 080.39.
- l. Loss for failure to invest provident fund from 05.05.179 to 31.12.1979) Kshs. 277, 909.00.
- m. Duty allowance reimbursement (2002) Kshs.136, 000.00.
- n. Medical allowance for 15 years at 200,000 x 15 Kshs.3, 000, 000.00.
- o. Full compensation Kshs. 1, 428, 504.00.
- p. Severance pay 4 months x basic x number of years worked 119, 042 x 40 x 4 thus Kshs. 19, 046, 720.00.
- q. Total Kshs. 73, 063, 887.05.

The claimant prayed for judgment against the respondent for:

- a. A declaration that the respondent's refusal to renew the claimant's contract of employment dated 05.06.2014 for the remainder of four term 5 years' contracts is unlawful, illegal, malicious, unconstitutional, contrary to section 4.3.2 of the Human Resource Policy Manual 2013, null and void.
- b. The respondent be compelled to renew the contract of employment entered into on 05.06.2014 for another term of 5 years and subsequently continue renewing the contract until the claimant serves 4 terms of 5 years as per the provisions of clause 4.3.2 of the respondent's Human Resource Policy Manual, 2013.
- c. An order compelling the respondent to reinstate the claimant into the position he held on 04.06.2019 without loss of benefits.
- d. In alternative the respondent to pay the claimant a sum of Kshs. 73, 063, 887.05 the claimant would have earned up to 04.06.2034.
- e. Certificate of service be issued to the claimant.
- f. Costs of this cause.
- g. Interest of the cause at court rates.
- h. Any other relief which the court deems fit, just and expedient to grant.

The respondent filed on 20.09.2019 the response to the further amended memorandum of claim and through Atudo & Macharia Advocates. The respondent's case is as follows:

- a. The interlocutory orders in issue never stated that the claimant's contract of service was to be renewed automatically for a five year term.
- b. The claimant was not in law entitled to a perpetual contract of employment as claimed.

c. The claimant is not entitled to the amount claimed as the claim has no factual and legal basis.

The respondent prayed that the claim be dismissed with costs.

The documents filed for parties were admitted in evidence by the parties' consent. On 20.02.2020 it was ordered by consent of parties:

1. The issue on pension as claimed is determined with orders that the claimant is entitled to pension benefits per terms of his contract of service.
2. Only issue to determine is whether the claimant is entitled to automatic renewal of the contract of service which lapsed on 04.06.2019 (and beyond the age of 60 years).
3. Parties to make formal submissions. The claimant to file and serve by 02.03.2020 and the respondent by mention on 19.03.2020 at 9.00am for directions on judgment.
4. Today's costs in the cause.

The parties subsequently filed and served their respective submissions.

The only issue to determine is whether the claimant is entitled to automatic renewal of the contract of service which lapsed on 04.06.2019 (and beyond the age of 60 years).

The letter of appointment to Security Officer is dated 05.06.2014. The letter stated that the respondent had decided to offer the claimant employment on a five years' renewable employment contract on the terms and conditions set out in the letter. The letter did not set out the procedure for renewal. The provisions in the staff Manual applied as per clause headed in the letter thus, "**Standing Orders**". The Court therefore finds that as per the claimant's case, clause 4.3.2 of the respondent's Human Resource Policy Manual, 2013 applied on the issue of renewal. The clause on contract employment states, "**Managing Director, Functional Directors, Managers, Coordinators and Officers shall be employed on contract basis with each contract term running for a period of five years. The contracts may be renewed based on performance and for a period not exceeding two terms for Managing Director and functional directors, three terms for managers and for a period not exceeding four terms for coordinators and officers....**"

It is submitted for the claimant that by that clause, the respondent is estopped from denying that term of contract and the clause cannot be defeated on account that the claimant had attained the mandatory retirement age of 60 years. Further the claimant had a legitimate expectation to work through the promised four terms of renewal.

The respondent submits that the claimant was a public officer who had attained the mandatory retirement age of 60 years. The respondent submits that the renewal of the contract was based on performance per clause 4.8.2 of the Manual which provides that performance standards would be set for each job so as to have criteria for appraising staff and for that purpose the clause sets 65% as performance pass mark. However, the respondent submits that since the claimant had attained 60 years of age, section 80(2) of the Public Service Commission Act, 2017 came into play. Under the section an appointing authority may appoint a public officer for service after the retirement upon such terms of contract as may be agreed if:

- a. the public officer possesses rare knowledge, skills and competencies for the time being required in the service;
- b. the retired officer is willing to be engaged on contract; and the retired public officer's performance shall not in any way be impaired by age.

It was the respondent's submission that the claimant being a security officer he did not possess rare skills or knowledge and the renewal was not automatic but in the respondent's discretion.

The Court has considered the parties' respective submissions and the applicable clause 4.3.2 Of the Manual. It is clear from the wording of the clause that the contracts may be renewed based on performance. Thus the Court finds that the use of "**may**" means the respondent had the discretion to renew and where the discretion is exercised, it would be based on performance. In the Court's opinion, under the clause, performance becomes a consideration only if the respondent is to exercise the renewal but failing which, the issue and consideration of the performance does not arise. In the instant case the claimant's five-year contract simply lapsed and there was no indication that the respondent exercised a renewal option and therefore the Court returns considerations of performance did not arise. While parties agree that performance was to be undertaken per clause 8 of the Manual on appraisal, the Court considers that the issue of the claimant's performance did not accrue because there was no exercise of the discretion to renew on the part of the respondent. Should the respondent have expressed it wanted to renew, then the issue of performance would be taken into account. In any event the Court finds that there was no evidence that the claimant had been appraised and on account of his good performance he was laying claim to a renewal. Thus the Court returns that clause 4.3.2 does not establish or provide for a mandatory consideration of renewal of contracts based on the performance of the concerned officer or employee. All the clause did in the Court's opinion was to provide for a discretion for the respondent to renew the contract of service and where such discretion was exercised, the only chain would be performance. Thus the clause created no entitlement to the renewal or appraisal for renewal and the claimant's contract of service having simply lapsed by effluxion of time, parties were bound by their contract and the Court finds no breach or illegality has been established on the part of the claimant.

The Court has considered the provisions of the Public Service Commission Act, 2017 as invoked for the respondent and finds that first the same was not pleaded and second, the provisions were clearly not applicable in the circumstances of the case where the claimant had not retired upon attaining 60 years of age and thereafter engaged on fixed term contract. Instead the evidence is that prior to attaining 60 years of

age the claimant had already been emplaced on a fixed term contract.

The Court has found that the contract of service lapsed by effluxion of time and the claimant has therefore failed to establish the justification for the remedies as prayed for except for a certificate of service per section 51 of the Employment Act, 2007. In particular, there was no unfair termination and the claimant is not entitled to payment on account of alleged denial of renewals. Looking at the margins of success, each party shall bear own costs of the suit.

In conclusion the claimant's suit is hereby determined with orders:

1. The respondent to deliver the certificate of service in 30 days.
2. Each party to bear own costs of the suit.

**Signed, dated and delivered** in court at **Nairobi** this **Friday, 26<sup>th</sup> June, 2020**.

**BYRAM ONGAYA**

**JUDGE**