



REPUBLIC OF KENYA



**KENYA LAW**  
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**Miyawa & 7 others v Judicial Service Commission (Petition 29 of 2016)  
[2017] KEELRC 1735 (KLR) (24 February 2017) (Judgment)**

*Maxwell Miyawa & 7 others v Judicial Service Commission [2017] eKLR*

Neutral citation: [2017] KEELRC 1735 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
PETITION 29 OF 2016  
S RADIDO, J  
FEBRUARY 24, 2017**

**BETWEEN**

**MAXWELL MIYAWA ..... 1<sup>ST</sup> PETITIONER  
RHODA RUTTO ..... 2<sup>ND</sup> PETITIONER  
EMILY MUKAMI ..... 3<sup>RD</sup> PETITIONER  
PATRICK MARTIN OKANGO ..... 4<sup>TH</sup> PETITIONER  
STEPHEN ANDITI ..... 5<sup>TH</sup> PETITIONER  
EMILY KINAMA ..... 6<sup>TH</sup> PETITIONER  
PRISCA MURIUKI ..... 7<sup>TH</sup> PETITIONER  
LOISE WANGECI ..... 8<sup>TH</sup> PETITIONER**

**AND**

**THE JUDICIAL SERVICE COMMISSION ..... RESPONDENT**

**JUDGMENT**

1. The 1<sup>st</sup> to 6<sup>th</sup> Petitioners were severally offered 3 year renewable contracts by the Judicial Service Commission (Respondent) on 22 November 2012 as Law Clerks while the 7<sup>th</sup> and 8<sup>th</sup> Petitioners had been offered open ended contracts on 13 June 2012 as Legal Researchers. The Petitioners were deployed to the Supreme Court of Kenya.
2. On 17 June 2013, the Respondent met and resolved that the Legal Researchers including the 7<sup>th</sup> and 8<sup>th</sup> Petitioners be re-designated as Law Clerks under new terms and conditions of service. This was prompted by appraisals by judges of the Supreme Court under whom they served.



3. Consequently, the Chief Registrar wrote to the 7<sup>th</sup> and 8<sup>th</sup> Petitioners on 6 August 2013 informing them of the re-designation and new terms and conditions of service (1<sup>st</sup> Variation). The new terms included converting the 7<sup>th</sup> and 8<sup>th</sup> Petitioners open ended contracts into contracts of definite duration (3 years) inclusive of the period already served as Legal Researchers, and improved remuneration for each of the Petitioners. The Petitioners accepted the varied contracts and in effect the contracts expired around July 2015 for 7<sup>th</sup> and 8<sup>th</sup> Petitioners, while the contracts for the 1<sup>st</sup> to 6<sup>th</sup> Petitioners expired around December 2015.
4. On 14 December 2015, the Respondent severally wrote to the Petitioners informing them that their contracts were being extended up to 31 March 2016 (1<sup>st</sup> Extension) in order to ensure availability of the research service to the Judges, and to enable deliberations on long term contracts.
5. The Respondent eventually met on 12 January 2016 and resolved that the terms and conditions of service upon which the Petitioners were serving be revised. Among the new terms was a variation of certain benefits and remuneration downwards and fixing of the tenure of the contract to 2 years non-renewable.
6. The Respondent informed the Petitioners of variations through letters dated 20 April 2016 (2<sup>nd</sup> Variation).
7. When alerted about the revised terms of service, the Petitioners wrote to the Respondent on 3 May 2016 expressing dismay at the extension of the contracts and unilateral variation of the other terms and conditions.
8. The Petitioners asserted in the letter that they were entitled to renewal of the contracts on similar terms and conditions as the expired contracts and therefore the unilateral variations were unlawful, unconstitutional (breached right to fair administrative action and fair labour practices) and therefore constituted demotion and/or constructive dismissal.
9. The Petitioners also requested the Respondent to afford them an opportunity to be heard and to be furnished with reasons for the unilateral variations.
10. Despite the misgivings, the Petitioners appended their signatures to the revised contracts separately from 27 April 2016 to 6 May 2016 and were issued with formal letters of appointments dated 28 June 2016 which they also signed.
11. On 15 August 2016, the Petitioners moved Court alleging that the actions of the Respondent to revise the terms and conditions of service were unconstitutional (violation of rights to dignity, fair administrative action, fair labour practices, legitimate expectation and contrary to the national principles and values. The Petitioners also alleged that they were coerced to accept the revised terms and conditions of service.
12. The Petitioners at the same time filed a motion under certificate of urgency seeking
  1. ....
  2. That pending the hearing of this application inter partes, a conservatory order be issued that the Petitioners whose retention in the employment of the Respondent is not in dispute by virtue of the clear offer and clear acceptance of such retention be so retained in the service of the Respondent under their terms of remuneration subsisting and in effect as at 30.06.16.
  3. That upon inter partes hearing and pending the hearing and determination of the substantive petition herein a conservatory order be issued that the Petitioners whose retention in the



employment of the Respondent is not in dispute by virtue of the clear offer and clear acceptance of such retention be so retained in the service of the Respondent under their terms of remuneration subsisting and in effect as at 30.06.16.

4. That the costs of this application be provided for.
13. When the motion was placed before Court ex parte on 15 August 2016, the Court certified it as urgent and also allowed proposed order 2 thereof with a return date of 13 September 2016.
14. Despite service, the Respondent was not represented on 13 September 2016 and after hearing brief oral submissions from Mr. Ongoya for the Petitioners, the Court granted order 3 as proposed in the motion.
15. On 13 October 2016, the Court gave directions as to the hearing of the Petition after addresses from legal counsel for the parties.
16. In this respect, the Respondent filed a replying affidavit on 13 October 2016 sworn by its Secretary.

#### **Petitioners' case(s)**

17. The Petitioners contend that the 2<sup>nd</sup> Variation(s) violated their rights to fair labour practices, fair administrative action, equal treatment of the law and legitimate expectation because of the variations were unilateral. The variations included contractual duration of 2 years non-renewable, reduction of salaries to Kshs 123,750/- from Kshs 210,000/- (entry/basic salary) and medical benefits.
18. The 7<sup>th</sup> and 8<sup>th</sup> Petitioners on the other hand further assert that that the 1<sup>st</sup> Variation(s) of their contracts from open ended contracts to fixed term contracts which were made unilaterally violated their rights to fair labour practices, fair administrative action, equal treatment of the law and legitimate expectation(s).

#### **Respondent's case**

19. The Respondent's case is contained in a replying affidavit filed in Court on 13 October 2016 and sworn by its Secretary.
20. It was asserted therein that the 1<sup>st</sup> to 6<sup>th</sup> Petitioners were offered 3 years renewable contracts and that renewable was not automatic but subject to satisfactory performance.
21. In respect of the 7<sup>th</sup> and 8<sup>th</sup> Petitioners, it was asserted that they were initially on probationary and not open ended contracts, and which contracts were varied around 6 August 2013, variations which these 2 Petitioners willingly accepted.
22. The Respondent admitted that an employer could not unilateral vary an employment contract but in case of such unilateral variation, the same would amount to constructive dismissal and the employee had two options, accept the varied contract or treat the contract as terminated and sue for constructive dismissal.
23. In the view of the Respondent, the Petitioners acquiesced to the variations if any and waived the right to claim unfair termination.
24. The Respondent denied that the contracts carried any expectation of renewal.
25. The Respondent also contended that the Petition was presented as a representative suit without conforming to applicable procedures or authority.



26. The Petitioners filed their submissions on 8 November 2016 while the Respondent's submissions which ought to have been filed by 25 November 2016 were only filed on 25 January 2017.
27. The Court has given due consideration to the material placed before and has extracted the issues as arising for determination from the written submissions as, locus of the Petitioners, whether the Petition raised/disclosed constitutional dispute(s) or issues, whether the Respondent violated the Petitioners right to fair administrative action, whether the Respondent violated the Petitioners right to fair labour practices, whether the Respondent violated the Petitioners right to equal treatment and whether the Respondent violated the Petitioners right to legitimate expectation.

### **Locus**

28. The Respondent, in the replying affidavit and written submissions contended that the Petitioners filed the Petition as a representative suit without evidence that the 1<sup>st</sup> Petitioner had the authority of the other Petitioners and therefore the Petition was irredeemably defective. Article 22(2) of the Constitution and paragraph 6 of the supporting affidavit were cited.
29. However, a perusal of the Petition does not reflect the submissions by the Respondent. All the Petitioners presented a joint Petition in their individual capacities and not on behalf of any other person(s). Such a step is contemplated under Article 22(1).

Whether the Petition raised/disclosed constitutional dispute(s) or issues.

30. The Respondent went to some length in its submissions to advance the position that the dispute(s) presented in the Petition revolved around private law rights and interests and therefore the Petitioners should have approached the Court in the ordinary way.
31. However, in the view of the Court, that determination whether an ordinary suit should have been the proper mode in the circumstances presented here cannot be made at the preliminary stage and in any case, a positive answer to any of the substantive issues posed by the Petitioners will dispose of the objection raised by the Respondent that the Petition as presented did not raise any constitutional issue/dispute.
32. Before examining the substance of the parties' cases and submissions, the Court has formed the view that it is imperative to outline the law on variation of employment contracts as it is possible that a verdict may be returned without reaching the constitutional issues posed.

The law on variation of employment contracts

The common law

33. A long chain of authorities on the common law suggest that for a variation of an employment contract to be lawful, there should be mutual agreement between the employer and the employee (or their representatives where there is organised labour).
34. The authorities also envisage that an employee's consent to the variation may be express or implied and can be inferred from conduct such as by remaining at work after revised terms have been imposed (see *Harlow v Artemis Ltd* (2008) IRLR 629; *Wandsworth B.C. v D'Silva* (1998) IRLR 193 and *Airlie v City of Edinburgh* (1996) IRLR 516).
35. The authorities further show that a unilateral variation of an employment contract without consent of the employee would amount to breach of contract or repudiation (*Rigby v Ferodo Ltd* (1987) IRLR 516, *Security and Facilities Division v Hayes* (2001) IRLR 81 and where the employee accepts the repudiation that would amount to constructive dismissal.



36. And as to the options available to the employee, the Employment Appeal Tribunal (UK) held in *Hogg v Dover College* (1990) ICR 39 that where an employer fundamentally varies a contract and the employee continues to serve, the employee may be taken to be serving a fresh contract and it is open to such an employee to bring an action for breach of contract in respect to the earlier contract while serving the new contract (see also *Alcan Extrusions v Yates & others* (1996) IRLR 327.

#### Statutory law

37. The principal legal architectural framework for employment contracts in Kenya is the Employment Act, 2007. This Act has fundamentally shifted the parameters within which the employment relationship is based.
38. It has codified some of the common law principles and outlined new protective rights particularly to employees.
39. Although predating the Constitution, 2010, the declared purpose of the Act was to assert and define the fundamental rights and basic conditions of service of employees and therefore in a certain respect, it sets out the contours of the right to fair labour practices envisaged under Article 41 of the Constitution.
40. Part III of the Employment Act, 2007 has tried to provide for the essentials (essentialia) of an employment contract and of particular interest in the instant case are section 10(2) which provide
- A written contract of service shall state—
- (a) the name, age, permanent address and sex of the employee;
  - (b) the name of the employer;
  - (c) the job description of the employment;
  - (d) the date of commencement of the employment;
  - (e) the form and duration of the contract;

41. And section 10(5) which is to the effect that

Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.

42. The Employment Act, 2007 appears to contemplate consultations between an employer and employee where the essential of an employment contract are being altered.
43. The essentialia of a contract in this respect would include duration of contract, job description, identity of the employer, place and hours of work and remuneration among others.

#### Constitution

41. The cornerstone or fulcrum upon which the employment relationship turns in this country has been set out in Article 41 of the Constitution and it is not lawful labour practices or legal labour practices. It is fair labour practices.
45. Fair labour practice has not been defined expressly either in the Constitution or statute.
46. In such a case, in my view, it is the responsibility of Parliament to give the right content in the first instance and failing that, it is for this Court as a specialist Court to set out its contours, scope, limits and nature of the right on a case by case basis.



47. Although the primary statutes governing the employment and labour relations in this country predate the Constitution of Kenya, 2010, there are prescriptions scattered over the statutes which in one way or the other prescribe or direct as to what may comprise the content of fair labour practice(s) would be.
48. These prescriptive statutory rights and duties would include sections 9, 10, 11, 12, 13, 26 – 34, 35, 41, 43 and 45 of the Employment Act, 2007. These provisions serve as a beacon to the Court when called upon to determine what constitutes fair labour practice, and whether there has been an unfair labour practice.
49. In short, the jurisprudence on what practice would amount to an unfair labour practice goes further and or beyond what is legal or lawful.
50. The Court will now turn to an examination of the Issues as presented by the Petitioners and because the background facts are not in dispute will only make reference to the facts as may be germane for determination of the issues.

Whether the Respondent violated the Petitioners right to fair administrative action

51. The place of the right to fair administrative action within the employment relationship has not been analysed in depth in this jurisdiction.
52. The Court of Appeal, High Court and some benches of this Court has held that the right applies within the employment relationship (see *Judicial Service Commission v Gladys Boss Shollei & Ar* (2014) eKLR and *County Government of Nyeri & Ar v Cecilia Wangeci Ndungu* (2015) eKLR. Most of these decisions relate to employment underpinned by public law and not to ordinary employees.
53. However, I have my misgivings as to whether such variation constituted administrative action.
54. The misgivings in my view arise because clear lines have not or may not be easily drawn in situations where an employer is acting as an employer, and situations where the action of the employer amounts to exercise of administrative power or function.
55. To dramatise the controversy or difficulty, one may ask, if a general worker or herds boy in the village allows the cattle to graze and destroy the neighbours crops and the employer fires him through the phone, can he challenge the decision as being against his right to fair administrative action?
56. In the present proceedings, the 1<sup>st</sup> to 6<sup>th</sup> Petitioners assert that the 2<sup>nd</sup> Variation(s) of their 3 year contracts to 2 years non-renewable contracts violated their right to fair administration action, while the 7<sup>th</sup> and 8<sup>th</sup> Petitioners contend that the 1<sup>st</sup> Variation(s) variation of the initial contracts from open ended to fixed term contracts constituted administrative action and therefore should have met the test set out in Article 47 of the Constitution and the Fair Administrative Action Act, 2015.
57. Section 2 of the Fair Administrative Action provides that  
The Act applies to all state and non-state agencies, including any person
  - (a) exercising administrative authority;
  - (b) performing a judicial or quasi-judicial function under the Constitution or any written law; or
  - (c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.
58. In my view and taking comfort in the persuasive Constitutional Court of South African case of *Chirwa v TransnetLtd & Ors* (2008) 2 BLLR 97 (CC), applying the right to fair administrative action to



ordinary employment relationships would lead to absurd results and because of the conclusion on the other issues posed, and which conclusion will become clear in due course, I am of the opinion that this is not a suitable case to give detailed reasons for my misgivings save to say that the Respondent was not exercising administrative authority or performing a judicial or quasi-judicial function in the case of the Petitioners.

Whether the Respondent violated the Petitioners right to fair labour practices

59. As already adverted to, the fulcrum upon which the employment relationship should be measured is the right to fair labour practices.
60. One of the primary employment statutes (Employment Act, 2007) require a written contract of service to have certain particulars. These particulars form the essentialia of the employment contract and include name of employer, job description, date of commencement and duration of the contract, and remuneration.
61. Further, in my view, the common law principle that a unilateral variation of an employment contract is unlawful and amounts to repudiation and or breach of contract, and the statutory requirement to consult with an employee where there is a variation to the employment contract, and more specifically to an essentialia of the contract such as duration and remuneration where the employee would be adversely affected are ingredients of and are subsumed in the fair labour practice principle.
62. The 1<sup>st</sup> to 6<sup>th</sup> Petitioners were on contracts of a definite duration, which expired around November/ December 2015, and in so far as the contracts expired, were extended pending formal contracts/ renewal, and they eventually were offered new contracts with revised terms and conditions of service, these new contracts were distinct and separate from the initial contracts.
63. The Court in this regard cannot find unilateral variation or violation of the right to fair labour practices in respect of the 1<sup>st</sup> to 6<sup>th</sup> Petitioners.
64. As regards the 7<sup>th</sup> and 8<sup>th</sup> Petitioners, the Respondent did not deny that it unilaterally varied these contracts by converting them from contracts of an indefinite duration to fixed term contracts of 3 years through the letters of 6 August 2013.
65. The Respondent also did not suggest that the variation(s) involved consultations with these Petitioners.
66. The decision by the Respondent in regard to the contracts of the 7<sup>th</sup> and 8<sup>th</sup> Petitioners as conveyed through letters of 6 August 2013 were therefore not only unlawful for being unilateral but also for lack of consultation and therefore amounted to a violation of the right to fair labour practices as it took away vested rights and entitlements.
67. The Respondent in effect repudiated the initial contracts and because of the fundamental nature of the variations, these Petitioners were being put on new contracts which they accepted, but that does not derogate from the position that legally the Respondent's unilateral action amounted to unfair labour practice.
68. Therefore, the contention by the Respondent that the Petitioners in effect had only 2 options, viz, treat the contract as coming to an end and claim constructive dismissal or decide to stay and be bound by the new contract is not supported by persuasive case law, for the employee can take up the new contract but still claim breach of contract (the options are more than 2, see Hogg v Dover College, supra).
69. This approach is the more logical and fair one because inevitably, the bargaining power between the employer and employee can never be the same.



70. For clarity the Court would observe that the Respondent did not repudiate the contracts of the 1<sup>st</sup> to 6<sup>th</sup> Petitioners (2<sup>nd</sup> Variation(s)) but the parties entered into new contracts after expiry of initial contracts. Whether the Respondent violated the Petitioners right to legitimate expectation.
71. The Petitioners asserted that they had legitimate expectation(s) that their contracts would be renewed on better or the same terms and conditions as the then existing contracts including on remuneration and that the expectation(s) was founded upon representations made by the Respondent that they were considering putting them on long term contracts.
72. The Petitioners sought to rely on a South African decision, South Africa Democratic Teachers Union & Ar v Education Labour Relations Council Case No. JR 2575/09, but after perusing the decision, it is doubtful whether it supports the Petitioners case.
73. This doubt arises because the case turned on an interpretation of a particular statutory framework (section 186(1) of the South African Labour Relations Act) which expressly provides that a dismissal occurs when an employer refuses to renew a fixed term contract when an employee reasonably expected a renewal.
74. Further, the legal principle within that framework is one of reasonable expectation and not legitimate expectation.
75. The Petitioners did not attempt to draw any lines between the statutory concept of reasonable expectation as obtains in South Africa and legitimate expectation as understood in this jurisdiction. The Court has also noted that the Petitioners case was anchored on legitimate as opposed to reasonable expectation while submissions appeared to treat the two as similar.
76. In Kenya, the principle of legitimate expectation was discussed at length by the Supreme Court in Communications Commission of Kenya & 5 Ors v Royal Media Services Ltd & 5 Ors (2014) eKLR wherein the Supreme Court summarised the ingredients of legitimate expectation thus
- The emerging principles may be succinctly set out as follows:
- there must be an express, clear and unambiguous promise given by a public authority; the expectation itself must be reasonable; the representation must be one which it was competent and lawful for the decision-maker to make; and there cannot be a legitimate expectation against clear provisions of the law or the Constitution.
77. In my view, the mere fact that the Petitioners were alerted that the Respondent was holding deliberations on the nature of new terms and conditions of employment including long terms contracts was not sufficient to create legitimate expectation of long term contracts or amount to an express, clear and unambiguous promise given by a public authority.

### **Economic duress**

78. The Petitioners also sought succour on the contention that they signed the revised/varied contracts under coercion and duress.
79. In my view despite the well-known edict that the bargaining power in the employment relationship is tilted in favour of the employer who wields economic power, this allegation needed to be proved and it therefore cannot be decided on the papers.



### **Appropriate remedies/Orders**

80. The Petitioners sought some 6 substantive orders which included preserving the initial contracts and the terms embodied thereon.
81. A remedy(ies) imposing terms and conditions the contracts ante the variations/revisions would not be appropriate or fair as it may implicate other legal contests such as servitude and freedom of contract.
82. But because the Court has come to the conclusion that the unilateral variation of the 7<sup>th</sup> and 8<sup>th</sup> Petitioners contracts from open ended to fixed term contracts were unlawful and amounted to an unfair labour practice, despite the fact that they continue to offer services albeit under new contracts and considering that these Petitioners were occasioned legal injuries including in terms of remuneration, such injuries ought to be remedied in terms of Article 23 of the Constitution and section 12(3) of the Employment and Labour Relations Court Act, the Court is of the view and orders that
- a. A declaration is hereby issued that the unilateral variation of the 7<sup>th</sup> and 8<sup>th</sup> Petitioners contracts of employment from open ended contracts to 3 year contracts was in violation of the right to fair labour practices as enshrined in Article 41 of the Constitution.
  - b. The 7<sup>th</sup> and 8<sup>th</sup> Petitioners be awarded Kshs 750,000/- each as damages for unfair labour practice(s)/breach of contract(s).
83. The Court finds no merit in the cases of the 1<sup>st</sup> to 6<sup>th</sup> Petitioners and orders the same dismissed.
84. Because of the ongoing employment relationship between the parties, each party to bear own costs.

**DELIVERED, DATED AND SIGNED IN NAKURU ON THIS 24<sup>TH</sup> DAY OF FEBRUARY 2017.**

**RADIDO STEPHEN**

**JUDGE**

### **Appearances**

For Petitioners Mr. Ongoya instructed by Ongoya & Wambola Advocates

For Respondent Mr. Wakwaya instructed by Rachier & Amollo Advocates

Court Assistants Nixon/Daisy

