



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 430 OF 2017

CLATUS ODHIAMBO MACOWENGA.....CLAIMANT

VERSUS

THE PRINCIPAL SECRETARY

MINISTRY OF TRANSPORT AND INFRASTRUCTURE....1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 6th December, 2019)

JUDGMENT

The claimant filed the statement of claim on 03.03.2017 through Omulele & Tolo Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the respondent's decision was not based on the evidence before it and the same was done in a gross violation of the law, in a discriminatory manner and in violation of the fundamental rights of the claimant and hence unfair, wrongful, and unlawful.
- b) That the Honourable Court be pleased to order that the letter dated 24.03.2016 be expunged from government records.
- c) Aggravated and exemplary damages for breach and violation of fundamental rights of the claimant.
- d) 12 months compensation for the duration of the contract in the sum of Kshs.2, 636, 400.00.
- e) Damages for loss of legitimate and as a consequence thereof, 3 years contract sum totalling to the sum of Kshs.7, 909, 200.00.
- f) Costs of the suit from the date of filing.
- g) Interest on (d), (e) and (f) above as the Court deems fit.
- h) Certificate of service.
- i) Any other relief as the Court may deem fit and just to grant.

The respondents filed the response to claim on 07.12.2017 through learned Litigation Counsel Leah Odhiambo for the Hon. Attorney General. The respondents prayed that the claimant's suit be dismissed with costs.

The undisputed facts in the case are as follows. The claimant was appointed by the 2nd respondent to serve in the 1st respondent's Ministry in the position of Aircraft Accident Investigator in-Chief (Technical) Job Group S. The appointment was effective 11.02.2010 for a term of 3 years renewable. The claimant served successfully and the contract lapsed on 10.02.2013. The contract was renewed by the 2nd respondent's letter dated 13.02.2013 for a further term of 3 years under the same terms of service. The contract as renewed was lapsing on 10.02.2016. The claimant served and 10.02.2016 came and went.

The **1st issue** for determination is whether the claimant continued to work after 10.02.2016 and without the contract having been expressly renewed or the claimant reappointed. A consent order was recorded at the hearing thus, **“The only issue of fact in dispute is whether the claimant worked after 10.02.2016 to 26.03.2016 and by consent other facts not being in dispute evidence to be moved on only that single fact in dispute.”** The claimant testified and the respondent’s witness (RW) was Kennedy Sakwa, Deputy Director for human resource.

The claimant testified that the contract was lapsing on 10.02.2016 and thereafter he remained in employment because he did not handover his work to another person. He stated that he was in office on a daily basis until he received the letter dated 24.03.2016 communicating the decision not to renew the contract. The claimant testified that he received the letter after 24.03.2016 and on a date he did not recall. He stated that he was called from office and given the letter by a personnel officer. The letter of 24.03.2016 required him to complete certain documents and it was the official communication to handover the office. He then complied and left but he had been paid up to 10.02.2016.

In cross-examination the claimant testified that his work entailed making of reports and between 10.02.2016 to 24.03.2016 he did not recall any investigation and report he prepared during that period. Further he stated that after the contract lapsed, he was not informed of any other engagement. He admitted that for the period 10.02.2016 to 24.03.2016 he had not filed any document to show that he worked. He admitted that he submitted all the work related reports by 10.02.2016.

RW testified that the claimant applied for renewal of the contract per the renewal clause 2 of the contract which provided, **“At some point not more than six months and not less than four months before the date on which his/her residual service under this agreement terminates, the person engaged shall give notice in writing to the Government whether he desires to remain in its employment and if he so desires the Government shall thereupon decide whether it will offer him further employment in which case the reengagement shall be on such terms as may be mutually agreed.”** RW testified that the claimant had applied for renewal by his letter dated 30.09.2015 and by his further letter dated 24.11.2015. The 1st respondent forwarded the claimant’s request for consideration by the 2nd respondent and the 2nd respondent decided that the contract would not be renewed on account of certain reports about the claimant’s previous performance and service. The 2nd respondent’s letter denying renewal was dated 09.03.2016. By the letter dated 08.06.2016 the 2nd respondent upheld the decision not to renew the contract. The respondents have exhibited reprimands issued against the claimant and requiring him to be vigilant in his resolve and undertakings to succeed in his work performance. The respondents have also exhibited evidence about the claimant’s doubtful postgraduate certificates and which are exhibited. RW testified that the letter of 24.03.2015 communicated the non-renewal of the contract as had been determined by the 2nd respondent.

The Court has considered the evidence on record. By his own evidence the claimant has failed to show that he worked after the contract lapsed on 10.02.2016; he confirmed he was not assigned duty and further confirmed that he did not thereafter carry out his duty of investigation and reporting accordingly. The Court returns that the claimant did not work after the contract lapsed on 10.02.2016.

To answer the **2nd issue** for determination the Court returns that the claimant’s contract of service lapsed by effluxion of time on 10.02.2016 and the claimant enjoyed no legitimate expectation for renewal. The claimant applied for reappointment or renewal of the contract per clause 2 but as submitted for the respondents and testified by RW, if no response was given like in the instant case, the renewal was deemed not granted. Clause 2 was clear that once the claimant applied, the respondents had the unchained discretion to renew or not to renew. The mere fact of the claimant applying for renewal did not amount to an expectation for such renewal because the clause gave the respondents an unchained discretion to decide on the application for renewal. The claimant has lamented that the alleged unsatisfactory performance and issue of doubtful certificates ought to have been subjected to due process. However, the Court returns that reprimands were sufficient and further the wide discretion not to renew the contract allowed the respondents to deny renewal without assigning a reason – and the Court cannot rewrite the contract. Thus the Court considers that after the reprimands or warnings about performance while the contract subsisted and the claimant having not appealed or objected, there was nothing left of a disciplinary process to be undertaken in that regard. Further, the issue of doubtful postgraduate certificates had been conclusively handled by the claimant’s previous employer. Thus it cannot be said that the termination of the contract by lapsing of the contractual term was thereby vitiated or impaired by the respondents’ failure to offer reasons for declining the renewal. In the circumstances there was no unfair termination because in any event, denial of the renewal did not amount to termination of a contract of service between the parties – the contract of service having lapsed by effluxion of time on 10.02.2016. The Court finds that there was no unfair termination of the contract of service as was alleged for the claimant and the prayer for compensation will collapse.

To answer the **3rd issue** for determination the Court returns that the contract having lapsed by effluxion of time, the claimant has failed to justify the basis for the claims and remedies as prayed for. They will fail. The Court has considered that the claimant applied on time for the renewal but the respondents replied belatedly that the renewal had been declined. Thus, the Court returns that each party shall bear own costs of the suit.

In conclusion, judgment is hereby entered for the respondents against the claimant for dismissal of the suit with orders each party to bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday, 6th December, 2019.

BYRAM ONGAYA

JUDGE