



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2174 OF 2012

(Before Hon. Lady Justice Hellen S. Wasilwa on 26th September, 2016)

AGNES NALIAKA MASIKACLAIMANT

VERSUS

MAENDELEO YA WANAWAKE ORGANISATION.....RESPONDENT

JUDGEMENT

1. The Claimant herein filed her Statement of Claim on the 17th of March 2013 via the firm of J. A Guserwa & Company Advocates, where she sought the following reliefs being Judgement against the Respondent as:

(a) A declaration that the purported dismissal of the Claimant is illegal, unfair, wrongful, unconstitutional and therefore null and void as against the Claimant.

(b) A declaration that should the Claimant be dismissed in accordance with the Respondent's Constitution, then she is entitled to all the benefits accorded under the various agreements subsisting between the Claimant and Respondent.

(c) An order of reinstatement in favour of the Claimant without loss of any benefit.

(d) In the alternative payment of the Claimant's lawful terminal dues as set out in paragraph 5A.

(e) Maximum compensation for the unfair termination.

(f) Costs of the suit.

(g) Interest in c (d) above as the court rates.

a. Three months pay in lieu of notice Kshs 600,000.00.

b. Payment in lieu of leave 2011/2012 Kshs 200,000.00.

c. Payment in respect of half salary.

For the month of March 2012..... Kshs 200,000.00.

d. Salary for the month of April, 2012Kshs 200,000.00.

e. Salary for the 15 days worked in May 2012

Kshs 100,000.00

f. Gratuity for the period workedKshs 600,000.00

TOTAL..... Kshs 1,900,000.00

Facts of the Claim

2. The Claimant was employed by the Respondent vide a contract of employment dated 19th of August 2010 as an Executive Director for one year period that lapsed on the 31st of July 2011. The Contract was renewed for a year period that was to lapse in April 2012, but was not formally extended.

3. She carried out her duties dutifully and diligently and expected a further renewal of contract, but on the 12th May 2012 she was locked out of the office and given the letter by the Respondent's Chairman informing her that her contract would not be renewed from a back dated date of 14th April 2012. She was not given reasons, notice nor justification for the non-renewal of her contract.

4. The Respondents filed their Response on the 18th day of February 2012 where they denied that the termination of the Claimant was wrongful and unlawful. The Respondent states that the Claimant's letter of employment provided for a probationary period of six months which she successfully completed and resulted in the Claimant being confirmed.

5. She was granted a one year contract effective from the 15th day of April 2011. The Respondent denies that the Claimant worked for a period of two years and that the decision not to renew was one that was within its discretion. The Respondent states that their actions were within the law.

6. The Respondent in their response state that the claim is incompetent, incurably defective and an abuse of process of Honourable Court. They pray that the claim be dismissed with costs.

7. The Claimant submits that the decision according to the termination letter was as per a resolution made during a full management meeting. They submit that the decision was *ultra vires* and contrary to Article 23(2) of the Respondent's Constitution which states that:

".. The executive Director shall be answerable to the National Steering Committee who will make recommendations at to the National Executive Council who shall be responsible for her appointment and dismissal.."

8. They submit that the power to appoint and dismiss the Claimant in her capacity as the Executive Director was vested in the National Executive Council which the Respondent did not consult.

9. The Claimant submits that the Respondent's own witness RW1 Elizabeth Mayeka gave her sworn testimony to the Court and stated that the management was set within the National Steering Committee, who make recommendations to the National Executive Council who then ratify the recommendations yet no such meetings took place.

10. The witness testified that the decisions to dismiss the Claimant emanated from the National Steering Committee and not the NEC as required by Constitution of Maendeleo ya Wanawake under Article 23(2).

11. The Claimant submits that her contract indicated that her contract was to end around the 15th of April 2012, but that there was no communication as to the renewal and she continued to work after expiry under the same terms, it is presumed that her contract was automatically renewed.

12. The Claimant submits that they are entitled for a 3 months' notice period or 3 months' salary in lieu of notice upon termination, plus all her benefits that had accrued to her as set out as paragraph 5A of the Statement of Claim as follows:

a. Three months pay in lieu of notice Kshs 600,000.00

b. Payment in lieu of leave 2011/2012 Kshs 200,000.00

c. Payment in respect of half salary

For the month of March 2012..... Kshs 200,000.00

d. Salary for the month of April, 2012Kshs 200,000.00

e. Salary for the 15 days worked in May 2012Kshs 100,000.00

f. Gratuity for the period workedKshs 600,000.00

TOTAL..... Kshs 1,900,000.00

13. The Claimant worked for the MYWO up to the 14th of May 2012, when she reported for duty on that day, she was unable to access her office and personal effects. She was not paid half her salary for the month of March 2012, no salary for April, 2012 and no salary for the days worked in May 2012 as set out above.

14. They refer to the case of **Lucia Muthoni Meria vs. Academic Services Ltd, Cause No 371 of 2014**, where the parties agreed to be bound by the Contract of service for a renewable 2 years fixed term up to 4th February 2014. In this Courts view when a party renew fixed term contract by their conduct the same is renewed for the same fixed period as the expired contract. However if the parties with the contract beyond the said terms after renewal, the contract is deemed to be for an indefinite period until termination on reasonable notice or breach or operation of the law.

15. East African Airways vs. Knight (1975) EA 165 where the Court held that a claim for loss of earnings arising from wrongful dismissal in a fixed term contract with a fixed salary should be claimed as special damages because the loss can be calculated precisely.

16. Samuel Chacha Mwita vs. Kenya Medical Research Institute, Cause No. 1901 of 2013; The Employment Act does provide a remedy to an employee who has entered into fixed term employment contracts as referred to in Section 10 (3) (c) of the Employment Act in terms whereas employee, who reasonably expected the employer to renew a fixed term contract of employment on the same similar terms but the employer offered to renew it on less favourable terms or did not renew it, can claim a dismissal occasioned thereby.

17. They pray for the Court to award as prayed.

18. The Respondents submit that at no time did the Claimant apply for renewal of contract. They submit that Article 14(2) of the Respondent's Constitution provides that the functions of the National Steering Committee shall be, recommended the appointment of the Executive Direction of MYWO; Article 13(2) (c) outlines one of the functions of the National Executive Council thus:

“adopt the appointment of the Executive Director of Maendelo ya Wanawake and approve the appointment of other senior officers of the secretariat on the recommendation of the National Steering Committee...”

19. Article 23(2) provides thus:

“...The Executive Director shall be answerable to the National Steering Committee who will make recommendations to the National Executive Council who shall be responsible for her appointment and dismissal.”

20. They submit that the meeting held by the Respondent on the 11th of May 2012 had the effect of a meeting of the National Steering Committee. They submit that the Claimant was asked when her contract was coming to an end as her file was missing but she responded that she was unaware.

21. They further submitted that on page 7 of the minutes of the meeting it was noted that the management while discussing the Executive Director contract had none of the members in favour of renewal.

22. They submit that it was therefore the decision of the National Steering Committee not to renew her contract and such decision did not fall under the ambit of Article 23(3) of the Respondent's Constitution. The said Article is only limited to the instances of appointment and dismissal of the Respondent's Executive Director.

23. They submit that the Claimant is not entitled to the payments in the Statement of Claim. They submit that the Claimant has not produced any evidence to demonstrate that she did not proceed on leave in the year 2011/2012. In any event any payment in lieu must be premised upon the Claimant's net salary.

24. Any payment in respect of the Claimant's salary for the month of May must be based on net salary. Further, any gratuity must be premised upon the letter of appointment which 25% of the basic salary at end of the stipulated contract period.

25. As to reinstatement, the Respondent states that the relationship between the Claimant and the Respondent has irretrievably broken down and that the limit of time within which reinstatement can be ordered set by the Employment and Labour Relations Act No 18 of 2014, which is three years, has already lapsed.

26. They submit that the claim should be dismissed with costs.

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

1. Whether the Respondents' failure to renew the Claimant's fixed term contract translated the same to a formal contract.

2. If so what were the terms of the new contract.

3. Whether the new contract terminated unfairly.

4. What remedies if any the Claimant is entitled to.

28. On the 1st issue, the Claimant was employed by Respondent with effect from 15.4.2011 on a fixed term contract for a period of 1 year vide a letter dated 9.8.2011. Previously the Claimant had served a 6 months' probation period from 19th August 2011 and her request to be confirmed in employment as communicated in the letter of 9.8.2011.

29. The letter stated her duties and terms of contract. Her gross pay was 250,000/= and she was also entitled to 25% gratuity of her basic salary (200,000/=) and 30 days annual leave.

30. The contract was silent on any renewal terms but the contract could be terminated after giving 3 months' notice or cash in lieu.

31. It is the Claimant's case that she served dutifully and diligently thus one year contract which would have ended on 14.4.2012 but it appears no party mentioned the termination or otherwise so the Claimant

continued serving until 14.5.2012 when she was informed that the contract could not be renewed. She was then asked to vacate her office.

32. It is the Claimant's case that she served for the month after 14.4.2012 without any problem and it is her position that she had no prior notice that the contract could not be renewed. She also avers that she was unfairly terminated.

33. The question is whether the Claimant needed notice that their term contract was going to come to an end and not be renewed.

34. My answer is no. Since the Claimant was on a fixed term contract the contract was to terminate at the appointed time and no notice was necessary.

35. However when the Respondent allowed the Claimant to continue in office with their silence or action, it was as if the old contract had been renewed on the same terms as previously.

36. In the case No. 371/2014 **Lucia Muthoni Meria vs. Academic Services Ltd** (Mombasa ELCR Court), Hon. J. O. Makau held that where parties by their conduct renew a fixed term contract after its expiry, then it is deemed to be renewed on similar terms as expired contract until terminated or renewable notice or breach or operation of the law.

37. In the case before me, I find the findings in the **Lucia Muthoni Meria** case (supra) appointment. I do find that also in the case of the Claimant herein, when her contract was renewed by letting her continue working for another month, without raising any issues, then the contract was deemed renewed on same terms as previous contract and could only be terminated by reasonable notice or by operation of the law or by breach.

38. The above exposition answers my issues No. 1 and 2 above.

39. So moving to issue No. 3 when the Respondents decided to throw the Claimant out of the office without notice they were in breach of the terms of the contract and so the termination was unfair. They ought to have given the Claimant notice to terminate the same which they failed to do.

40. I therefore find that the Claimant was entitled to notice under the contract being 3 months which I grant her:

$$= 200,000 \times 3 = 600,000/=$$

41. The Claimant has also indicated that she was not paid her salary for ½ of March, April and 15 days worked May 2012. This, I also find is her entitlement as the Respondent have not shown that contrary to her assertion, they paid her. This is totalling **400,000/=**

42. The Claimant also prayed for gratuity for the period worked which is 25% of her basic salary. This translates to

$$(200,000 \times 12) \times 25/100 = 600,000/=$$

43. Since I have made a finding that the termination was unfair, I also find for Claimant and award her 3 months' salary as compensation for unfair termination = **600,000/=**

Total awarded = 2.2 million.

44. I also direct that the Claimant be issued with a Certificate of Service.

45. The Respondent to pay costs of this suit.

Read in open Court this 26th day of September, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Juma holding brief for Mukele for Respondent – Present

Mbaluto holding brief for Guserwa for Claimant – Present