



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 182 OF 2016

BETWEEN

MARIA MUKWANA.....CLAIMANT

VERSUS

KENYA MEDICAL RESEARCH INSTITUTE.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Wandai Matheka & Company Advocates for the Claimant

Federation of Kenya Employers for the Respondent

JUDGMENT

1. The Claimant filed her initial Statement of Claim on 8th March 2016. She filed an Amended Statement of Claim on 15th May 2016. She states she was employed by the Respondent State Corporation on 5th November 2013, as a Procurement Manager. She was given a 2-year renewable contract. She reasonably expected she would serve for a period not less than 5 years. Her contract was to expire on 8th December 2015. She applied for renewal on 25th November 2015. The Respondent replied on 4th December 2015, offering her extension of 3 months only. This was to lapse on 8th March 2016. All other terms, she was advised, would stay the same. She received a letter from the Respondent dated 8th February 2016, giving her 1 month notice of termination of her contract. She was told there would be no renewal. She was not given any reason for non-renewal. Her last salary was Kshs. 328,684. She filed this Claim seeking the following orders against the Respondent:-

- a) Loss of salaries for 2 years at Kshs. 7,888,416.
- b) 3 months' salary in lieu of notice at Kshs. 986,052.
- c) Gratuity of 2 years at Kshs. 788,841.
- d) Compensation for unfair termination the equivalent of 12 months' salary at Kshs. 3,944,208.

- e) Exemplary damages at Kshs. 500,000.
- f) Relocation allowance at Kshs. 120,000.
- g) Accrued leave allowance at Kshs. 67,230.82
- Total... Kshs. 14,294,748
- h) Costs and interest.

2. The Respondent filed its Statement of Response on 31st August 2016. It is admitted the Respondent employed the Claimant as a Procurement Manager in a 2-year contract, which was to lapse on 8th December 2015. It was extended for 3 months ending on 8th March 2016. The Claimant was notified there would be no renewal, through a letter by the Respondent, dated 4th December 2015. The contract was renewable, but the period of renewal was at the discretion of the Respondent. She was offered gratuity at Kshs. 99,605 which she has not collected. There was no basis for the Claimant to expect renewal for a period of 2 years. The Respondent states it is willing to pay the Claimant the sum offered as gratuity, and pay accrued leave allowance of Kshs. 67,230.82. Consent order was recorded in the course of the hearing, on the prayer for accrued leave allowance at Kshs. 67,230.82. Otherwise it is the Respondent's prayer that the rest of the Claim is dismissed, with costs to the Respondent.

3. The Claimant testified on 8th March 2016, as did Respondent's Head of Human Resources, Hillary Nasora Ondatto. The matter was last mentioned in Court on 27th June 2017, when Parties confirmed the filing of their Closing Submissions.

4. Maria told the Court she was a Contracting Supervisor working for Kenya Petroleum Refineries for 5 years and 4 months, before she was recruited by the Respondent. She was invited by the Respondent through the phone, in August 2013. She left her permanent position with Kenya Petroleum Refineries, because she expected her new Employer would renew her contract upon expiry. She was employed by the Respondent on 9th December 2013.

5. She was given a fixed term contract to sign when she reported. It did not have a renewal clause. She enquired from the Respondent why this was so. She was advised it was not necessary because her performance would determine if there was renewal.

6. She worked well, registering contracts for the Respondent, and overseeing disposals which yielded good results. She did not have disciplinary issues.

7. Her contract was to expire on 8th December 2015. She was anxious and wished to know if her contract would be renewed. She approached the Human Resources Office, and was advised the Respondent was waiting for comments on Claimant's performance from her Supervisor, before determining if there would be renewal. Nothing was forthcoming, compelling the Claimant to write to the Human Resources Office on 25th November 2015, asking for renewal.

8. The Respondent replied on 4th December 2015, extending her contract by 3 months. She expected renewal would have been for a similar period of 2 years as the expiring contract.

9. She had applied for a loan from Commercial Bank of Africa [K] Limited. The Bank had asked for information on renewal of her contract, which triggered her enquiry with the Respondent.

10. She testified she ought to have been given reasons for non-renewal. If the Respondent terminated her contract, the Respondent should have supplied her with reasons for its decision.

11. At Kenya Petroleum Refineries, she had a grant of Kshs. 1.7 million, and a car loan of Kshs. 1.5

million. She was advised by the Respondent that the Respondent would sort out these obligations with her former Employer. It was not done. The former Employer instead sent auctioneers to the Claimant, seeking to recover its debt.

12. The Respondent directed the Claimant to obtain a loan from Imarika Sacco which served Respondent's Employees. She obtained a loan for the sum of Kshs. 2.7 million. It was payable in 4 years. It was guaranteed by the Respondent. She applied on 4th April 2014 under pressure from her former Employer.

13. Imarika wrote to the Respondent's CEO asking him to offset the loan from her salary through check-off. There was a schedule of payments, covering a period of 48 months. Respondent's Human Resources Manager, Hillary, signed Guarantor's Form.

14. The contract provided for 3 months' notice or salary in lieu. She was issued 1 month notice. The letter extending her contract stated all other terms remained unchanged.

15. She prays for salary of 2 years. She legitimately expected to serve another 2 years. This expectation was based on promises made by the Respondent, and guaranteeing of her Imarika Loan by the Respondent. She prays for anticipatory gratuity of 2 years. She prays for damages. She merited relocation allowance of Kshs. 120,000. She was relocated initially from Mombasa to Kilifi through Cube Movers.

16. She denied forging Appraisal Forms exhibited by the Respondent. Template is given by Respondent's Human Resources Office. The Employee fills the form. The Claimant would discuss what she filled with her Supervisor and agree if assessment was correct. If there was consensus, the form would be retained by the Human Resources Office. It was not true the Appraisal document filed by the Respondent was the correct version, and the one presented by the Claimant a doctored document. She was never warned or questioned about poor performance.

17. Cross-examined, she testified she obtained her version of Appraisal documents from Respondent's Human Resources Office. Her signature appeared in Appraisal documents exhibited by both Parties.

18. Her contract did not say there would be renewal for a similar period of 2 years. Renewal is different from extension. Renewal is for the same period.

19. She reported to work at 8.00 a.m. and sometimes at 8.30 a.m. She would send her Supervisor text messages when she was late. She did not have these messages in Court.

20. She was advised by word of mouth that her contract would be renewed.

21. The loan from Imarika was to offset house and car loans given to the Claimant by her former Employer. The loan was personal. Hillary guaranteed as a Co- Employee of the Claimant. The Respondent did not write a letter guaranteeing the loan.

22. The Claimant testified she continues to service the loan. She does small quantities of consultancy. She has not secured a full time job. She is 47 years old. She attempted to return to Kenya Petroleum Refineries without success. The position she held there has been taken up by another Officer.

23. She was paid gratuity of 2 years. She claims anticipatory gratuity of 2 years. 3 months' notice applied with regard to the expired 2-year contract. She still lives in Kilifi. Relocation allowance would be paid to the Moving Company. Quotation is given to the Respondent by Procurement Department. The Claimant did her own quotation without prejudice.

24. She concluded her evidence on redirection with the evidence that relocation allowance was her right under the Company's policy. She filed the Claim on 8th March 2016; no relocation allowance has been paid to her yet. The letter extending her contract for 3 months was made unilaterally, and was not signed by the Claimant. The Respondent was involved by Imarika, in Claimant's loan facility.

25. Hillary Nasora Ondatto told the Court Claimant's contract was for 2 years, which ended in December 2015. It was extended for 3 months, ending March 2016.

26. The contract did not say there would be a renewal of 2 years. Renewal was at the discretion of the Respondent. The renewal period was at the discretion of the Respondent.

27. The Claimant was habitually late and absent from work. She was appraised in July 2015. It was stated that she struggled with punctuality. She was a habitual latecomer. She did not contest appraisal. She continued being absent and reporting to work late.

28. She was to discuss renewal with the Director. Hillary was not privy to what was to be discussed. She was entitled to gratuity of about Kshs. 98,000 under clause 8 of her contract. The Respondent is ready to pay this.

29. The Respondent did not terminate her contract; it lapsed on its own terms. Relocation is paid on recruitment and end of contract of employment. The money is paid to specific movers. The Respondent receives quotations and its Procurement Department selects one mover. The Claimant gave no quotation, and has not cleared with the Respondent.

30. Hillary told the Court on cross-examination that he has a Masters' Degree in Human Resources from the University of Manchester. The Appraisal document filed by the Respondent, on the date of the hearing of the Claim, was different from that filed by the Claimant earlier.

31. The document filed by the Claimant at paragraph 4 states the Claimant's performance, overall, was good. The one filed by the Respondent states she was not punctual. There was no document filed by the Respondent showing the Claimant was a latecomer or an absentee Employee. The Appraisal has some positive comments about the Claimant.

32. Extension of the contract was made on the advice of Management. Respondent could have released the Claimant after her contract expired. The contract did not have a clause on extension. No reason was given for extension. 1 month notice of termination was not malicious. Relocation policy is there but requires there is a quotation given. It would not have been right to extend her contract by 2 years. Hillary told the Court on redirection that the Claimant did not dispute her appraisal. Notice of termination, while the Claimant was on contract extension, was given as good practice. Hillary guaranteed her the Imarika loan, as a Colleague and Member of the Sacco.

The Court Finds:-

33. Parties do not dispute the history of the Claimant's employment with the Respondent. They do not dispute that the Claimant was employed by the Respondent as Procurement Manager. The contract was for 2 years, beginning 9th December 2013, ending 8th December 2015. The contract was stated to be renewable based on job performance evaluation of the Claimant. Her last salary at the rate of Kshs. 328,684 is not contested. It is also agreed that upon expiry on 8th December 2015, the Claimant's contract was not renewed; rather, it was extended by 3 months' which lapsed on 8th March 2016.

34. ***The prayer for accrued leave allowance in the sum of Kshs. 67,230 has been admitted, and is hereby allowed as prayed.***

35. The Claimant was paid gratuity for the 2 years worked. The Respondent offers gratuity at Kshs. 98,605 under clause 8 of the contract, based on 3 months worked under extension. The Court does not take away a benefit conferred on the Employee by his Employer. ***The Respondent shall pay gratuity of Kshs. 98,605 as offered.***

36. The Claimant prays for anticipatory gratuity. Gratuity is normally based on years completed in service. It is not anticipated, but made based on service rendered, rather than service anticipated would be rendered. The Claimant, for whatever reason, did not work for 2 years after March 2016, to earn gratuity.

Clause 8 of her contract specified gratuity would be paid based on the number of years worked. It would be paid pro rata for any part of the years worked. The Respondent fulfilled its obligation under the contract on gratuity, having paid the full gratuity for 2 years worked, and pro rata gratuity, for 3 months' contract extension. Anticipatory gratuity is not based on any sustainable method of rewarding or recognizing expended labour. The item is rejected.

37. Relocation allowance at Kshs. 120,000 is not based on any clause in the Claimant's contract. It was the policy of the Respondent to relocate Employees on recruitment and termination of employment as explained by Hillary. This policy was executed through a specified mode. There would be different quotations given from relocation service providers. The transaction would be processed through Respondent's Procurement Department, and money paid to the service provider. The Claimant did not show she actually was relocating and had engaged Cube Movers, or that any other service provider gave a quotation of Kshs. 120,000. The Court does not think relocation allowance in the circumstances, is payable to the Claimant. The prayer is declined.

38. The Claimant has not persuaded the Court that she merits exemplary damages, pleaded at Kshs. 500,000. Her injury, if any, is confined to economic harm, under the law of unfair termination, or breach of the contract of employment, for which statutory compensation, or general damages for breach of contract, would suffice. There is nothing to justify the nature of damages sought.

39. The Court declines the prayers for anticipatory salary for the same reason anticipatory gratuity has been rejected. The Claimant did not go on to serve the Respondent for 2 years. She has been doing her own consultancy work, and is ably servicing her obligations. The law as held in Court of Appeal of Kenya, Appeal between *Elizabeth Wakanyi Kibe v. Telkom Kenya Limited [2014] e-KLR*, is that Employees must upon termination of employment, move on and not sit back waiting to earn anticipatory salary. Fair remuneration is based on services actually rendered, and anticipatory salary is not normally fair remuneration. For whatever reason, the Claimant did not render any service to the Respondent for 2 years after March 2016, to be fairly entitled to salary of 24 months at a staggering Kshs. 7.8 million.

40. Was termination/non-renewal of contract unfair? The Claimant's 2-year contract was set to expire, and expired 8th December 2015. Renewal would depend on Claimant's performance.

41. There was no renewal, but an extension was offered from December 2015, ending March 2016. The Respondent gave no explanation why it was necessary to extend the contract.

42. There is evidence the Claimant obtained a loan for the amount of Kshs. 2.7 million, from Respondent's Employees' Sacco. The loan as shown in the documents on record was guaranteed by Colleagues of the Claimant at the Respondent, who included Human Resources Manager Hillary.

43. Not only was the loan guaranteed this way; it was arranged to be paid through salary check-off over a period of 4 years, ending in 2018. There is a letter dated 11th April 2014 from the Lender to the Respondent, confirming the loan was to be paid in installments over a period of 4 years, through salary check-off.

44. The Respondent appears to argue that the Claimant was a latecomer, and absentee Employee, grounds which perhaps militated against renewal of contract. The Claimant conceded in her evidence that she was occasionally late for work, arriving at 8.30 a.m. instead of 8.00 a.m., but that she always notified her Supervisor she would be late.

45. There was no persuasive evidence led by the Respondent to show that lateness to work, or absenteeism, were the reasons the Respondent failed to renew Claimant's contract. At no time is it recorded that the Claimant was warned against, or confronted with allegations of lateness and absenteeism during employment. Furthermore, the Respondent extended her contract by 3 months, notwithstanding these allegations.

46. The Appraisal forms produced by the Parties varied, and cannot both be decisive in determining

Claimant's performance. On 1st February 2016, the Claimant wrote to the Respondent stating her appraisal indicated performance was satisfactory, meriting renewal. The Respondent did not write back disputing her assertion, but wrote back, informing her there would be 'no further renewal.' The extension appears in the mind of the Respondent, to have been some form of renewal, going by its letter dated 8th February 2016.

47. On the whole, the actions of the Respondent can be concluded to have led the Claimant into reasonably expecting there would be renewal. The Respondent participated in the Claimant's loan transaction, directing her to apply for the loan and by having its Human Resource Manager and other Staff sign as guarantors to the Claimant; by allowing the loan repayment to be made over a 4 year period, a period beyond the contract period, through salary check-off; by not advising the Claimant there would be no renewal when she first asked the Respondent about renewal; by not responding to her assertion that appraisal had shown her performance was satisfactory; and by extending Claimant's contract for 3 months.

48. The decision whether to renew a contract of employment, as decided in a catena of recent decisions of the Employment and Labour Relations Court of Kenya, is a prerogative of the Employer, challengeable on limited grounds. This was the holding of the Court in the case of *Teresa Omondi Carlo v. Transparency International [2017] e-KLR* and in *Margaret A. Ochieng' v. National Water and Pipeline Corporation [2014] e-KLR*. One limited ground is, as concluded in *Ruth Gathoni Ngotho-Kariuki V. PCEA [2012] e-KLR*, where the Employee has legitimate expectation that the contract would be renewed. The Employee must demonstrate rational and objective reason for her expectation. The Claimant Maria Mukhwana gave such a demonstration as captured at paragraph 47 of this Judgment.

49. The Court is satisfied that non-renewal of the Claimant's contract amounted to unfair termination of employment.

50. Section 49 [4] [f] of the Employment Act 2007 requires the Court to take into account, in determining suitable remedy, the Employees' reasonable expectation on the length of the service period. The Claimant had worked for 2 years. She expected renewal for 2 years. She was granted a loan repayment period, with the endorsement of the Respondent, over a period of 4 years. She had reasonable expectation she would work for at least another 24 months for the Respondent. She worked 3 months, and was 21 months off the mark, in her expectation.

51. The Court is not compelled however, to grant her anticipatory salary as argued elsewhere in this Judgment. There is no legal obligation to grant salary over a period of 21 months. But there is good reason, to grant the Claimant reparation for her economic injury, based on the statutory capping for unfair termination. The Court has taken into account also, that she left a secure job with Kenya Petroleum Refineries, lured by the false promises of a fruitful career with the Respondent. ***She is granted the equivalent of 12 months' salary in compensation for unfair termination at Kshs. 3,944,208.***

52. The Claimant prays for 3 months' salary in lieu of notice based on clause 7 of the expired contract. She was granted extension of 3 months, and given notice of 1 month, before termination in March 2016. The extension was unilateral, but stated the notice period would be 1 month. The Claimant did not accept 3 months' extension and wrote on 1st February demanding to know if there would be full renewal of 2 years. She reasonably expected to work 2 more years. Considering the conclusion by the Court that non-renewal amounted to unfair termination, and considering also the unexplained imposition a 3-month extension the Court is inclined to allow the prayer for notice pay which the Claimant would have been entitled to, had the initial contract terminated prematurely. She was in the end however, unequivocally notified for a month, that there would be no renewal. ***She merits, and is granted the balance of 2 months' salary as notice pay, at Kshs. 657,368.***

53. ***Costs to the Claimant.***

54. ***Interest granted at 14% per annum from the date of Judgment till payment is made in full.***

IN SUM, IT IS ORDERED:-

- a. It is declared non-renewal of the Claimant's contract of employment amounted to unfair termination.*
- b. The Respondent shall pay to the Claimant: accrued annual leave allowance as conceded at Kshs. 67,230; gratuity as conceded at Kshs. 98,605; the equivalent of 12 months' salary in compensation for unfair termination at Kshs. 3,944,208; and 2 months' salary in lieu of notice at Kshs. 657,368- total Kshs. 4,767,411.*
- c. Costs to the Claimant.*
- d. Interest granted at 14% per annum from the date of Judgment, till payment is made in full.*

Dated and delivered at Malindi this 13th day of October 2017

James Rika

Judge