



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1325 OF 2015**

(Before Hon. Lady Justice Hellen S. Wasilwa on 6<sup>th</sup> July 2016)

CATHERINE WAMBUI KARUNO..... CLAIMANT

VERSUS

TROCAIRE ..... RESPONDENT

**JUDGMENT OF THE COURT**

1. The Claimant herein filed a Statement of Claim dated 29<sup>th</sup> July 2015 where the Claimant states she was unlawfully declared redundant and seeks compensation from the Respondent in terms of:

*a. A declaration that the Claimant was unlawfully and unfairly dismissed.*

*b. Damages for racial and gender discrimination.*

*c. Damages for unfair and unlawful dismissal to the tune of Kshs 6,661,053.00 as follows:*

*Damages for unlawful termination of employment being 12 months wages (12 x 289,611) Kshs3,475,322.00 one month's notice pay being entitled for termination Kshs 289,611.00 ten (10) months' wages for the remainder of her contract term Kshs 2,896,110.00*

**TOTAL KShs6,661,053.00**

*d. Costs of the suit*

*e. Interest on (iii) and (iv) above*

*f. Any other relief this Honorable Court may deem fit to grant.*

**Facts of the Suit**

2. On the 4<sup>th</sup> of January 2012, the Claimant was employed by the Respondent as a Regional Human Resource and Administration Manager earning a gross salary of Kshs 239,224.00. She was tasked with development and review of the organization's policies and procedures, strategic performance management, recruitment training and development as well as general administration. She performed her duties dutifully and diligently which earned her promotion to the position of

- Regional Human Resource Advisor in April of 2013.
3. The Claimant avers that while she was working as the Regional Head she suffered through discrimination on account of race and gender was overworked and treated with contempt as she got minimum support from management and other members of staff.
  4. The Claimant avers that she performed duties that were beyond her job description but was never compensated for it.
  5. The Claimant avers that in April of 2013, she was informed that the organization would be restructuring and that her position would not be tenable, this was despite a verbal undertaking that her position would not be affected by the restructuring and that she would be engaged with her superiors for at least an additional two years. Moreover, the fact that other workers performing similar work in the same job grade had two year contracts gave her a sense of security.
  6. The Claimant avers that no attempt to retain her on any other capacity was made, nor was she given adequate notice, she also states that the criteria used to determine redundancy was not made known to her. She further states that the Respondent recruited a new Human Resource Officer at the Nairobi Office while it declared the Claimant redundant.
  7. The Claimant avers that she has made several attempts to get a job but despite her brilliant CV she has not gotten beyond the interview stage, and suspects sabotage from her former employer. She has made several attempts to mitigate the situation through the Catholic Church and the Ministry of Labour but all the attempts have been futile.

### **Response**

8. The Respondents have filed a Memorandum of Response dated 15<sup>th</sup> of September 2015 and filed on the 12<sup>th</sup> of February 2016. In it they admit that the Claimant was in their employment at the stated period but deny the allegations stated in the Claim putting the Claimant to strict proof thereof.
9. The Respondents state that the engagement was for the stated period divided into the following contractual terms; 4<sup>th</sup> January 2012 for 14 months which ran until 4<sup>th</sup> March 2013, at a salary of Kshs. 239,224.00. The contract was later renewed for a year from 4<sup>th</sup> March 2013 for a further year ending 28<sup>th</sup> February 2014 at a salary of Kshs. 270,820.00 and finally a four month renewal from 1<sup>st</sup> March 2014 upto 30<sup>th</sup> June 2014 but with no change in salary.
10. The Respondent avers that the renewal did not constitute a promotion but was a re-designation and extension of contract. The terms presented were fixed term and the Claimant entered into it voluntarily therefore the issue of unfair and unlawful termination should not arise.
11. The Respondent avers that it was undergoing a restructuring process and several positions were to be affected and as the Claimant's contract was automatically lapsing at the expiry of contract, she was not affected by the Redundancy. She was not discriminated against and was free to communicate with management on any issues.
12. The Respondent avers that the suit herein is unreasonable and an abuse of the Courts process and should therefore be struck out with costs.

### **Claimant's submissions**

13. The Claimant submits that her termination was in breach of the Claimant's legitimate expectation which arose from an express promise made to her by her superior. She relies on Lord Frazer in the case of **Council of the Civil Service Union v Minister For the Civil Service 1985 AC 374 H.L.** where it was stated:

***“Where a person claiming some benefit or privilege has no legal right to it as a matter of private law, he may have a legitimate expectation of receiving the benefits or privilege and if so, the courts will protect his expectation as a matter of public law.”***

14. The Claimant submits that the following amounted to communication that led to legitimate expectation. The first was communication between herself and Rosemary Heenan, the then Regional Manager and her immediate boss, who wrote to Commercial Bank of Africa informing the bank that the Claimant was their employee and that upon expiry of her contract, her contract would be renewed for not less than two years.
15. Secondly, the Regional Manager informed the Claimant in an email communication that a decision had been made with the head office to retain her in Nairobi for at least two more years after expiry of her then contract. And finally Guy Clerk, who became the new Regional Manager in an email communication to the Claimant informed her of a decision to offer her the position of Regional HR Advisor until February 2015 in line with earlier communication made to her.
16. The Claimant submits that even in their Court testimony, the Respondent through their witness acknowledged these promises made to her but however, insisted that since these promises were never reduced to written contract they have no legal basis, however the Claimant submits that the Respondent is estopped from denying the legal effect of these promises as the Claimant was led to believe these promises and acted upon the same to her detriment.
17. To this end, they rely on the case of **Combe vs. Combe 195 1 All England Law Reports 766 at 770** by Denning LJ where it states as follows:

***“the principle as I understand it is that where one party has by his words or conduct made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but must accept legal relations subject to the qualification which he himself has so introduced even though it is not supported in point of law by any consideration, but only by his word.”***

18. Further, the Claimant submits that her letter of appointment states that her employment will commence on the 4<sup>th</sup> of January 2012 for a period of 14 months up to 28<sup>th</sup> February 2013 and may be renewed subject to availability of funds, good performance and/or continuation of the program.
19. This they state was another express promise made to the Claimant, nothing has changed as far as the conditions upon which her contract would be extended, there was not justifiable basis for her termination or failure to renew her contract, the program continues to run in the region and there has been no allegation that it has run out of funds.
20. She further submits that she did her tasks exceptionally well which earned her glowing appraisal from her employer and her termination then was not a reflection of the circumstances in the organization.
21. As to the legality of the actions, the Claimant submits that the Respondents’ actions went against Section 40 of the Employment Act as she was not informed in writing about the intended redundancy, the action did not take into account seniority, skill, ability and reliability of the Claimant before declaring her redundant. Even though she was offered a redundancy package which she declined, the Respondent did not meet all the legal requirements as envisioned by the law.
22. As to compensation, the Claimant relies on the case of **Pravin Bowry vs. Ethics and Anti-Corruption Commission** where the court while dealing with an instance of unfair termination of term of contract stated:

***“..the court fully embraces the principle of legitimate expectation as espoused by the supreme court of Canada in Wells case and finds that the case is fully applicable in the case of the claimants .....the court notes that for the purposes of effecting this benefit, the only precondition is that there be premature termination of contract of employment.”***

23.The Court in this instance awarded Mr. Bowry Kshs 34,684,000 as salary for the unspent period of his contract. The Claimant therefore urges the Court to award her Kshs. 2,316,888.00 being sums that she would have earned had she worked up to 28<sup>th</sup> of February 2015 when her contract was meant to expire.

### **Respondent’s submissions**

24.The Respondent submits that the contract signed by the Claimant was for a fixed term period. She was then not terminated as alleged. They submit that the correspondence that she relies on were where she sought further extension which was denied at the end of her contract.

25.They rely on the Employment Act in particular Section 7, 8, 9 and 10 which recognizes fixed term contracts which are not illegal and end at the date it is indicated to end, they therefore submit that it would be illegal to impute or construe any longer period outside the express agreement set out in the fixed term contract.

26.They submit that the principle of estoppel as urged by the Claimant is not applicable in this case. They further submit that for it to apply parties must act on the promise to their detriment as espoused in the case of **Combe vs. Combe (supra)**, but in this particular case, nothing arose following the discussions and the Claimant left when the contract ended.

27.The Claimant further submits that in communication with the Country Director confirms its readiness to the Claimant to honor its obligation to June 2014 *“the date you explained to me that you are due to finish your employment with Trocaire”*.

28.This they state is proof that she was aware that her time with the organization was coming to an end and that therefore no notice of termination was required.

29.The Respondents reiterate that the Claimant was not declared redundant and that she was also not terminated before the contract end. They maintain that the Claimants’ contract came to an automatic end by effluxion of time and no issue of redundancy arose. They rely on **Banking, Insurance & Finance Union (Kenya) vs. Commercial Bank of Africa Ltd [2015] eKLR** where it states that:

***“On the question as to whether there was an unfair redundancy, this is twofold in that where an employee is on contract with a fixed period, once it has expired; there is automatic termination by effluxion of time. Termination of employment can also occur in a case where there is valid contract but due to a situation of redundancy, the employer is forced to terminate....”***

30.For the foregoing reasons, the Respondents submit that the Claimants’ claim for unlawful termination, notice pay and salaries for an alleged unexpired term of the contract are untenable and misconceived. They urge the Court to dismiss the suit with costs.

31.Having considered the submissions of both parties, issues for determination are as follows:

1. ***Whether Claimant was declared redundant or contract terminated by effluxion of time.***
2. ***Whether Claimant had a legitimate expectation that the contract would be extended.***
3. ***What orders to grant in the circumstances.***

32.On the 1<sup>st</sup> issue, the Claimant was initially employed on contract on 4<sup>th</sup> January 2012 for a period

of 14 months upto 28<sup>th</sup> February 2013. This contract was then renewed with effect from 3<sup>rd</sup> March 2013 to 28<sup>th</sup> February 2014 for one year.

33. On 27.1.2014, the Claimant was given another contract extension and re-designation as Regional HR Advisor. The contract was to run from 4<sup>th</sup> March 2013 to 30<sup>th</sup> June 2014.

34. In the meantime, there is communication between the Claimant and the Respondents on her position with the company. On 7.7.2013, the Respondent's Regional Manager wrote to the Claimant as follows:

***“Hi Catherine,***

***The position is located in Maynooth and I think they usually require someone with residency or a work permit for Ireland. With the current unemployment, it is very difficult to get work permits for non-national staff these days. We have agreed with Caoimhe that your position will continue in Nairobi for at least two more years to facilitate the transition and my recommendation is that it continues after that with a greater focus on Somalia, Kenya and South Sudan. Feel free to contact Joe if you are still interested in applying, he can advise you further.***

***Best wishes***

***Rosemary” (Document 5)***

35. Another letter to the Claimant is in an email dated 16.4.2013 where the Respondent's Regional Manager also wrote to the Claimant as follows:

***“Hi Catherine,***

***I cannot find Helen's JD but I have attached Claire Wilkes one. I also attach the sheet that was calculated at the IDMT. The 1<sup>st</sup> column highlights the role of the HR Partner. I think from these you can start drafting a JD for your new position and then we can work together to complete it.***

***Thanks***

***Rosemary” (Appendix 6)***

36. On 8.11.2013, there was also communication to the Claimant that by one Guy Clerk, Head of Region – Horn and East Africa Nairobi Kenya as follows:

***“As discussed in our subsequent meeting, the decision has been made to offer you the position of Regional HR Advisor (RHRA) until February 2015 in line with commitments given to you by the organization before I began in post in April 2013. In the meeting to which you refer I informed you that I was to draft a JD for the role of RHRA a task still to be done and one which I am now committing to re-prioritise. The challenge as I explained continues to be how we make your role fit with the regional needs and the existing HR support in place.***

***If there is any other documentation you are expecting I'd be grateful if you could let me know.***

***With best wishes***

***Guy”***

37. Whereas the above communication had been made to the Claimant, the appointment to Regional HR was never realized in writing.

38. The promises made seem to have fallen by the wayside and instead the Claimant was informed that the Respondent had decided to restructure the organization and in that regard, she was informed her contract had 'come to the end'. The letter in question is dated 25<sup>th</sup> June 2014 addressed to the Ministry of Labour at Nyayo House. It reads:

***“The position of Regional Human Resources Adviser for the Horn & East Africa Region has been phased out with effect from June 30<sup>th</sup> 2014. This is as a direct result of strategic and operational decisions made by Trocaire, the effect of which was to dismantle and remove the regional management structure which saw management personnel at a country level reporting to Regional Managers, in whom was vested significant authority and responsibility.***

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***In this regard, as required by Section 40 of the Employment Act 2007, this is to notify the Ministry of Labour of our intention to not renew the contract for the position of Regional Human Resource Advisor. Catherine Karuno has likewise been informed verbally and served with written letter to communicate the end of contract period information as required by law”.***

39. My reading of the above letter points to a redundancy as defined in Section 2 of Employment Act which states as follows:

***“Redundancy means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment”.***

40. Section 40 of Employment Act is also referred to and it states as follows:

1. ***An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions:***
  - a. ***Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;***
  - b. ***Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;***
  - c. ***The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;***
  - d. ***Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;***
  - e. ***The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;***
  - f. ***The employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and***
  - g. ***The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.***

41. Though Claimant had been in contract which was ending on 30<sup>th</sup> June 2014, had the Respondent kept quiet about it then it could be said that the contract ended by effluxion of time.
42. However when the Respondent chose to involve the Ministry of Labour and inform Claimant that they could not renew this contract because the position was being phased out, then they were pointing to a redundancy situation.
43. This is coupled with the communication promising her the job upto 2015. This promise was made by different people in the Respondents organization and on 3 different occasions and even confirmed by the new Regional Director Mr. Guy. This gave the Claimant hope that she would continue working thus a legitimate expectation for her to retain the job. In the words of **Denning LJ in Combe vs. Combe (1951) ALL ELR 766 at 770** (supra), the Claimant had a legitimate expectation she would be continuing to work for Respondent upto 2015.
44. The principle was embraced in the case of **Pravin Bowry vs. Anti-Corruption Commission** (supra) where the Court also found that the Claimant had a legitimate expectation to work to the end of his contract and awarded him accordingly.
45. Though the Respondents change tact at the last moment, this Court finds that as the Respondents have stated on their own they declared Claimant redundant and this was an unlawful redundancy as they also didn't follow the law – Section 40 of Employment Act.
46. The Claimant submitted that they even employed someone else to take up her job whereas they pretended to have phased her position out.
47. In the circumstances, I will go with the finding that Respondents declared Claimant redundant but the redundancy was unfair and unlawful. Also that the Claimant had a legitimate expectation to work for Respondent upto 2015 which expectation was frustrated by the Respondents. The proposition answers the 2 issues above.
48. Having found as above, I find that Claimant is entitled to the following orders which I grant:

1. ***1 months salary in lieu of notice = 299,747/=.***

2. ***12 months salary as damages for unlawful redundancy***

***=299,747 x 12 = 3,596,964/=.***

***Total = 3,896,711/=***

***Less statutory deductions***

3. ***Plus costs and interest.***

Read in open Court this 6<sup>th</sup> day of July, 2016.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Juma for Claimant – Present

No appearance for Respondent