



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 232 OF 2016

(Consolidated with Cause No. 219, 338, 339 & 340 of 2016)

(Before Hon. Justice Hellen S. Wasilwa on 4th July, 2019)

CLEOPATRA KAMA MUGYENYI.....CLAIMANT

-VERSUS-

AIDSPAN.....RESPONDENT

JUDGEMENT

1. The Claimants filed suit seeking damages for failure by the Respondent to renew their contracts of service whereas they had legitimate expectation.

2. Their claims are as follows:-

1. Purity Wambui Munene

- **Employed - 1st July 2010 - 31st December 2011**
- **Renewed - January 2012 – December 2013**
- **Renewed - January 2014 - 31st December, 2015**
- **Salary - 715,000**

2. Cleopatra Kama Mugenyi

- **Employed - 2nd January, 2014 – 31st December 2015**
- **Salary - 664, 600**

3. Kelvin Kinyua

- **Employed - 1st July, 2010 - 31st December 2011**
- **Renewed - January 2012 – December 2013**
- **Renewed - January 2014 - 31st December, 2015**
- **Salary - 563,200**

4. Samuel Obara

- **Employed - 3rd March, 2014 – 31st December, 2015**

- *Salary* - *490,600*

5. *Illah Evance*

- *Employed* - *16th October, 2013 – 31st October, 2015*

- *Salary* - *490,600*

3. The Claimants aver that the respective contracts were renewable and as a result they had legitimate expectation that they would be renewed as they had previously done for Purity Wambui Munene and Kelvin Kinyua who in their view had performed exceptionally well to attract the said renewal.

4. That on 30th September, 2015, they received letters from the Respondent informing them that their contracts would not be renewed and would come to an end on 31st December, 2015 save for Illah Evance whose contract was to terminate on 31st October, 2015. They were sent letter on transitional mechanisms and handover on 1st December, 2015. They responded to the said letter and sought to know why they were not being given new contracts.

5. That on 11.12.2015 the Respondent wrote back claiming that the Claimants were refusing to hand over as instructed in earlier correspondence. On 18.12.2015, the Claimants wrote to the Respondents informing them that they had handed over as instructed.

6. On 21st December, 2015, the Claimants alleged that they did a follow up letter seeking to know why their contracts were not being renewed which letter has not been responded to. On the midnight of 31.12.2015, the Claimants were locked out of the Respondent's server denying them access to their email correspondence.

7. That despite refusing to renew the Claimants' contracts the Respondent continues to publish the Claimants on their official website as employees of the Respondent. That the action of failing to renew the contracts was discriminatory, unlawful, in bad faith and a breach of the contractual terms and legitimate expectation derived from the contract.

8. That as a result of the Respondent's actions the Claimants aver that they have suffered loss and damage and seek relief from the Respondent through the Court. They claim for pay in lieu of notice, gratuity and 12 months' salary as damages.

9. The Respondent in their respective Memorandum of Response state that the Claimants' employment was governed by their contracts of employment and other conditions of employment as spelled out in the Employer's Administration Manual, Finance Manual and Handbook.

10. That the Claimants voluntarily applied for positions within the organisation and terms of their employment were clearly set and they accepted that the contracts of employment were fixed term contracts for a period of 2 years. At the time of employment, no verbal or written agreements were given to the Claimants that their contracts would be renewed regularly. That automatic renewal of contracts is not a practice and norm of the Respondent.

11. That contract renewal is mutually agreeable, such is sealed with the signing of a contract renewal form. Neither mutual agreements were entered into nor was signing of contracts renewal done for the Claimants.

12. That at no time during the duration of the Claimants' employment were they promised renewal of contract by the former Executive Director as alleged by the Claimant and confirmation of renewals for senior staff are undertaken upon Board approval in accordance with Administration Manual 4.5.1. That with no such renewal invitations or board confirmation for the Claimants' employment, renewal was not done.

13. That all contracts of employees ending on 31st December, 2015 were not renewed and there was no legitimate expectation for renewal of contracts under the terms of the employment contract and in any event the claim for legitimate expectation has no basis in law.

14. That the Respondent issued the Claimants notices of end of contract and as such the Claims ought to be dismissed with costs.

15. Cleopatra Kama Mugenyi and Purity Wambui Munene gave evidence in the suit and reiterate the averments in their respective claims.

16. One Angela Kageni the Respondent's Regional Head of Africa Office gave evidence on its behalf.

Submissions

17. On behalf of the Claimants it is submitted that Section 41(1) of the Employment Act provides that before terminating employment the employer must explain to the employee in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or union to be present during the explanation.

18. Further that under Section 43 of Employment Act, the employer has the burden of proving and justifying the reasons for termination and Section 45 of the Employment Act requires that termination must be in accordance with fair procedure. That the Claimants contracts of employment were terminated unfairly and they urge the Court to so hold.

19. They cite the case of **Eunice Mwikali Munyao Vs Elys Chemical Industries Limited (2017)eKLR** where the Claimant was employed

on an annual fixed term contract renewable upon performance review. The Court cited with approval the case of **Dierks vs University of South Africa (1991) BLLR (LC)**, which clearly sets out the criteria for reasonable expectation for renewal of a fixed term contract. The Court held that the contract was renewed by the conduct of the parties and the Claimant's employment was unlawfully and unfairly terminated. The Claimants urge the Court to allow their respective claims.

20. The Respondent on the other hand submits that the contracts issued to the Claimants did not have a renewal clause and there was no obligation on the part of the Respondent to renew it. They cite the case of **Fatuma Abdi Vs Kenya School of Monetary Studies (2017) eKLR** where it was held:-

*“Therefore a fixed term contract of employment is a lawful mode of employment with a start date and an end date. In this case the Claimant made application for renewal of each contract and a new contract was issued for a fixed term. There was no time the Claimant worked without a written contract or went beyond any such written contract so as to create the expectation that even where a written contract was not issued, it would be renewed for another term. In the case of **Ruth Gathoni Ngotho Kariuki Vs the Presbyterian Church of East Africa & Another** it was a term of the contract that before the lapse of its term either party could give 3 months' notice for renewal. Unlike in the present case where renewal was not automatic, the case for Ruth Gathoni the employer failed to issue the due notice creating a legitimate expectation to her that the contract would be renewed upon lapse of its term.”*

21. It is further submitted that the Claimants were not entitled to renewals of their contracts or reasons for non-renewal and cite the case of **Rajab Barasa & 4 Others Vs Kenya Meat Commission (2016) eKLR** where it was held that a fixed term contract will not be renewed automatically, even when there exists a clause, the Court held that the expectation of the employees that their fixed term contracts would be renewed, had no basis as there was no express, clear and unambiguous promise given by the Employer on renewal. The employer retains the discretion, even where there is a clause allowing for renewal.

22. That it is trite law that damages are not awarded for breach of contract. Moreover, an employee whose fixed term contract is terminated prematurely cannot be granted damages equivalent to the unserved term of the contract for unfair or unjustified termination of the contract.

23. That the Claimants have not established that they are entitled to the maximum award of damages and the same should not be allowed. That the Claimants were paid their final dues upon effluxion of time of their contracts of employment and are therefore not entitled to any further payments under this head. They urge the Court to dismiss the Claim with costs.

24. I have examined all the evidence and submissions of the Parties. The main contention by the Claimants is that the Respondent refused to renew their contract despite their legitimate expectation that renewal would be done.

25. It is imperative to note that the Claimants were on fixed term contract, which came to term. As opined by my learned colleague in **Fatuma Abdi vs Kenya School of Monetary Studies (2017) eKLR** above and in **Rajab Barasa & 4 others vs Kenya Meat Commission (2016) eKLR**, a fixed term contract cannot be renewed automatically. There must have been an indication by act or omission from the employer to indicate renewal was forthcoming to wet the Claimants appetite that their contracts would be renewed and hence submit legitimate expectation.

26. There is however, no indication that the Claimants were given any such hopes. It is therefore my finding that Claimants' contracts ended upon expiry of time and Respondents were not in any way to blame for not renewing their contract.

27. On issue of gratuity, Section 35(6) of Employment Act 2007 states that this is not payable for employees who are members of NSSF for which the Claimants were. This prayer is therefore not warranted.

28. The only prayer I grant the Claimants is their prayer for issuance of a Certificate of Service.

29. Each Party to bear its own costs.

Dated and delivered in open Court this 4th day of July, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Masinde holding brief Mungai for Claimants – Present

Respondent – Absent