



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1901 OF 2013

SAMUEL CHACHA MWITA CLAIMANT

VERSUS

KENYA MEDICAL RESEARCH INSTITUTE RESPONDENT

JUDGEMENT

1. On 27th November 2013 the Claimant filed his claim against the Respondent seeking the following orders;

1. *A declaration that the failure to renew the claimant's contract without ascribing reason is contrary to the constitution and the Employment act 2007*
2. *A declaration that the failure to implement the policy of realignment of the salaries structure of 25th June 2012 has occasioned monetary loss of income to the claimant*
3. *The Respondent pays the Claimant the total sum of Kshs.541,008/- itemised as follows;*
 - a. *Kshs.368,790/- being equivalent of Claimant six (6) months' salary in lieu of notice*
 - b. *Kshs.172,218/- being equivalent of the loss of income by the Claimant owing to failure to implement the new salary structure*
4. *The Respondent pays the Claimant the costs of this cause*
5. *The Respondent pays the Claimant interest on 3. (a) and (b) above*
6. *Any other relieve the Court may deem fit and just.*

Claim

2. The claim is that the Claimant being a Senior Medical Illustrator worked for the Respondent for 22 years from 1986 to 2013. Upon training and completion, in 1986 the Claimant was employed by the Ministry of Health and seconded to the respondent. From 1986 to 2001 he was posted to the Respondent Nairobi office in the Medical Illustration Unit on permanent and pensionable basis. From 2002 to 2006 the Claimant resigned his position with the Respondent to undertake private consultancy. He was recalled in 2006 and re-joined the respondent. He was retained on a three (3) years contract renewable as a Senior Medical Illustrator and at Job Group N of the Terms and Conditions of Service in the Public Service. The contract was renewed for one year in 2009 and for 3 years in 2013.

3. On 25th June 2012 the salary structure for civil servants was re-aligned and harmonised with new salary scale which the Respondent should have implemented to the claimant. Despite plea to effect the

same, the Claimant never got a salary review. This failure occasioned loss of income to the claimant. Since being retained on contract, the Respondent MIU department remained a one-man show and without a substantive head as the Claimant was all alone.

4. On 27th may 2013 and in line with the contractual stipulation, the Claimant requested the extension of his contract that was due to expire on 31st November 2013. On 7th July 2013 the Claimant received a response from the Respondent which indicated that the respondent's board had recommended that the position be competitively advertised and that the Claimant should thus apply when such advertisement was made. This decision was only brought to the attention of the Claimant 39 months later after it had been passed. The Claimant appealed against this decision which appeal was rejection without giving any reasons. He made another appeal which was ignored. The Claimant learnt that the Respondent board recommendation to advertise is position was to be initiated 3 months before his contract expired but this has not been done.

5. The Claimant continued to work diligently and was cleared by the Respondent to travel to the United States. The Respondent failed to advertise the position or renew the Claimant contract. That such actions are discriminatory as the Claimant has been deprived his entitlement. The deliberate withholding of information was with malice and in breach of natural justice where reasonable notice of 6 months was required.

6. The Claimant gave evidence in support of his case and stated that upon employment by the Respondent in 1986 he served diligently until 2001 when he resigned. In 2002 to 2006 he was employed by an NGO under a consultancy. In 2006, the Respondent head of Department where the Claimant was previously employed died and the Claimant was recalled back by the respondent. Due to his age and being above 45 years, he was given a 3 years contract running from 2006 to 2009. As a Medical Illustrator he was the only officer of the Respondent in that field and the only other staff was a Photographer and hence the Claimant was in charge of the Unit.

7. In 2009 the claimant's contract was renewed for a year. In 2010 the contract was renewed for 3 years ending November 2013. In 2012, the government reviewed civil servant salary with a 17% increase but the claimant's salary was never reviewed. This caused the Claimant loss since he was still in the Respondent employment at the time.

8. The contract was due for renewal in June 2013 and the condition was that he had to apply which he did 6 months in advance. He also asked for a promotion as he had done 6 years with no promotion of salary review. The practice was that one had to apply to the director who in return was to submit the proposal to the Board and upon approval the director had to issue the contract while the Claimant continued working. When the Claimant made an enquiry after failing to get any feedback, the assistant director informed him that the board had recommended that he had a last contract and would be an advertisement in the press upon which he should re-apply. The reasons for non-renewal were not given. Upon this information, the Claimant decided to seek redress. He waited for the advertisement but this never came through. He was told to vacate office.

9. A year later the Respondent advertised for the position but it was a grade lower than what he held. He could not apply it was at Job Group 9 while h had been at Group 10.

10. The Claimant was aggrieved by the fact that the Respondent board decision not to renew his contract was not communicated in time. He learnt of the same 3 months before the lapse of his contract. The Claimant had served diligently as an employee of the respondent. In November 2013 the Respondent gave a recommendation letter to the US Embassy as he needed to ravel for training. The Respondent did not actively recruit anybody for the position held by the claimant. The failure to renew contract was a violation of the claimant's rights. The Claimant reiterated his claims.

Defence

11. In defence the Respondent admit that they had employed the Claimant upon secondment, he

voluntarily resigned on 26th February 2001, was cleared and all terminal dues paid upon release. The employment then came to a close and nothing is due.

12. The defence is further that on 19th October 2006 the Claimant applied to be employed by the Respondent on short term period. Under the Staff Service Regulations the Respondent has powers to hire a person on permanent and pensionable terms, contract basis or casual terms and based on the claimant's request, he was employed on 3 years contract basis. Upon expiry of the contract the Claimant was paid his gratuity. Upon request for renewal, the Claimant was issued with a new contract of one year and upon expiry gratuity was paid. A new contract was issued for 3 years on condition that it was the last extension upon expiry on 30th November 2013. Clause 2 of the schedule of the contract was express as it provided that the Claimant was to give notice in writing to the Respondent in the event that he desired to remain in its employment and upon which the Respondent was to make a decision. On 27th May 2013 the Claimant made a request for renewal of his contract and on 24th June 2013 the Respondent advised the Claimant that the board had decided to advertise for the position.

13. The decision not to renew the claimant's contract was within the law and the contract of employment agreed by the parties which vested the Respondent with discretion to renew or not to renew the contract. The contract was specific on the remuneration payable. Provisions outside the contract cannot be relied upon to justify any other claim. The Respondent treats all its employees equally and without discrimination against any such employees. The Respondent decision to competitively advertise the position previously held by the Claimant was within the knowledge of the Claimant and he was free to apply once so advertised.

14. On the issue of discrimination, this does not arise as the Claimant was under a contract and the Respondent had the discretion not to renew. The Respondent acted within the law and the contract between the parties. The Claimant was not dismissed save that his contract lapsed. Save for the Court order, the Respondent was ready to effect the payment. The claim should be dismissed with costs.

15. In evidence, the Respondent called **Benson Ochieng** the acting assistant director Human Resource. He has been with the Respondent since 1985 and worked with the claimant. That the Claimant was initially employed on permanent and pensionable terms and then he resigned. He was later employed on contract and upon each lapse he was paid all dues. The rules and regulations for hiring the Claimant were that the Claimant made a request for employment and since he was above 45 years of age he could not be taken under the permanent and pensionable terms. He could not be re-employed under his previous terms. By then the retirement age was at 55 years of age and for one to earn pension he should have worked for 10 years – anybody between 18 to 44 years was employed on permanent and pensionable terms. The Respondent could also only grant contracts for a maximum of 36 months. Renewal of each contract was based on application.

16. The Claimant was offered employment on contract upon recommendation by management. A memo was done to this effect on 27th October 2006. Upon expiry the Claimant requested for renewal and was extended for a year. A total of kshs.262, 265.30 was paid in gratuity and thus closed the contract. The next contract expired and the Claimant was paid kshs.113, 977.95 which closed the contract. On the next request for renewal the Claimant got a 3 years contract running from 30th November 2010 to 30th November 2013. The contract required 3 months notification by the Respondent board. The board has a calendar of events and meet quarterly and only do action point for follow up by management. The board had noted the claimant's contract had been renewed for the last time and there is no requirement that the board should give a reason for non-renewal. The board had the discretion not to give any reasons. Other than the salaries paid, the contract issued to the Claimant were the same and he was conversant with the process of issuance of new contracts.

17. On 24th June 2013 the Respondent informed the Claimant that they would not renew his contract. This was done through the human resource office. The board had decided to advertise the position and the Claimant was at liberty to apply. This was sufficient information and there was no need for further communication between the Respondent and the claimant. There was no advertisement until 2015 for a

Graphic Designer and the Claimant can apply.

18. On salary increment, this is based on the government calendar. Parastatals operate under a different system of making requests to Treasury via their line Ministry for salary review and a circular has to be issued. The circular for civil servants does not apply for parastatal staff unless there is such a directive. On 30th November 2013 the Claimant contract lapsed. To apply the circular terms on the Claimant one would have to look at the contract terms as he was not permanent and pensionable and to review his salary at this point would be to act retrospectively which was not the intention here.

19. Mr Ochieng also testified that it was the practice of the Respondent to allow staff to travel abroad for events all one needed was to get permission. The Claimant was treated just like any other employee.

20. The claims set out do not arise as the notice pay lacks justification. Termination notice was for one month but the Claimant got a notice of 3 months. The claim for unpaid salary does not relate to the Claimant as he was not subject of the government circular on an increment.

Submissions

21. Only the Claimant filed their written submissions. Ms Ngetich was in Court on 1st December 2015 and was directed to file submissions by 2nd December 2015. No submissions are on record for the respondent.

22. The Claimant submitted that upon his re-employment by the Respondent his contracts were extended and his last contract had a provision for extension at least 6 months. That under the Further Employment schedule to the Agreement Terms of Engagement this created a legitimate expectation that there would be extension of the contract. The Claimant rely on the case of **Communications Commission of Kenya & 5 Others versus Royal Media Services Limited 5 others, Petition No. 14 of 2014** where the Supreme Court held that a legitimate expectation is built where there is clear and express promise given which expectation is reasonable and a representation made. A legitimate expectation cannot be given a restrictive interpretation. In this case the contract issued to the Claimant made a provision that the Respondent board would inform the Claimant whether they would renew his contract.

Determination

Whether the claimant's right under the Employment Act or the Constitution have been violated;

Whether the Claimant is entitled to new salary under the salaries structure of 25th June 2012

23. It is important to set out here that parties filing claims before this Court ought to comply with the Rules of the Court particularly with regard to the provisions of Rule 4. A party must set out the issue/s in dispute and the provisions upon which the claim is based upon. This sets in motion clarity of the issues for determination.

24. In this case what I find to be in dispute is the non-renewal of the claimant's contract that expired on 30th November 2013.

25. A Written contract is the fodder for employment relationship. Such written document enables each party to the employment relationship to know the terms and conditions of such employment. So important is such a document that sections 9 and 10 of the Employment Act is fully dedicated to the subject of what should go into an employment contract. Parties to an employment relationship are encouraged to go beyond the legal minimum and set out more terms and conditions of employment so as to further elaborate on the relationship.

26. Where parties enter into an employment contract, such a contract by mutual agreement can be for permanent employment, for a fixed period or and or term, seasonal, or as the case may be. Such time

fixing is for the parties to agree upon or based on the needs of each party. Such a contract is then executed by the parties and becomes enforceable. The Court cannot interfere with its terms unless any term/s is contrary to the law. Therefore where parties agree to end the contract at a fixed date, the other cannot allege breach. To do so would be to defeat the very essence of having agreed on the fixed term of the contract in the first instance.

27. In this case, both parties agree that the Claimant was formerly employed by the respondent. He resigned and was paid all his dues. Later in 2006 he requested to be employed and was issued with a 3 years contract, it was renewed by a further one year contract and another of 3 years. The last contract was to expire on 30th November 2013. Under the last contract ending 30th November 2013, at clause 2, the parties agreed to the salaries payable to the claimant. A further schedule was attached to the contract so as to set out more details to the principal document/contract. At clause one, the contract was for a fixed term of 3 years and at clause 2, the employee agreed to give a 6 months' notice seeking renewal of the contract and upon which request, the employer;

... The Institute [respondent] shall thereupon decide whether it will offer him further employment in which case the re-engagement shall be on such terms as may be mutually agreed.

28. Thus the parties, agreed to have the employee start the process of seeking the renewal of the employment contract with an expression of interest and through giving notice of such intention. The employer, upon such notice was to decide whether to offer further employment. This then can be taken that such a decision could go either way. Positive or rejection. The decision to offer further employment was left to the employer. In such an agreement there was the freedom to agree on what was to go into the contract as held by the Court of Appeal in the case of **Kenya Airways Limited versus Satwant Singh Flora [2013] eKLR**;

It was an express term of the contract of employment between the appellant and the Respondent that the contract would be terminated if the Respondent failed to obtain a work permit from the Immigration Department. Once the respondent's permit expired, any further work he carried out was illegal. Thus, failure to obtain a work permit was an intervening event which vitiated the contract between the parties.

29. Therefore based of this kind of mutual understanding and or agreement the Claimant was at all material times aware of the expiry of his fixed term contract as at 30th November 2013. His request for renewal on 27th May 2013 was not positively considered vide respondent's letter dated 24th June 2013. That far the parties have followed what had been agreed upon when executing the subject contract. However, in the letter of reply, the Respondent opened new issues and shared with the Claimant that;

Please note that when your contract was last renewed by the Institute's board of Management for a Further term of three (3) years w.e.f. 1st December 2010 to expire on 30th November 2013. The board recommended that the position be competitively advertised should there be need to retain the same on the Staff Establishment.

30. The contest here is that this information was kept away from the Claimant and was not shared with him until 3 months before his contract expired. That the decision not to renew the contract made by the board in 2010 was left in his file but the Claimant had no such knowledge. By making an application for renewal of contract, the Claimant had a legitimate expectation that it would be renewed for a further term.

31. As set out above, a fixed term contract automatically expires once its term has lapsed. Without the mutual agreement of the parties, there can be no claim that a party had an expectation for renewal. I rely on the case submitted by the Claimant **Communications Commission of Kenya & 5 Others versus Royal Media Services Limited 5 others** which set out the principles that govern legitimate expectations. As set out by the Supreme Court, there must be *an express, clear and unambiguous promise given* and I find no such promise made herein to the Claimant for the renewal of his contract. To the contrary you existed a fixed term contract that was not renewed. Such cannot be found to be an unreasonable measure

by the Respondent as parties had set out the time period for engagement. The Claimant also relied on the case of **BIFU versus Kipsigis Teachers Sacco Society Ltd [2012] ekr**, however, such a case is distinguishable from this one as in that case, the grievant was allowed to continue working despite his contract coming to an end. By such an act, for the period that the grievant remained at work and no action was taken to terminate the employment, a new regime of employment commenced. This is not the case here, the Claimant was advised to collect his terminal dues, which dues have been awaiting his collection upon the lapse of his contract. The interim orders enjoyed pending the determination of the interlocutory application served a set purpose. There was therefore no legitimate expectation built for any purpose that can create further employment by extension of the contract. This I find to have been clearly set out under the statement of defence thus;

17. clause 2 of the schedule of the contract expressly provided that the Claimant shall give notice in writing to the Respondent in the event that he desires to remain in its employment and the Respondent is to make a decision thereof.

18. In his letter dated 27th May 2013, the Claimant made a request for renewal of his contract as required by the terms of the contract.

19. In a letter dated 24th June 2013, the Respondent advised the claimant, the Board of Management's decision in regard to his contract which further advised the Claimant to apply for the position once the Respondent advertises the same.

32. I therefore find no rights violations with regard to the non-renewal of the claimant's contract. The employment contract governing the terms and conditions of service was by mutual agreement to the extent that the time period to end the same was settled. This is not in violation of any law or of the constitution.

33. On the question whether the circular issued on 25th June 2012 applied to the Claimant with regard to the realignment of salaries, the Claimant was a specific contract. His was not a general assignment that conferred benefits outside the agreed terms. To have his terms vary outside the mutually agreed contract would be to go outside its terms. Such would cause the application of terms and conditions not settled by the parties. My reading of the circular is that it was applicable to officers in the civil service, the Claimant was not one such civil servant. Such position ceased on 21st March 2001 when his resignation of 26th February 2011 was accepted by the respondent. The Claimant ceased being permanent and pensionable. When he was re-employed it was made clear that due to his age and policy applicable then, he could only be employed on contract of up to 3 years. Such was the position he held until the fixed term contract lapsed on 30th November 2013. The dues claimed do not arise with regard to the claimant.

34. In the penultimate, the remedies sought by the Claimant do not arise. He cannot claim outside the contract he held with the respondent.

The claim is hereby dismissed. Each party shall bear their own costs.

Orders accordingly.

Delivered in open court at Nairobi this 16th day of December 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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