



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE 2288 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**CAROLINE MUTHONI NJOROGE.....CLAIMANT**

*VERSUS*

**LVCT HEALTH.....RESPONDENT**

**JUDGMENT**

Vide her statement of claim dated 16<sup>th</sup> December 2014 and filed in Court on 23<sup>rd</sup> December, 2014, the claimant avers that her employment was unprocedurally, illegally and unconstitutionally terminated by the respondent herein.

Her case is that she was employed by the respondent on or about April 2005 on contractual basis for a renewable term of two (2) years. Her last contract commenced on 1<sup>st</sup> October 2012 and her last salary was Kshs.288,000/-.

The Claimant avers that she worked diligently and to the Respondent's satisfaction during the entire period of her contract. That upon expiry of the last contract the Respondent asked her to continue performing her duties which to her implied that the contract would be renewed. The Claimant further averred that relying on the Respondent's promise of renewal of her contract she turned away alternative employment.

The Claimant contends that on 24<sup>th</sup> November 2014 she was issued with a letter of termination by the Respondent's Executive Director and offered one month's salary in lieu of notice, pay for days worked in October and November 2014, outstanding leave and ex gratia payment of 2 months' salary. The Claimant contends that the termination was unfair as no reason was given for the same contrary to the provisions in the Respondent's Human Resource Manual, 2012 and the Employment Act, 2007.

Aggrieved by the Respondent's decision to terminate her services the Claimant filed the instant Claim seeking the following reliefs:

- a) The Respondent be ordered to pay the Claimant the full entitlement of the balance of her two year contract as compensation for breach of contract.
- b) Damages for illegal termination.
- c) Damages for discriminatory termination.
- d) Any other appropriate relief as the Court may deem fit to grant.
- e) The Respondent meet the costs of this cause.

In its response to the claim dated 13<sup>th</sup> February 2015 and filed in Court on 17<sup>th</sup> February 2015 the respondent admits having engaged the Claimant on contractual basis. The respondent avers that the contracts were renewable on the basis of availability of funds from donors.

The Respondent further avers that the Claimant did serve the full term of her contract and that at the time of separation she was paid her terminal dues, which she duly accepted, comprising of the following:

- i. Payment for November 2014 salary    Kshs.288,829/=

ii. Payment in lieu of 1 month notice      Kshs.288,829/=

iii. Ex gratia pay (good will)                      Kshs.577,658/=

**Total**    **Kshs.951,757/=**

The Respondent denies that the Claimant's contract was renewed by implication. It avers that there was no assurance from it whether express or implied to renew the contract of the claimant. It contended that the Claimant was among 44 of its employees who were informed of the non-renewal of their contracts due to lack of donor funding at the Annual Staff Meeting. It supported this averment with various emails between the Respondent and affected employees. It contended that she was not dismissed as alleged but rather she served the full term of her contract. That as such the issue of damages for discriminatory termination does not arise. It is on this basis that the Respondent contends that the Claimant is not entitled to any reliefs as sought in her Memorandum of Claim and urges the Court to dismiss the same with costs to the Respondent.

### **Claimant's Case**

In her evidence the Claimant reiterated the averments in her Memorandum of Claim. She testified that she was engaged by the Respondent on contractual basis with her last contract commencing on 1<sup>st</sup> October, 2012 and ending on 30<sup>th</sup> September, 2014. She further averred that all her previous contracts with the Respondent were renewed upon expiry long after the expiry date.

She testified that upon expiry of the last contract she continued to perform her duties in October and November 2014 in the absence of any renewal from the Respondent. Further that on 24<sup>th</sup> November 2011 she received a letter of non-renewal of contract from her supervisor.

She testified that upon expiry of her contract she continued working for the Respondent in the belief that her contract would be renewed just as all her previous contracts had been renewed. She insisted that the Respondent assured her of a renewal for another 2 years only for her to receive a notice of non-renewal without any prior communication.

The claimant confirmed having received a cheque of Kshs.951,757/- from the Respondent as payment of terminal dues. She also confirmed having been issued with a certificate of service and a recommendation by the Respondent at the time of separation. She averred that the letter of recommendation was later cancelled rendering her destitute. She testified that the Respondent later advertised her position and the same was filled by someone else. That no reasons were given to her.

She prayed for damages for discrimination because she noted that she was the only employee of the Respondent whose contract was not renewed. She urged the Court to allow her Memorandum of Claim as prayed.

On cross-examination, the claimant stated that she had not availed any evidence to prove that her position was advertised. She confirmed having received her terminal dues from the Respondent at the time of separation.

She further testified that the Respondent's Human Resource Manual provided for non-renewal of contracts and that her contract did expire on 30<sup>th</sup> September 2014 and the same was not renewed.

GRACE KAOME MUKASA, RW1 who is the Human Resource and Administration Manager of the Respondent, adopted her witness statement dated 21<sup>st</sup> January 2019 and filed on 25<sup>th</sup> January 2019 as her evidence in chief. In the statement, RW1 confirmed that the Claimant had a 2 year contract with the Respondent effective from 1<sup>st</sup> October 2012 to 30<sup>th</sup> September 2014 and that the same was not renewed upon expiry.

RW1 further testified that the Claimant was duly paid her terminal dues at the time of her separation with the Respondent. She testified that there was no communication between the Respondent and the Claimant either express or implied that her contract was going to be renewed.

RW1 insisted that the Claimant is not entitled to any of the reliefs sought in her Memorandum of Claim, her contract having expired and having been paid all her terminal dues at the time of separation. RW1 urged the Court to dismiss the Claimant's Memorandum of Claim with costs to the Respondent.

On cross-examination RW1 stated that when a contract expires and an employee continues working as was the case with the Claimant, such an employee is paid for services rendered to the company. She insisted that the Claimant was not issued with another contract upon expiry of her last contract.

RW1 further testified that the Respondent's staff was reduced in the year 2014 when a total of 45 employees including the Claimant herein whose contracts expired were not renewed and therefore the issue of discrimination does not arise.

### **Submissions by the Claimant**

It is submitted on behalf of the Claimant that the Respondent renewed her contract by implication by asking her to continue performing her duties and paying for the services rendered for the month of October and November 2014. That the respondent also renewed the Claimant's medical cover.

The Claimant relied the Authority of ***Industrial Court of Kenya at Nairobi Cause No. 74 of 2015 Eunice Mwikali Munyao Vs Elys Chemical Industries Ltd*** where the Court held:

*“The only logical conclusion therefore is that the Claimant’s contract, having expired on 18<sup>th</sup> April 2014 was renewed on similar terms, by conduct of the parties. It follows therefore that at the time the Claimant’s employment was terminated, she had served only two months of her contract which was to run from 19<sup>th</sup> April, 2014 until 18<sup>th</sup> March, 2015. In the absence of any reason for premature termination of this contract, the Court finds that the Claimant’s employment was unlawfully terminated and she is entitled to compensation.”*

To further buttress this argument the Claimant further relied on the cases of **Shashikant Chandubhai Patel Vs Oriental Commercial Bank Ltd (2014) eKLR** and **Lucia Muthoni Meria Vs Academic Services Ltd (2015) eKLR**. She therefore urged the court to allow her Claim as prayed.

It is further submitted that the Respondent breached the terms of her contract which had been renewed by implication. It is on this basis that the Claimant contends that her termination was illegal and discriminatory.

In conclusion, the Claimant submitted that she is entitled to the reliefs as sought in her Memorandum of Claim and urged the Court to allow the same as prayed.

### **Respondent’s Submissions**

The Respondent on its part submitted that the Claimant has failed to prove by way of evidence that the termination letter issued to her had no reason for non-renewal of her contract as she failed to produce the said letter as evidence in this matter. The Respondent cited and relied on Sections 62 and 64 of the Evidence Act.

On the issue of renewal of a contract by implication, the Respondent submitted that the same has no legal basis in Kenya. It is further submitted that the Claimant’s contract was a fixed term contract and that the same expired. The Respondent further contended that the principle of legitimate expectation does not apply in fixed term contracts and that non-renewal of fixed term contracts does not constitute unfair termination or dismissal.

The Respondent submitted that it did inform the Claimant in its Annual Staff Meeting as well as vide its letter of non-renewal of the fact that her contract would not be renewed upon its expiry. The Respondent confirmed having paid the Claimant terminal dues at the time of separation being payment of one month’s salary in lieu of notice, payment for November 2014 salary and Ex-gratia pay. Further that this amount was agreed between the parties.

It was on this basis that the Respondent submitted that the decision not to renew the Claimant’s contract was lawful and justified. To buttress this position the Respondent relied on the case of **Stephen M. Kitheka Vs Kevita International Limited (2018) eKLR** where the Court held:

*“The Claimant having been on a fixed term contract with an ascertained date of expiry is not entitled to notice of termination. He is further not entitled to salary for February, 2013 as he did not work, or to compensation as his employment was not terminated unfairly...”*

The Respondent further relied on the Court’s findings in the matter of **Margaret A. Ochieng Vs National Water Conversation and Pipeline Corporation (2014) eKLR**.

The Respondent further submitted that in the absence of a valid contract between itself and the Claimant the issue of illegality and discrimination do not arise. The Respondent further submitted that the Claimant failed to provide evidence of discrimination as pleaded as the contracts of a total of 45 employees were not renewed.

The Respondent urged the Court to dismiss the entire claim on grounds that the Claimant’s contract terminated by effluxion of time and the Claimant was duly paid all her dues at the time of separation. To buttress this argument the Respondent relied on the provision of Section 18(5) of the Employment Act, 2007. The Respondent further prayed that it be awarded costs of this suit.

### **Analysis and Determination**

Having considered the facts of this cause, evidence, submissions and authorities cited by the parties, there is no dispute that the Claimant was engaged by the Respondent on successive fixed term contracts of two (2) years from April 2005 with the last contract covering the period 1<sup>st</sup> October 2012 to 30<sup>th</sup> September 2014. It is further not in dispute that the Claimant’s last contract was terminated by a letter dated 24<sup>th</sup> November 2014, which was served after the expiry of the Claimant’s fixed term contract had expired. The Issues for determination therefore are:

1. Whether the Claimant’s employment contract was renewed after expiry of the fixed term contract.
2. Whether the termination of the Claimant was unfair.
3. Whether the Claimant is entitled to the reliefs sought.

### **Whether the Claimant’s fixed term contract was renewed**

The Claimant submitted that upon expiry of her employment contract she was informed by the Respondent to continue working giving her an

implied indication that her contract would be renewed as was the case with her previous contracts. She further contended that on this basis she did not look for alternative employment with the belief that the Respondent would issue her with another two (2) year contract. The Claimant further contends that the letter of non-renewal of contract dated 24<sup>th</sup> November 2014 was a breach of the contract that had been renewed by implication.

The Respondent on the other hand submitted that the Claimant's contract was a fixed term contract with its commencement date and expiry date clearly stipulated. It is further submitted that the doctrine of legitimate expectation does not arise in renewal of a fixed term contracts and that its non-renewal does not constitute unfair termination or dismissal.

It is not in contest that the Claimant served on successive fixed term contracts up to 30<sup>th</sup> September 2014. The letter of non-renewal of contract was not produced by either party. The legal position on fixed term contracts is as was stated by Mbaru J. in the case of **Samuel Chacha Mwita v Kenya Medical Research Institute [2014] eKLR** that:

*“Fixed term employment contract, is for example, entered into for a period of six months with a contractual stipulation that the contract will automatically terminate on the expiry date, the fixed term contract will naturally terminate on such expiry date, and the termination thereof will not (necessarily) constitute a dismissal, as the termination thereof has not been occasioned by an act of the employer. In other words, the proximate cause of the termination of employment is not an act by the employer. There is a definite start and a definite end. Thus, the contract terminates automatically when the termination date arrives; otherwise, it is no longer a fixed term contract.”*

Fixed term contracts cannot be automatically renewed. A new contract has to be issued at the expiry of the same. In the case of **Rajab Barasa & 4 Others v. Kenya Meat Commission 2016] eKLR**, it was held that –

*“A fixed term contract will not be renewed automatically even when there exists a clause allowing for such renewal.”*

However the position in the present case is that the contract lapsed on 30<sup>th</sup> September 2014 but the claimant was asked to hold over until 24<sup>th</sup> November 2014 when she was issued with a non-renewal notice. The respondent has not denied that it asked the claimant to continue working after her contract expired. It has not stated the manner in which this was communicated to controvert the claimant's averment that she was made to understand that the contract would be renewed thus giving her a legitimate expectation of renewal of the contract.

As demonstrated by the claimant, her previous contracts had been renewed long after the date of expiry thereof. She gave examples of her contract for the period ending 30<sup>th</sup> September 2008 which was renewed on 25<sup>th</sup> May 2009, her contract ending on 30<sup>th</sup> September 2010 which was renewed on 25<sup>th</sup> October 2010 and her contract ending on 30<sup>th</sup> September 2012 which was renewed on 10<sup>th</sup> October 2012. Unless the respondent can prove that there was express communication of non-renewal of the contract prior to the termination thereof which it has not done had claimant had legitimate expectation of renewal of her contract.

Further in the communication to staff from the Executive Director, Dr. Wanjiru dated 8<sup>th</sup> September 2014, she stated as follows –

*“I know that the question of job security has been in the air and some of you have asked me about this. I have said, since the last staff rationalization process, that we have no planned deliberate staff release process.”*

The claimant therefore had no reason to even suspect that her contract would be not 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 contract based on the conduct of the respondent and previous practice of the respondent.

As provided in Section 45(5)(d) in deciding whether it was just and equitable for an employer to terminate the employment of an employee, the court shall consider –

**“(d) the previous conduct of the employer in dealing with the type of circumstances which led to the termination, ...”**

I find that under the circumstance the claimant had legitimate expectation of renewal of her contract for a further term of 2 years.

The respondent raised the issue of production of the letter of non-renewal of the contract citing Sections 62 and 64 of the Evidence Act. These are not applicable in employment contracts. Section 10(7) of the Act, expressly shifts the burden of proof to the employer in respect of production of employment records. The Section provides as follows –

**(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.**

Based on the provisions of Section 10(7) of the Employment Act, the court notes that the respondent did not produce the Human Resource Manual, which is expressed in the claimant's contract to contain the applicable terms and conditions of her employment.

## **Remedies**

The claimant prayed for payment of the balance of her two year contract as compensation for breach. I think this would not be conscionable. Section 49(4)(l) of the Employment Act requires that an employee mitigates the losses of termination. I would therefore decline this prayer.

The claimant further prayed for damages for illegal termination. Under Section 49(4) of the Employment Act, the court is enjoined to consider the among other factors –

- (a) the wishes of the employee;**
- (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and**
- (c) the practicability of recommending reinstatement or re-engagement;**
- (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;**
- (e) the employee's length of service with the employer;**
- (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;**
- (g) the opportunities available to the employee for securing comparable or suitable employment with another employer;**
- (h) the value of any severance payable by law;**
- (i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;**
- (j) any expenses reasonably incurred by the employee as a consequence of the termination;**
- (k) any conduct of the employee which to any extent caused or contributed to the termination;**
- (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.**

Taking into account all these factors including the legitimate expectation of the claimant, the length of service of 10 years, her evidence that she turned down other opportunities for employment due to her legitimate expectation of renewal of her employment contract, it is my view that compensation equivalent to 7 months' salary is reasonable and I award the claimant the same in the sum of Kshs.2,016,000 based on her last salary of Kshs.288,000.

The prayer for damages for discrimination is dismissed as the claimant did not adduce sufficient evidence to prove the same.

#### **Orders**

In the final analysis, I find the termination of the claimant's employment unfair as it was contrary to her legitimate expectation of renewal based on respondent's conduct and award her Kshs.2,016,000/= as compensation.

The respondent shall further pay the claimant's costs of this suit. Decretal sum shall attract interest at court rates from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11<sup>TH</sup> DAY OF OCTOBER 2019**

**MAUREEN ONYANGO**

**JUDGE**