



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1443 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

LINDA NDENENGO MWAKUGU.....CLAIMANT

VERSUS

OPEN SOCIETY INSTITUTE COMPANY LIMITED.....RESPONDENT

JUDGMENT

Vide a Memorandum of Claim filed on 25th July 2016, the Claimant alleges that the termination of her employment by the Respondent after it failed to issue a proper and compliant notice of renewal of her contract of employment fell short of the requirements of sections 41 and 45 of the Employment Act. She avers that the Respondent did not issue her with a written notice within 3 months as required under Clause 8.5.1 of the Human Resources Manual.

She further avers that on 27th June 2016 she was issued with a notice that her contract which was lapsing on 30th June 2016 would not be renewed and that she would be paid 3 months' salary in lieu of notice. She avers that the Human Resources (HR) Handbook did not provide for an option of payment in lieu of notice.

She seeks the following reliefs:

- 1. A declaration that the Claimant's contract of employment was constructively renewed for three years with effect from 1st July 2016 by default of the Respondent to issue a notice of non-renewal as stipulated in the respondent's HR handbook*
- 2. A declaration that the act of the respondent issuing a termination letter on 12th July 2016 lacked in procedural and substantive fairness and the said termination was unfair and in breach of contract.*
- 3. Kshs.11,448,000 being 36 months' gross salary at the monthly rate of Kshs.318,000 for loss of reasonable expectation of employment for three years.*
- 4. Kshs.3,816,000 as compensation to the claimant to the maximum of twelve (12) months' salary to meet the ends of justice for unfair dismissal and loss of employment.*

The Respondent filed a Statement of Response on 9th August 2016. It avers that it was its discretion to inform the Claimant that her contract would not be renewed and that its communication did not in any way breach the obligations under the contract of employment. It further avers that pursuant to the provisions of the Preamble of Human Resource Handbook, it acted in good faith in issuing a notice of termination and paying the claimant 3 months' salary in lieu of notice. It avers that there was no expectation of renewal of the contract as it was a fixed term contract. It is its case that the termination was a result of effluxion of time and in accordance with the Employment Act.

Claimant's Case

The Claimant testified as CW1 and relied on her Witness Statement dated 20th July 2016 as her evidence-in-chief. She further testified that her expectation based on her experience with the organisation and the HR Policy was that she expected adequate notice. That this is not what happened in her cases as she was given 3 days' notice. She testified that she had no inkling that her contract was coming to an end. She testified that should either party have intended to terminate the contract, the notice period was to be 3 months.

Upon cross-examination, she testified that she was aware that she was employed on a renewable fixed term contract. She testified that there

was possibility of the contract being renewed or not being renewed. She testified that Clause 8.5 of the HR Handbook provided that the contract would be renewed on agreement and further that the clause was not a stand alone. She testified that both parties were to agree on renewal. That the date of expiry of her contract was 30th June 2016 and that there was no discussion on renewal of her contract 3 months prior to the expiry. According to her, it was her understanding that there was not going to be a termination.

She stated that she did not have a letter stating that her contract was renewed. That on 27th June 2016 she was verbally informed that her contract would not be renewed and that on 28th June 2016 she received a notice of termination dated 27th June 2016. She testified that she knew that her contract was not going to be renewed before 30th June 2016.

She confirmed receiving 3 months' salary in lieu of notice and pay in lieu of leave. She testified that at the staff retreat, the Director spoke of realignment but did not speak of the extension of contracts. She stated that the Director stated that no one would lose their job which to her meant that everyone's contract would be renewed. She testified that her contract expired before the structural changes.

She testified that on 4th July 2016 she travelled to Switzerland for training and as at this date she had already received her notice but she had not received the response to her query on the unprocedural notice.

In re-examination, she testified that she had received 2 written notices dated 27th June 2016 and 12th July 2016, one being the termination notice, and the other a verbal notice.

Respondent's case

JOYCE KIPTUI the Respondent's Human Resource Manager testified as RW1 and relied on her Witness Statement dated 1st December 2016. She testified that the Claimant was informed of the non-renewal of her contract in a meeting held on 27th June 2016 and through a written notice dated 30th June 2016.

She testified that the Respondent's letter dated 12th July 2016 was a response to the Claimant's letter. That the notice of non-renewal was not withdrawn. She testified that the Claimant was not required to attend the training that took place from 1st to 11th July 2016 in Geneva. That the training was for the Claimant's personal benefit. That in the meeting held on 27th June 2016 and in an email sent to her, the claimant was given an option not to attend the training.

In cross-examination, RW1 testified that the HR Manual at Clause 6 provided that it did not bind the Respondent and that it is a guidebook for information. That the manual is binding to all employees and that it formed part of the Claimant's terms of employment as incorporated by the contract.

She testified that the Claimant was not given 3 months' notice for non-renewal of her contract. She testified that there is no provision in the Manual on the discretion to issue the notice. She testified that indeed the Claimant was issued with the letter dated 27th June 2016 notifying her of the end of her contract 3 days before its expiry.

She testified that the respondent notified the Claimant of the termination of her contract and also issued her with a termination notice dated 12th July 2016. She stated that the termination was in accordance with the provisions of the Employment Act.

In re-examination, she testified that as at 12th July 2016, there was no contract of employment as the claimant's employment terminated on 30th June 2016.

Claimant's Submissions

The Claimant urged the Court to find that the contract of employment which bound both parties incorporated the provisions of the HR Handbook. She submitted that it is illogical for the Respondent to incorporate the terms of the Handbook in her contract and thereafter claim that the terms did not bind it.

She submitted that the Respondent was required to give her 3 months' notice of the non-renewal of her contract as Clause 8.5.1 of the HR Handbook provides that this was to ensure smooth transition. She submitted that the 3 months' notice was to be issued before expiry of her contract and not 3 days to its expiry. She relied on the case of **Jayne K. Mwanza v National Water Conservation & Pipeline Corporation [2014] eKLR** where the Court held that the respondent had an obligation to communicate its refusal to renew the contract. That where there is a legitimate expectation of renewal of the contract and there is no renewal the non-renewal amounts to dismissal.

She submitted that the Respondent did not identify any clause in the HR Manual that provides for the option of making 3 months' payment in lieu of notice. That Clause 8.5.1 of the HR Handbook bore an expectancy of renewal. Further, she did not receive a response to her enquiry on the renewal. That she was sent for training and that the respondent's Executive Director assured all staff that no jobs would be lost. She therefore submitted that there was an expectation of renewal. She submitted that there was reasonable expectation that the contract would be renewed and relied on the case of **Caroline Muthoni Njoroge v LVCT Health [2019] eKLR**.

She submitted that within the tenor of Clause 8.5.1 of the HR Manual, if an employer does not issue a notice to the employee that he/she will not renew the contract, the employer is deemed to have waived the notice and expressed the intention to continue thus this clause would also apply to the employer. It was her submission that the failure to issue the notice of renewal resulted in the renewal of her contract. In support of this, she relied on the case of **Margaret A. Ochieng v National Water Conservation & Pipeline Corporation [2014] eKLR** where the Court held that fixed term contracts carry no expectation of renewal. She further relied on the case of **Ruth Gathoni Ngatho v PCEA and**

Another [2012] eKLR where the court held that the failure by the employer to give 3 months' notice prior to expiry of the fixed term contract the employee was justified in legitimately expecting there would be renewal.

With respect to costs of the suit, she urged the court to order that the Respondent does bear costs.

Respondent's Submissions

The Respondent submitted that there was no inconsistency between the Handbook and the Employment Act thus the terms of the Handbook were applicable. It submitted that since the employment contract was not renewed by mutual agreement of the parties before its expiry, the same lapsed through effluxion of time.

It also relied on the **Margaret A. Ochieng case [supra]** where the Court held that the fixed term contract had its own inbuilt termination notice in that the claimant knew of the termination. It submitted that the Court in this case stated there are limited exceptions where fixed term contracts may give rise to an expectancy of renewal.

It submitted that the Claimant has not argued that the decision not to renew her contract was based on improper motive or countervailing circumstances. It relied on the case of **Cleopatra Kama Mugenyi v Aidspan [2019] eKLR** where the Court held that there must be an indication by act or omission from the employer that renewal was forthcoming. It further relied on the case of **Teresa Carlo Omondi v Transparency International-Kenya [2017] eKLR**.

It submitted that the **Jayne Kanini Mwanza case** is distinguishable from the present case as in that case there was no communication that the contract would not be renewed. She further submitted that there is no expectancy of renewal under Clause 8.5.1 of the Handbook. It submitted that the decision in **Ruth Gathoni** was overturned on appeal and argued that following the Court of Appeal's decision in this case, the failure to issue the notice before 3 months' period did not imply that the contract was automatically renewed. She further testified that its failure to respond to the Claimant's enquiry on non-renewal of her contract did not create a legitimate expectation of its renewal. In support of this position, it relied on the Court of Appeal decision in **Trocaire v Catherine Wambui Karuno [2018] eKLR**.

It further submitted that the facts of the suit are not indicative of the circumstances that would lead this Court to find that the contract was constructively renewed. With respect to the claim of 36 months' salary it submitted that under Section 49(1) of the Employment Act, the maximum compensation for unfair termination is 12 months. It relied on the Court of Appeal decision in **Kenya Airways Limited v Alex Wainaina Mbugua [2019] eKLR**. It further submitted that the claim for 12 months' compensation be dismissed as the contract was terminated by effluxion of time. It submitted that the suit lacks merit and urged the Court to dismiss it.

Analysis and Determination

The issues for determination are:

- a. Whether there was legitimate expectation that the contract would be renewed.
- b. Whether the Claimant's termination was unfair.
- c. Whether the Claimant is entitled to the reliefs sought.

Whether there was legitimate expectation that the contract of employment would be renewed

It is the Claimant's case that the fact that the Respondent did not issue a written notice of non-renewal as stipulated in the Handbook led her to legitimately expect that her contract would be renewed. The Claimant submitted that she had legitimate expectation that the contract would be renewed for the following reasons:

- a. Clause 8.15 of the HR Handbook bore a clause of giving expectancy of the renewal,
- b. She inquired on the renewal but no answer was given.
- c. The Respondent's Executive Director assured all staff at the retreat that no jobs would be lost.
- d. She was sent for a training in order to inter alia fit into the organisation's culture.

The Respondent submitted that there was no express promise of renewal and that none of its actions is indicative of a clear and ambiguous representation that would lead the claimant to expect renewal. Clause 8.5.1 of the HR Handbook provides:

*"All contracts have a stipulated duration. **The staff member and OSIEA can mutually agree to renew the contract.** The staff member may opt not to renew their contract by giving the organisation three months' notice **or OSIEA may opt not to renew the contract, also giving the staff member three months' notice.** This notice period is to enable the staff member and the organisation handle the transition smoothly."*

[Emphasis Added]

Although the above clause only anticipated that the renewal of the contract was to be by mutual agreement between the parties, it further stated that a party had to communicate the intention not to renew by giving 3 months' notice. It is very express that the employer would give the employee notice of non renewal at least 3 months before expiry of the contract and a similar obligation placed on the employee. The clause is also explicit on the reasons for such notification being to benefit both the employee and employer. It states that such notification is "to enable the staff member and the organisation handle the transition smoothing."

The respondent admits that at the retreat held on 20th to 24th June 2016, only 3 days before the claimant was notified of the non-renewal of her contract, the respondent's Managing Director had assured all staff that there would be no job losses. Further, in May 2016, the respondent had approved training for the claimant that was to take place in July 2016, outside the term of her contract.

Further, in the letter dated 12th July 2020, the respondent states that the 3 months' salary offered to the claimant was pay for the period 1st July the 30th September 2016.

Had the respondent given the claimant notice of non-renewal of contract, the notice would have been effective from 1st April 2016 to 30th June 2016, the date of expiry of the contract. This therefore means that the assurance by the Managing Director and the approval of training were all within the last 3 months of the claimant's contract during which, had the notice of non-renewal been issue, the same would have been running.

In **Teresa Carlo case** [Supra], cited by the Respondent, the court held that:

"The burden of proof, in legitimate expectation claims, is always on the Employee. 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. The Employee must demonstrate some rational and objective reason, for her expectation. The representation underlying the expectation must be clear and unambiguous."

As was stated by the court in **Roberts M. Ndegwa v The Minister for Tourism [2012] eKLR** –

"It is this courts considered opinion that an appointment takes place in circumstances where the employee is entitled to the appointment by reason of the employer's conduct. In the instant case, the petitioner was entitled to deem the contract renewed in view of the circular, failure of the respondent to convey his refusal to renew and the entitlement to renew as per the terms of the contract. The court considers that in employment relationships there exist a reciprocal duty of cooperation and the employer must respect express provisions of the contract, the personal dignity of the employee and the legitimate expectation that consultative framework that underpin the relationship shall be respected."

Further in **Jayne Kanini Mwanza v National Water Conservation and Pipeline Corporation (2014) eKLR** the court stated –

"Simply put, the Respondent was under an obligation to communicate refusal to renew the contract the Claimant had with the Respondent before the expiry date. There is a plethora of case law that where there is legitimate expectation of renewal and there is no renewal such as in Ibis case, the non-renewal of the contract amounts to a dismissal."

Again in the case of **Caroline Muthoni Njoroge v LVCT Health [2019] eKLR**, this court held :-

"The claimant therefore had no reason to even suspect that her contract would not be renewed following the assurance by the Executive Director that no staff was going to be released.

I therefore find that there was reasonable expectation for renewal of the contract based on the conduct of the respondent and previous practice of the respondent."

Further in the case of **Ruth Gathoni Ngotho-Kariuki v PCEA and Another (2012) eKLR**, the court stated that: -

"In this case the Employer was obliged to give the Employee notice 3 months before the expiry of her fixed term contract, indicating whether her contract would be renewed or not...The Employer failed to do so and the court found that the employee was justified in legitimately expecting there would be renewal."

The court further stated –

"Similarly, in the present case the court finds that the claimant's contract of service was constructively renewed with effect from 01.04.2010. The claimant was entitled to be informed by the respondents the refusal to renew within the contractual three months before the lapsing of the expiring contract. By that conduct of the Respondents, the contract thereby was constructively renewed. The timelines in the contract for conveying the decision of refusal to renew created express trust, confidence and expectation that the Respondent's silence despite the claimant's inquiry that the contract had or would be renewed. The contract of employment was obviously one of the most important thing in the Claimants life. It was therefore important that the Respondents strictly comply with the contractual provision on the renewal failing which the claimant would be entitled to claim under the contract."

In the present case, I find that the claimant had legitimate expectation of renewal of her contract based on the fact that she was not served with a notice of non-renewal of contract, that she was authorised in May 2016, to attend training in Geneva in July 2016 which was outside the term of her contract that was in force at the time and on the assurances by the Managing Director during the retreat just a couple of days to the date of expiry of her contract, that there will be no job losses.

I however hasten to state that what was breached is not the claimant's contract but her legitimate expectation for renewal thereof. This is because the respondent did inform her of the intention not to renew the contract, albeit late.

In **Registered Trustees of the Presbyterian Church of East Africa & Another v Ruth Gathoni Ngotho- Kariuki [2017] eKLR**, the Court of Appeal held:

*“We concur with the trial Judge to the extent that as per the contract of service the appellants’ were required to inform the respondent of their intention of whether they would renew her contract 3 months prior to the expiry of the same. However, we respectfully disagree that the failure to do so amounted to an automatic renewal. Why do we say so? It is clear from the wording of the above clauses as well as the hospital’s human resource manual that the renewal was subject to the mutual consent of the respondent as the employee and the appellants’ as the employer. To hold otherwise would be tantamount to holding at servitude a party who wishes to exercise his/her right of termination in terms of the contract as observed by this Court in **Minnie Mbue vs. Jamii Bora Bank Limited [2017] eKLR**. Further, this Court in its own words in **Kenneth Karisa Kasemo vs. Kenya Bureau of Standards [2013] eKLR** held:*

“We have carefully considered the law and the facts surrounding this case, suffice to say that the law on employment does not normally envisage a situation where an employee is “forced” upon an employer (and vice versa) and case law is rife on this subject and indeed this Court has time without number honoured the contract existing between the parties.”

The fact that the respondent stated in the letter of 12th July 2016 that payments to the claimant were for salary for the period 1st July to 30th September 2016 made its situation worse as this implies the renewal of the contract for the said period. I however do not agree with the claimant's position that her contract was renewed. It is my view that what the respondent failed to do was give notice 3 months prior to the lapse of the contract.

In my view thereof, an award of 3 months' salary would be adequate compensation for breach of the claimant's valid and legitimate expectation of renewal of her contract. The prayer for 36 months' salary would therefore fail. So would the prayer for compensation equivalent to 12 months' salary for unfair termination. This is because in my view there was no unfair termination as the contract lapsed and there was no renewal thereof. As I have already set out above what the respondent breached was only the claimant's legitimate expectation that had arisen from the conduct of the respondent.

In the end I award the claimant 3 months' salary in the sum of Kshs.954,000. The respondent shall pay the claimant's costs of this suit and interest shall accrue from date of judgment.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3RD DAY OF JULY 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE