



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO. 1197 OF 2012**

**JENNIFER KIMANI..... CLAIMANT**

**VERSUS**

**PERMANENT SECRETARY**

**MINISTRY OF ROADS.....1ST RESPONDENT**

**KENYA RURAL ROADS AUTHORITY ..... 2ND RESPONDENT**

**ATTORNEY GENERAL .....3RD RESPONDENT**

**JUDGEMENT**

This is a claim dated 27th June 2012 by the claimant Jennifer Kimani for unfair termination of employment and non payment of outstanding terminal dues by the respondents. The 1st and 3rd respondents filed their defence dated 9th October 2012 where they deny all the allegations of the claimant and also raised a preliminary objection that they should not be party to the claim as there was no cause of action against them. On 9th October 2012, the 1st and 3rd respondents filed a separate preliminary objection to the claim. The 2nd respondent gave their defence dated 9th September 2012 which was amended and dated 28th September 2012 where they admitted that the claimant was their employee on contract which ended and upon non renewal, the same came to an end and therefore no claim stands against them. On 25th October 2012, the claimant filed her response to the amended response.

On 8th November 2012, the court heard the preliminary objection and by a ruling dated 9th November 2012, the 1st and 3rd respondents were struck off the record upon the court finding that the claim as filed only related to the 2nd respondent only. Therefore hearing commenced with the claim as against the 2nd respondent

It was the claimant's case that she entered into a contract of employment with the 2nd respondent on 1st April 2009 for a period of 3 years as Finance Manager, which contract was renewable by the claimant upon giving a six (6) months notice before the expiry of the contract. That the contract was to commence upon the assumption of duty by the claimant after she signed the contract on 21st January 2009 and commenced duty on 1st April 2009.

Under the contract, the terms of the claimant were a basic salary of Kshs.148, 286.00, house allowance of Kshs.65, 000.00 and remuneration allowances at Kshs.129, 625.00 all together with other benefits as

under the 2nd respondent's guidelines of service of Kenya Rural Roads Authority (KRRRA).

On 30th September 2012 the claimant applied to the board of respondent to renew her contract which application was acknowledged by the Director General and on 27th March 2012, the Director General refused to renew her contract on the reason that the claimant had not notified the board of her intention to renew her contract within the stipulated period of 6 months. The claimant stated that this decision of the respondent not to renew her contract was made without due regard to the duration of the previous contract which had not expired and with haste with a clear scheme of getting rid of her and from the respondent employ. The claimant noted that at this time of her employment there were several sensitive issues that were still work in progress where she was looking into malpractices within the department, which had been raised with the board, on the loss of colossal sums of money that had been misappropriated and some that were at risk of being misappropriated.

The claimant further stated that the failure to renew her contract was done with malice with and meant to stop her investigation and for the sole aim of defeating the ends of justice which she particularised and set out as; Failure to consider the then existing contract, that she had worked diligently as finance manager, respondent did not consider the expiry date of the contract, and failing to allow the claimant to follow up on the malpractices. That as a result the respondent has caused the claimant to suffer loss and damage by the non renewal of her contract. She was not paid 3 month salary in lieu of notice, 3 years salary for the unexpired term of her contract and mental anguish.

The claimant therefore claims for;

*Kshs. 1,028,733.00 being 3 months pay in lieu of notice*

*Kshs. 12,344,796.00 salary for unexpired term of the contract*

*General damages for breach of contract*

*Compensation for damage to her character as a professional accountant*

*Gratuity unlawfully withheld at Kshs.2,000,000.00 and*

*Interests on the awards.*

The 2nd respondent on the other hand stated that they had employed the claimant on a 3 year contract which was dated 23rd January 2009 the date of commencement with a provision for renewal, 6 months before it expired. The claimant was paid according to the contract and the claimant salary was increased to provide for acting allowances in terms of KRRRA Salary Guidelines. That the claimant applied for her contract to be renewed but upon assessment, the respondent board found her to be unsuitable in terms of the respondent management structure and policies and that these reasons were communicated to her. That the Claimants contract expired on 23rd January 2012 of which the respondent communicated to the claimant through the Director General on behalf of its board.

The respondent further stated that upon the expiry of the contract between them and the claimant, she was expected to get clearance from the 2nd respondent whereupon her terminal dues were to be paid. Several letters were issued to this effect, but that the claimant failed to comply. That had the claimant done the clearance with the respondent; she would have been paid dues of Kshs.1, 357,930.00 all inclusive of gratuity and allowances due.

To this response, the claimant replied to the effect that there was no appraisal done on her despite the respondent having an elaborate human resource department and performance management policy. Her position as Manager Finance was reaffirmed in the human resource board paper. That the fining made by the respondent to the effect that she was unsuitable was due to the reason that she had detected fraud in the systems involving some members of the management which made the general manager finance, director general and board uncomfortable resulting in her forced exit.

Further that her gratuity as due was based on her last salary being Kshs.1,654,671.00, leave dues was worth Kshs.274,328.80 and acting allowances at kshs.44,468.50 all totals being kshs.1,973,468.30.

In evidence the claimant gave her sworn statement that she is a Certified Public Accountant and was employed by the 2nd respondent from 1st April 2009 until her termination in January 2012 and again on March 2012. She signed her contract on 23rd January 2009 and the contract stipulated that it would take effect upon her commencement which she did on 1st April 2009 to end on 31st March 2012.

As the Finance Manager the claimant noted that since the 2nd respondent was a new authority, there was another grade of General Finance Manager and the hired person did not start immediately where the respondent asked her to carry out the duties under this position as well as her position duties. She was paid acting allowances for the months she was responsible for the senior position until January 2012 the respondent advertised for this position.

December 2011, the claimant got a letter from the Director General stating that the claimant should have applied for the renewal of her contract and thus they regretted to inform her that the contract would not be renewed in January 2012 and was therefore to do her clearance from the office. On 2nd January 2012 the claimant wrote to Director General indicating that her contract was running from 1st April 2009 and was to end on 31st March 2012 and noting this the claimant had already written to the human resource office on 31st September 2011 for renewal. She was then reinstated but in her reply to the Director General she had noted that she was employed by the board and this should have been addressed but was not.

On 27th March 2012, another letter was issued advising the claimant that the board had made a decision not to renew her contract. The claimant however noted that there had been no board meeting and only a human resource committee met and her contract renewal was part of the agenda. This committee was to report to the board as a recommendation upon which the board as the appointing authority was to make a decision. That from her contract; the claimant contract could be terminated by the board upon a performance appraisal which was not done or upon 3 month notice or payment in lieu of notice which was not done. That since her appointment she had worked diligently was in an acting capacity for general director finance and was credited with outstanding performance.

That in the circumstances of her case, the non renewal of contract was not fair and the only reason given was that she had failed to apply for renewal, which she had done and the same acknowledged by human resource office. That her termination was malicious since the person appointed as her senior could not appraise her as the person was not a qualified accountant qualified by CPA K and noting that she had performed well, there were no issues. That after she was reinstated she discovered incidents of fraud perpetrated from the date the new officer was appointed and she started following it up and with her findings confronted the Director General, she followed it up to find out how funds had misappropriated and how this could be followed and repaid noting her noble duty as a CPA K certified person and did not wish to be seen as an accomplice. However, in her follow up, the Director General was uncomfortable who in his letter of 27th March 2012 noted that the claimant was not the head of the department. The claimant therefore asserted she was terminated to silence the malpractices ongoing at the respondent Authority.

She filed her report with the Ethics and Anti-Corruption Commission. This was acknowledged and she then wrote to the Prime Minister's office to the attention of Inspector General for State Corporations all in an effort to address these malpractices. On this basis, the claimant wanted her job back as she had been unfairly terminated.

The claimant also stated that no certificate of service had been issued as well as all the lost months were not paid for, and also claimed notice pay and general damages for breach of contract. The claimant also seek damages due to damage of her character and profession as by her termination, the respondent implied that her termination was due to non performance and she is thus aggrieved .She was owed gratuity based on her last salary at 31% annual basic salary and the respondent practice was to pay at this rate.

The claimant further confirmed that during her service to the respondent she complied with all procedures, was diligent in her work and as the manager finance the respondent got audited accounts that were not qualified by the auditors. Her performance was outstanding.

On cross-examination the claimant confirmed that her contract was for 3 years as dated 21st January 2009 ending 31st March 2012 and not January 2012 and under the contract the board could terminate based on performance but on 27th March 2012 she got the termination letter and was to hand over all respondent property since her contract would not be renewed. That she had a reasonable expectation that her contract would be renewed. That on 6th January 2012, the Director General wrote to her correcting his mistake done earlier in the termination letter dated 27th December 2011 and reinstated her.

That there was fraud which the claimant detected and made a report to EMU and CASA.

The respondent in their evidence called Judith Adhiambo Yamo the Human Resource Manager. She stated that she has been an employee of the respondent since 26th June 2009 and she worked with the claimant who signed her contract on 23rd January 2009 and commenced work on 1st April 2009 and as the human resource officer she was conversant with the claimants file and the matter in court.

That in the claimants contract it was for 3 years and all the terms were outlined in this contract noting that if the claimant wished to renew her contract with the respondent, she had to apply 6 months before end date as renewal was not automatic as it was subject to satisfactory of duty. That where there was a renewal, a new contract would be issued but in the claimant's case, none was issued.

That the claimant was acting as general finance manager and was dully paid the acting allowances. She was not confirmed for this position and it was advertised. When the claimant was terminated she was owed gratuity as per clause 14 of the contract at 31% basic salary and based on the record, the claimant had not used all her leave days and gratuity was computed at kshs.1,101,133.03, leave at kshs.274,328.80 and allowances at Kshs.44,468.05 all amounting to kshs.1,419,930.38. From this amount there was property of the respondent held by the claimant which she has not surrendered, a lap top worth kshs.62,000.00 and thus what was owed to her was kshs.1,357,930.38.

Notice pay was not due since the claimants contract had expired and therefore not entitled to renewal. The claim for damages does not lie as there was no contract. The gratuity due was based on annual basic pay progressive each year hence changing each year and wrong for the claimant to base her claim on her last basic pay. That there was a human resource policy dated March 2012 and the respondent had no formal appraisal system for staff and hence there was nothing to be used in the claimant's case and what she produced in her evidence was not approved until March 2012 before her contract expired.

When the Director General wrote to the claimant on 6th January 2012 and again on 27th March 2012, it was a clarification of the claimant's contract status that the claimant was not successful in the interviews for general manager finance and her contract would not be renewed. That the claimant was not terminated, her contract simply expired and was not renewed. On this the claimant was only entitled to kshs.1,357,90.38 less taxation which the respondent is willing to pay and the claim dismissed as it does not arise.

On cross-examination, the witness confirmed that the claimants contact was for 3 years and renewable upon 6 months application and the same was running from 1st April 2009 to 31st March 2012. That the performance appraisal stipulated under clause 4 was not operational as the respondent had no performance system but there was the general performance cycle with quarterly reviews which was reported to the board. That using the public sector management cycle, the claimant was gauged.

The witness further confirmed that the Director General had erroneously issued the letter dated 2nd January 2012 but this was corrected by the letter dated 6th January 2012. The issue on the claimant's contract was to be addressed by the board and a communication was to be issued to the claimant as the board could terminate as per the contract. That in this case, there was no need for notice or a payment in lieu of notice as the contract had expired and not renewed. That what the board decided was

communicated by the Director General and the Director General decisions were ratified by the board.

That the claimant applied to have her contract renewed and the human resource board committee referred the issue to the witness which she took to the human resource committee, which met on 27th March 2012 and resolved that the claimant's contract be terminated. This decision was to be ratified by the board and on the same date the claimant received communication from Director General on the termination of her contract.

### Assessment

Courts respect written employment contracts as such a contract outline the terms and conditions of such employment. This contract will not be disturbed unless there are very good reasons to. These reasons will only apply in very exceptional circumstances as a written contract should not be disturbed unless the same is written contrary to written law. However, even where a contract is signed with the consent of the parties to it, it cannot offer that which is against the law, the minimum requirements of the law must be met but the benefits due to an employee can only go beyond the legal minimum.

The letter of appointment issued to the claimant as signed by the respondent and she is an important document herein as from this document, the terms and conditions of employment were outlined. This is an important document, not just for the claimant but also for the respondent in dealing with the claimant. This letter dated 23rd January 2009 was issued following an interview of the claimant by the respondent on 9th January 2009 for the position of manager finance. The claimant was outlined as an officer reporting to the Director General and the performance measures as agreed were that apart from the outlined tasks stipulated in the letter of appointment, the claimant in consultation with the Director General, more tasks would be allocated, her performance would be reviewed and appraised regularly and documented in meetings with the Director General. Hence, in the claimant's performance of her duties, the Director General was a key person in a supervisory role as well as for reviews and appraisal.

This appointment was to take effect as outlined in clause 5 for 3 years commencing from the date you assume office. The board reserved the right to terminate the contract prematurely, on the advice of the Director General, depending on the claimants' performance.

Thus, despite this contract stipulating that it would be valid for 3 years, the same could be prematurely terminated based on performance. Performance was to be upon the review and appraisal of the Director General as per the terms of the claimant's contract.

In this regard, 'performance' of the claimant was core to her continued employment as so much seem to have been pegged on it. In my reading of the entire letter of appointment, I do not find anywhere where the parties define this 'performance'. Under clause 4 of the letter of appointment states;

### *Performance measures*

*In addition to the duties and responsibilities detailed in this letter of appointment, key tasks will be agreed between you and the Director General in consultation with the Board, and your performance will be reviewed and appraised regularly and documented in meetings with the Director General.*

From the evidence of Judith Yamo, the Human Resource Officer of the respondent, there was no performance appraisal system for the respondent to use until the draft document was approved by the Board in 2012. She stated that;

*There was no formal performance system for appraisal, but we had the general performance cycle and department heads had to review on quarterly basis which was reported to the Board. ... We had a management contracting cycle based on the public sector management cycle and it was used to gauge the claimant in her duties and performance. It was done on the claimant as managers made quarterly reports on the achievement of their performance. ... We submitted these reports to show the claimant's performance.*

However, according to the witness who is responsible for human resource at the respondent's, their performance system was not in force until 2012, just before the claimant was terminated.

It is important then to restate the law as regards 'performance' this being an issue that was highly pegged on the role of the claimant. The Employment Act, 2007 is clear on the procedure governing termination on the ground of poor performance. Subsection 41 (1) of the Act provides that before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity and the employer shall explain to the employee, in a language the employee understands, the reason for which the employer is considering the termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation. Subsection 41(2) requires the employer, before terminating the employment of an employee or summarily dismissing the employee under the section to hear and consider the employee's representations which the employee may have to make in view of the alleged misconduct or poor performance.

In this case, the claimant was not subjected to any appraisal, on the reason that her contract had expired and that the board was not going to have the contract renewed. What was in the letter of appointment?

There is a renewal clause as at clause 6 and beyond this there is a termination clause as at clause 26. On the one part, if the claimant wished to be reappointed to the same position she was required to make a request of at least 6 months before the contract expired. However, if any of the parties wished to terminate the contract for one reason or the other, a notice of 3 months was required or a pay of basic pay and house allowance in lieu of such notice.

I note that the claimant on her part made a request for renewal of her contract dated 30<sup>th</sup> September 2011. This was admitted by the respondent and even if they had not, the same was acknowledged as received. Also the letter of employment took effect from 1<sup>st</sup> April 2009 and was to expire on 31<sup>st</sup> March 2012 and 30<sup>th</sup> September falls exactly 6 months before this expiry when the claimant made her request for renewal.

To this application, the respondent wrote to the claimant on 27<sup>th</sup> December 2011 with regrets that the contract would not be renewed as she had made her renewal request late. Upon challenge of this position by the claimant, the respondent on 6<sup>th</sup> January 2012 wrote;

#### *RENEWAL OF APPOINTMENT*

*We acknowledge receipt of your letter dated 2<sup>nd</sup> January 2012.*

*The matter will be referred to the Board, and a decision communicated to you thereafter.*

*In the meantime, you will be expected to attend to all your duties assigned to you, under the supervision of the General Manager (Finance).*

Was this therefore a reinstatement? Was it an indication that the claimant was now to proceed on a new contract as she had requested?

All seems to have been well until 27<sup>th</sup> March 2012 when the respondent wrote to the claimant thus;

#### *RENEWAL OF EMPLOYMENT CONTRACT*

*I have been directed by the Board of Directors to inform you that this Authority will not renew your employment contract upon expiry. ...*

Going back to the claimant's letter of appointment, termination of the contract was with notice of 3 months by either party. The renewal of the same was upon the claimant request 6 months in advance to expiry date. From the respondent's letter of 6<sup>th</sup> January 2012, the claimant was invited back to her

position and on 27<sup>th</sup> March 2012 just on the even when her 3 year contract was supposed to expire, she was served with notice indicting that her contract would not be renewed.

The action of the respondent was not a proper reading of this letter of appointment, a letter they signed where they outline the terms and condition that was to govern the employment relationship. By the respondent inviting the claimant back to her position on 6<sup>th</sup> January 2012, this was not equivalent to notice for termination as under clause 26 of this letter of appointment. By indicating that the contract had expired a few days to the last date of the contract was an act that would be termed most inappropriate by a body that is supposed to serve public interest and not use their position to exploit the labour of their employees even where such an employee had already expressed interest in the job with an application and no performance appraisal is indicated to have been undertaken as to objectively assess this employee. This would be an act contrary to this court interpretation of Article 41 of the Constitution where parties to an employment relationship as supposed to engage in fair labour practices. This is not one such interpretation. It defeats the very purpose of these constitutional provisions and goes contrary to the expectations outlined under section 41 of the Employment Act.

A body like the 2<sup>nd</sup> respondent operate for and on behalf of the public. In the event of conflict between individual interests, the public good should override these personal preferences. Where there is a citizen with a legitimate expectation from a public officer, that citizen is bound to challenge any act that this public officer does that express bias or lack objectivity. In this case, I find the evidence of Judith Yamo most helpful. She indicated that her own contract was renewed after it expired and that when they assessed the claimant's request for renewal of her contract there were exceptional circumstances for the claimant's case but the committee assessing here found that her performance and the various incidences of integrity formed the larger part and this committee recommended that the contract should not be renewed.

Judith also admitted that the respondent lacked a performance appraisal system until March 2012 when one was approved by the Board. Was this newly approved tool used to appraise the claimant? This court was denied this evidence by the respondent. It was not indicated as to how the performance of the claimant was assessed. This was supposed to have been done by the Director General as per the terms and conditions of the letter of appointment and even though this officer acts and functions to implement the Board decisions, Judith was clear in her evidence that they sat as the Human Resource Board Committee, a high organ I must state and decided that based on their assessment, the claimants contract based on performance and incidences of integrity, her contract was not to be renewed.

This action is contrary to the Employment Act as per section 41 outlined above. The respondent had the letter of appointment to use to their advantage where they found the claimant wanting in performance or on any other ground. They could terminate the contract prematurely on condition clause 26 was followed. The respondent chose otherwise, to ambush and gives a surprise on 27<sup>th</sup> march 2012 by terminating the employment of the claimant. This is not what is envisaged in an open and democratic state that is governed by the rules of mutual good will when parties enter into a contract. Each party is expected to take their end of the bargain by performing their part and performing it well.

When such a situation happens, an employee who finds themselves in the circumstances as the claimant was before the respondent, the only recourse is this Court. To seek the protection of rights that has been violated. As in this case, by the respondent failing to follow the very document that outlined its relationship with the claimant, they were undertaking an unfair labour practice.

I however must take note of the claimants conduct. In her evidence, she had a demeanour that expressed anxiety and lacked composure. She stood out as extremely confrontational, spoke loudly and in a rushed manner even when the Court tried to have her calm down. This only further agitated her more and went on to note in her evidence about the Director General;

*The first letter of termination [from the Director General], it was unprocedural on two accounts. He misunderstood the contract provisions which I corrected in my response. It communicated the position of the Director General and not the position of the Board. ... After I was reinstated, I discovered incidents*

*of fraud perpetrated from the date the new officer took office and I started following it up. I confronted the boss and the Director General. I followed it up and sought to know how these funds could be followed as my duty as a CPA K certified and I did not wish to be seen as an accomplice.*

I can only imagine the kind of ‘confrontation’ that took place at the respondent offices upon these discoveries. Also the efforts made by the claimant ‘to correct’ the Director General misunderstand of her contract details. Even where employees are highly qualified, have good experience and outstanding credential that have made them been appointed to a particular position, a work environment constitutes a team that must work in a cohesive manner that is productive. The good efforts to stem out corruption in Kenya is highly recommended and the fact that the claimant already reported the matter to the Prime Minister’s office and to the Anti-corruption commission was a good act for any citizen. These efforts should not be put to waste and these reports must be followed as the allegations with these reports from a public body are very serious issues against the public of Kenya. However even where an employee makes such finding like the claimant did at their work place the same must not be done in a manner that is disruptive and in utter disregard to protocol. Due recognise that in each team there is a leader and a team to be lead is a fact that cannot be ignored at the work place. The Director General was the supervisor of the claimant as per her letter of appointment, and even though the claimant was best suited for the job, the Director General remained her supervisor who was supposed to appraise and review her work.

## **Remedies**

On the claim for notice pay, I find that the respondent did not follow clause 26 on notice required to terminate the employment of the claimant. Where notice was not issued, a pay of 3 months basic pay together with the house allowance was due. I will grant this amount.

On the unexpired term of the contract, one notice was paid; this claim does not arise in the claimant’s case. Her contract was not renewed, the existing contract was to expire on 31<sup>st</sup> March 2012, it was not renewed and having awarded notice pay, the claim for the unexpired contract term will be declined.

The claim for damages over breach of contract was outlined as due based on the fact that there was an ongoing contract that was terminated before it expired. By the claimant being allowed to serve all the term of her contract the respondent cured what would have been otherwise a good claim for damages in breach of a contract. This will therefore not be granted.

Compensation for damage to the claimant’s character as a professional accountant was based on the fact that the claimant was alleged to have failed in her duties and that she had incidents lacking integrity. Apart from the financial reports that were submitted, the claimant by her own conduct did not stand out as a person who respected the authority of her superiors and even where she may have been unfairly challenged while undertaking her duties, she failed in addressing the same in a civil manner. The fact that she confronted her boss and the Director General was indicative of a combative person. This does not speak well to this claim for the damage to her character. In any event, this claim did not stand out as having caused any particular damage to the claimant’s profession as a certified CPA K. nothing was adduced as evidence that this has had any impact to her career. I will not grant.

Gratuity was payable as outlined in the letter of appointment clause 14, at 31% of the annual basic salary. This was ‘... *one-off gratuity calculated at the rate of 31% of your annual basic salary.*’ Annual basic salary is a graduated amount that is subject to change and when not outlined in a contract of letter of appointment in this case, the same is to be based on the last basic salary as earned by an employee. Basic salary at the time of termination was Kshs.148, 158.00 all computed to kshs.1, 654,671.00. To this leave was due at Kshs.274, 328.80 and outstanding allowances at Kshs.44, 468.00. This will be awarded at Kshs. 1,973,467.00.

These were the only claims as outlined by the claimant. Noting that there was no particular claim for unfair termination and based on the outlined issues above, I will grant the claimant costs of the suit.

There was no counter-claim for any monies or property that the claimant was alleged to be owing to the

respondent. I will confirm the only claim outlined before this court.

**Conclusion**

**Judgement is hereby entered for the claimant as against the respondent in the following terms;**

**Notice pay at kshs.1, 028,733.00 and**

**Gratuity at Kshs. 1,973,467.00.**

**Interests on (a) and (b) above awards at court rates from the date of judgment.**

**The claimant to be issued with her Certificate of Service within 14 days from the date hereof. This to be sent to her advocates and a copy to her last stated address under her letter of appointment.**

**Costs of the suit.**

**Delivered in open court this 30<sup>th</sup> day of July 2013**

**M. Mbaru**

**Judge**

**in the presence of**

**Jacob Kipkirui: court clerk**

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