



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO.770 OF 2015**

**FRANCIS TONU.....CLAIMANT**

**VERSUS**

**HEIFER INTERNATIONA KENYA.....RESPONDENT**

**JUDGEMENT**

Issues in dispute – unlawful/unfair termination of employment and refusal to pay terminal dues

1. The claimant is an adult male and who was employed by the respondent, a non-governmental organisation and registered under the Non-Governmental Organisations Co-ordination Act and being an organisation involved in the provision of training and livestock to farmers within Kenya.
2. On 29<sup>th</sup> July, 2004 the claimant was employed by the respondent as an Accounts Clerk in Nairobi on a renewable contract terms at a monthly salary of Kshs.33, 000.00. the salary was increased during the course of employment and the claimant lastly earned Kshs.96, 128.62.
3. The claimant was issued with a written contract for two (2) years with a provision that it would be renewed on mutual agreement of the parties. The employment contract was always renewed by the respondent from 2004 to 2014. The renewal of contract was always on the same terms save for the adjusted salary. There was therefore a continuity of service and there was a reasonable expectation of continuous renewal of his employment or a mutual agreement to terminate the contract of employment.
4. On 25<sup>th</sup> March, 2014 the respondent issued the claimant with letter of extension of contract and notice to terminate contract. That his employment contract would be extended for 3 months and the same would serve as termination notice. The claimant replied to the notice and claimed unfair termination of his employment with the respondent by letter dated 23<sup>rd</sup> March, 2015.
5. the claim is that the termination of employment was unfair as the contract of employment had a renewal clause and the claimant had served the respondent for a continuous period of 12 years on the same terms. This rendered the employment to fixed term and thus termination of the same was unprocedural.
6. The claimant had a meeting with the respondent's Country Director who informed him that they required a lean staff. This was in essence declaring the claimant redundant. The Human Resource Manager then wrote an email to the claimant indicating that the position held by the claimant was declared redundant. The claimant was therefore being denied his redundancy package.  
  
There was no valid reason to terminate the contract of employment noting the renewable clause and it was still running on the two years terms. The claimant was not given notice of termination of contract as he was given an extension which was also to serve as notice period contrary to section 35 of the Employment Act, 2007. Clause 4 of the contract provided for payment of gratuity at 10% on all monies earned while in the employment of the respondent and since 2007 such gratuity has not been paid. By dint of redundancy the claimant was terminated from his employment but the respondent failed to pay his lawful terminal dues.
7. The claim is seeking for a declaration that the termination of employment was unfair; payment of 12 months compensation; notice pay; gratuity earned; and costs of the suit.
8. The claimant testified in support of his claim. The claimant testified that upon his employment by the respondent, he worked diligently for 12 years on a 2 years contract that was renewed upon lapse. This was until 31<sup>st</sup> March, 2014 when he was issued

with a notice extending his contract for 3 months and that the same would serve as a termination notice. He was informed that the respondent wanted a lean staff. He was only paid the due salary and had to leave his employment despite expectation that the contract would be renewed as was the practice. The human resource manager also wrote to the claimant stating that his position was being phased out. This was a redundancy but the respondent did not want to pay the due package. There were other employees affected. The termination of employment was not procedural and based on legitimate expectation for renewal; the claimant had expected to continue in service so as to be able to support his family. He had a daughter in class 8 and he was not able to give her support due to unemployment.

## Defence

9. In defence, the respondent has admitted to having employed the claimant and issued him with fixed term written contracts of employment. clause 3 of the contract had renewal terms and conditions. The contract naturally expired and thus terminated on its own terms. The renewal of contract by the respondent did not create an expectation of continuous renewal of the claimant's employment with the respondent. at the end of each term, the parties were at liberty to renew or end the contract. Successive issuance of fixed term contract was based on objective grounds as the respondent was donor dependent and projects were based on expected income. The uncertainty on income necessitated employees be placed on fixed term contracts.

10. The respondent did not take any action that can be interpreted to have created a legitimate expectation of renewal of contract and neither was there an improper motive for the non-renewal of the contract. The last contract was due to expire on 31<sup>st</sup> March, 2014 but was extended for 3 months to serve as notice. The claimant on this basis applied for his pension fund and noted it was due to his end of contract with the respondent.

11. There was no unfair treatment of the claimant in the termination of his fixed term contract of employment. There was no indication to the claimant that the respondent wanted a lean staff, his contract naturally lapsed. Section 35 of the Employment Act, 2007 did not apply in this case as the contract had an end date to it.

12. The claimant's contract provided for a gratuity pay at 10% on all monies earned while in employment and in 2007 employees agreed to the creation of an individual pension plan into which contribution would be made. An employee would contribute 10% of their salary while the respondent would contribute an equal amount. There is a memo dated 25<sup>th</sup> July, 2007 to all employees of the respondent in this regard. In response the claimant filed his details on 23<sup>rd</sup> August, 2007 seeking to join the established pension plan with CFC Life Assurance and the respondent has the record to confirm the gratuity payments under the plan to the claimant.

13. The claimant was never declared redundant or his position rendered so. His fixed term contract lapsed. The claims made do not arise and should be dismissed with costs.

14. In evidence, the respondent witness George Odhiambo testified that he is the respondent Country Director which a donor funded organisation and has projects based on the ability to fundraise for them. due to the nature of funding, all employees are on fixed term contracts and before each lapse, there is a communication on renewal or not. The core consideration is the availability of funds.

15. There was communication to the claimant that his contract would end and thus no renewal. The claimant had been issued with a letter by the human resource manager against the laid down procedures and he thus issued a proper communication and notice to the claimant. It was not a lay off but an end of contract. This lapse of contract also affected other employees based on projects. These decisions were not based on a declaration of redundancy.

16. In 2007 the respondent decided not to hold staff gratuity, it was discussed and agreed that a pension plan be established. There were no objections from the claimant and he gave his personal details for registration. The pension plan was to replace the gratuity provision in the contracts of employment. When the claimant's contract ended, he hand over and it was only after 2015 when he decided to file the claim after the human resource manager had also been terminated in her employment.

17. Both parties filed written submissions.

18. The claimant submits that there was a legitimate expectation for the renewal of his employment contract and was thus denied the right to employment base don long service and continued renewal of the same. Before the termination of his employment, the claimant was not given a chance to make representations to argue his case as held in **Republic versus Chief Justice of Kenya & 6 Others Ex Parte Moijo Ole Keiwua [2010] eKLR.**

19. The principle that fixed term contracts of employment lapse on the end date can be challenged on the grounds the where the employer through regular practice and express promise leads the employee to legitimately expect renewal, the expectation becomes legally protected. Where there is a legitimate expectation for renewal of the employment contract, the employer must act in a rational and objective manner towards the employee as held in **Teresa Carlo Omondi versus Transparency International – Kenya [2017] eKLR.**

20. The respondent renewed the employment contract for the claimant for 12 years thus building a reasonable expectation of permanent employment. The terms of each contract remains the same save for the remuneration. Due to constant renewals, termination of the same required a higher threshold in terms of expectations for continued work. In this case, the communications between the claimant the human resource manager were of the nature that there were employees to be laid off and this was only changed by the Country Directors to avoid paying the claimant his redundancy package. Such is an unfair labour practice.

21. The claimant also submits that section 10(3)(c) of the Employment Act, 2007 address a scenario where an employment contract for a fixed term is renewed with less favourable terms and the employee can claim under unfair termination of employment terms. To terminate such a contract, the employer must have a reasonable and justifiable cause as held in **Samuel Chacha Mwita versus Kenya Medical Research Institute [2014] eKLR**.

22. In this case, the claimant was rendered redundant by his dismissal. The Communications from the respondent and evidence that the respondent laid off of other employees speak to the definition redundancy under section 40 of the Employment Act, 2007.

23. The respondent submits that the claimant was employed on a fixed term contract which lapsed. It was extended for 3 months and was also to serve as the notice period. Section 20 of the Employment Act, 2007 defines what a contract of service is as being one set on a fixed period of time. Every employer is required to issue an employee with a written contract of employment spelling out the terms and conditions thereto. Section 18 of the Act allow for termination of contract of employment by effluxion of time and as such this cannot be a ground for unfair termination of employment in accordance with section 45 of the Act.

24. Parties to an employment Contract are bound by its terms as held in **Veronica Moraa & 28 others versus Indu Farm (epz) [2016] eKLR**. A written contract of employment is set to protect the rights of the parties to it and must be construed in its simple meaning. A fixed term contract thus expires on its agreed date as held in **Samuel Chacha Mwita versus Kenya Medical Research Institute [2014] eKLR**.

25. The respondent also submits that the non-renewal of the claimant's contract of employment did not amount to unfair termination of his employment. The 2 years contract issued to the claimant expired on 31<sup>st</sup> March, 2014. It was extended for 3 months to enable him complete outstanding duties. The extension ended as of 30<sup>th</sup> June, 2014. There was an express provision of start and end date. This cannot be the basis of unfairness. There was no promise or indication there would be a renewal and the claimant accepted his dues and only filed claim after one year. In **Bernard Wanjohi versus Kirinyaga Water and Sanitation Company Limited and Another [2012] eKLR** the court held that the employer has no obligation in fact or in law to give reasons with regard to termination of a fixed term contract of employment. Parties have already agreed on the end date and to require the employer to do more would not be justified.

25. In this case, the claimant accepted his end of contract and went through clearance process. The claimant was not terminated with regard to his performance or redundancy. There was no legitimate expectation for a renewal by conduct or promise for employment as held in **Teresa Carlo Omondi versus Transparency International – Kenya [2017] eKLR** where the court held that legitimate expectation is not similar to anticipation, desire or hope but based on a right, grounded on the larger principles of reasonableness and fair dealing between an employer and employee. In this case the claimant has not met the required threshold.

26. The claim for gratuity is well addressed in that the claimant agreed to the conversion of the same into a pension plan and was thus invested and he was paid his dues. Nothing remains owing. Any investments is to be with CFC Life Insurance and not the respondent.

#### Determination

27. It is common ground that the claimant was employed by the respondent on 2 years fixed term contracts. Upon the lapse of each contract, the claimant would receive a renewal of the same under the same terms and conditions save for a change in the remuneration. for 12 years the claimant worked for the respondent under a fixed term contract the last ending 31<sup>st</sup> March, 2014.

28. By letter dated 25th March, 2014 the respondent informed the claimant that; *Re: Extension of Contract and Notice to Terminate Contract*

*As you are aware your current employment contract with Heifer International Kenya ends March 31, 2014. We will be extending your contract for a period of three (3) months up to June 30, 2014 to complete any key outstanding tasks that you need to undertake successfully. Terms and conditions of your current remain the same.*

*Take notice that by the three (3) months extension of your contract will also serve as the notice period required under your contract for purposes of terminating the contract. In these circumstances, I would like to inform you that there will be no further renewal of your contract after June 30, 2014. ...*

29. The claimant accepted the extension and the terms and conditions thereto on 26<sup>th</sup> March, 2014. In evidence, the claimant confirmed that he left his employment at the end of the extension period. However on 23<sup>rd</sup> March, 2015 he sent a demand letter to the respondent on the basis that he had been unfairly terminated from his employment; he had been discriminated against as other employees were hired to replace and take up his duties; there was contravention of the claimant's rights in employment and fair administrative action.

30. Section 8, 9 and 10 of the Employment Act, 2007 requires parties in an employment relationship to put the terms and conditions of the same into writing. This is to ensure that both parties are aware of the binding terms agreed upon and thus governing their relationship.

31. In this regard therefore, where there is a written contract of employment, the court is to take it in its ordinary meaning unless

there is demonstration that the intentions of any particular clause is to be construed otherwise. The rationale is that a fixed term contract expires with effluxion of time and unless either party invites the other to renew it, then it automatically ends as contemplated.

32. In **Margaret A Ochieng versus National Water Conservation & Pipeline Corporation [2014]** eKLR the court held as follows;

*Was renewal automatic? The Court agrees with the submissions of the Respondent that it was not the intention of the Parties that there would be an automatic renewal. Such an intention would not make sense, and would negate the Respondent's policy shift in 2008, from permanent and pensionable terms to fixed-term contracts, with regard to certain positions. The Respondent would just have re-designated the position held by the Claimant prior to 2008, and asked her to go on serving on permanent and pensionable terms.*

*Automatic renewal would undermine the very purpose of the fixed-term contract, and revert to indeterminate contracts of employment. ...*

*Courts have upheld the principle that fixed-term contracts carry no expectancy of renewal, in a catena of judicial authorities. ...*

33. The above position is reiterated in the case of **Rajab Barasa & 4 others v Kenya Meat Commission [2016]** eKLR where the court held as follows;

*Where the intention of the parties is to have the contract for a fixed term, upon expiry, either party can opt out or invite the other to a new contract as the previous one has ended. The relationship must be renewed under a new contract. Otherwise, there would be no need for a fixed term contract. This is not a departure from the Employment Act as the law recognises the freedom of the parties to enter into fixed term contract, seasonal contracts or in some cases piece-work contract. Where the intention of the parties is to rely on any other document in terms of how the employment relationship is to be governed, such must be set out under the written or fixed terms contract. To hold otherwise would be to defeat the very purpose of such a contract. Indeed this was the court's view in the case both parties herein have relied upon, **Margaret A Ochieng versus National Water Conservation Corporation** the rationale being that the purpose of a fixed-term contract is not to renew it automatically. Such a contract (fixed-term) does not carry the expectation for renewal. The exceptions to this general rule are few and limited based on each case and its circumstances where strictly an employer should not act in a manner so as to avoid a legal obligations.*

34. To go outside the written terms of the fixed term contract and assert a claim for legitimate expectation that the same should be renewed would therefore go against the sanctity of having a fixed term contract. In this case, every time the claimant's contract of employment expired, he was issued with a letter of renewal. This position obtained until his last contract ending 31<sup>st</sup> March, 2014.

35. The next contract was for another fixed term period of 3 months and ending 30<sup>th</sup> June, 2014. This contract, though stated to be an extension and notice of termination, essentially it was another fixed term contract for 3 months. Though the period was less than the previous 2 years contracts, the claimant accepted and served the full term.

36. The claimant has made a claim that based on an email by the human resource manager on 12<sup>th</sup> June, 2014, he was terminated from employment due to redundancy and he should earn the benefit of a redundancy package.

37. I have gone through the emails dated 12<sup>th</sup> and 13<sup>th</sup> June, 2014. These are emails between Patricia Wangui and George Odhiambo. Patricia on the one hand proposes that the termination of the claimant was due to reduction in the work force where a position is eliminated. Based on the human resource manual, such an employee including the claimant should be paid severance benefits. Mr Odhiambo in reply asserts that there is a difference between a redundancy and end of a fixed term contract.

38. These are communication between officers of the respondent on a time and date after the claimant fixed term contract had issued. The claimant was not part of these communications. Based on these communications, there was no change to the claimant's terms and conditions with regard to his fixed term contract. It is not clear then how the claimant accessed these communications as he is not a party.

39. The claimant has sought to rely on the principle of legitimate expectation that his contract should have been renewed as was practice and had been in the service of the respondent for a long period. which is that legitimate expectation arises out of the existence of a repeated or regular practice, leading the person benefiting from the promise or practice to believe he would continue to so benefit as held in **J.P. Bansal versus the State of Rajasthan & Another, Appeal [Civil] 5982 of 2001**. However legitimate expectation with regard to renewal of an employment contract can only suffice where by the actions of the Employer it gives rise to legitimate expectation on the part of the Employee, that there would be renewal and also that where the decision not to renew is based on improper motives or there are countervailing circumstances as held in **Margaret A Ochieng versus National Water Conservation & Pipeline Corporation [2014]** eKLR cited above.

40. I have carefully gone through the judgement in the case of **Teresa Carlo Omondi versus Transparency International – Kenya [2017]** eKLR and the expositions therein with regard to the question of legitimate expectation in the renewal of a fixed term contract of employment and note the facts herein and the facts therein are fundamentally different. The position in **Samuel Chacha versus KEMRI, cited above** is more eschewed to facts herein. The question of renewal of a fixed term contract that

has been extended on its terms once or twice does not create a right to continued renewal in the future. Such a fixed term contract expires based on its term period.

41. In this case, I find the claimant's fixed term of contract of 2 years lapsed, he was issued with another fixed term contract of 3 months and the same ended on 30<sup>th</sup> June, 2014. The respondent was clear in no equivocal terms that the fixed term contract would serve and termination notice. While the claimant was in employment, he accepted the term of renewal and did not challenge any part thereof until he had left his employment with the respondent.

42. With regard to the claim for gratuity, I find the evidence in defence by the respondent in this regard has not been challenged in any material way. The claimant's contract of employment made provision for a service gratuity, there was a change to the clause in this regard and a memo issued converting the same into an Individual Pension Plan and an investment thereof with CFCLife. The claimant gave his personal details in his application and he since made application to withdraw from the scheme and be paid his benefits through his bank.

43. The remedies sought of notice pay; compensation and gratuity pay are therefore not available to the claimant.

**Accordingly, the claim herein is dismissed. Each party to bear own costs.**

Delivered in open court at Nairobi this 28<sup>th</sup> day of September, 2017.

**MBARU JUDGE**

In the presence of:

David Muturi & Nancy Bor: Court Assistants

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