



REPUBLIC OF KENYA

INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE 509 OF 2010

RUTH GATHONI NGOTHO-KARIUKI.....CLAIMANT

VERSUS

PRESBYTERIAN CHURCH OF EAST AFRICA

AND PRESBYTERIAN FOUNDATIONRESPONDENTS

JUDGMENT

This is the judgment in the case of Ruth Gathoni Ngotho Kariuki, the Claimant, against, the Presbyterian Church of East Africa and the Presbyterian foundation, the Respondents.

The Claimant filed the memorandum of claim on 10.05.2010 through K.K. Nyakundi & Company Advocates. The Respondents filed the Response to the Memorandum of claim on 14.06.2010 through Amuga & Company Advocates. The amended memorandum of claim was filed on 25.06.2010, the Amended Response to the Amended Memorandum of claim was filed on 1.07.2012 and the Reply to the amended Response to the amended memorandum of claim was filed on 7.7.2010.

The Respondent raised a Preliminary Objection against the Claimant's naming of the 1st – 7th Respondents as parties to their cause. The court upheld the objection and ordered the claim against the 1st – 7th Respondents as struck out and the suit to proceed against the 9th and 10th Respondents only. The court's Ruling on the Objection was delivered on 25th March, 2011. However, the pleadings were not amended by the parties to reflect the proper parties to the suit as ordered by the court. The court considers that procedural omission as occasioning no injustice to either party and will proceed to determine the case on its merits.

In the amended memorandum of claim, the claimant is praying for judgment against the Respondent jointly and severally for:-

- (a) Special damages of Kshs.9,940,101.64/=.
- (b) General damages.
- (c) Legal Costs.
- (d) Interest on the above until payment is full.
- (e) An order that the claimant be issued with a certificate of service.

(f) Any other relief as the Honorable Court will deem just and fit to grant.

The Respondents have prayed that the Claimant's case be dismissed with costs.

The case came up for hearing on 29.11.2012. The Claimant gave evidence to support her case. Counsel for the Respondents informed the court that the Respondents relied on the documents on record and were not calling any witness.

In support of her case the Claimant testified as follows:

(1) The Claimant was employed by the Respondents as a nursing officer in charge at the Respondents' Presbyterian Church of East Africa Kikuyu Hospital. She was employed on 29.03.2004 on a fixed term contract of three years and was subject to renewal.

(2) The letter of appointment is annexure 2 on her verifying affidavit. The letter was dated May 2, 2007. Clause 2 on terms of appointment provided, "***The Hospital's Board shall renew your contract and you shall serve the Hospital as Nursing Officer in charge of the Kikuyu Hospital for 3 – year renewable contract commencing April 2, 2007***". Further, clause 6 on renewal of the employment arrangement provided, "***Not less than three months before the date of this expiration of this contract, the Hospital Board shall inform the officer as to whether or not it wishes to renew the contract***". The Claimant was, among other benefits, entitled to a monthly gross salary of Ksh.110,083.00

(3) The Claimant served successfully her initial three years term and the contract of employment was renewed by the letter dated March 7, 2007 being annexure 1 on the verifying affidavit. The letter stated as follows:

"March 7, 2007

Secretary,

Kikuyu Hospital Board

P. O. Box 45

KIKUYU 00902

Dear Sir/Madam

RE: CONTRACT RENEWAL FOR KIKUYU HOSPITAL, NOIC

Greetings in the name of Christ.

The PCEA Health Board has renewed the contract of the Kikuyu Hospital NOIC, Mrs. Ruth G.N. Kariuki, with effect from April 1, 2007 for three years. Please note that the previous contract commenced on March 29, 2004.

Yours in Christ's Service,

SIGNED

Rev. David Gathanju

Deputy Secretary General and

Health Board Secretary

cc - *Secretary General*

- *Chairman, Health Board*
- *Kikuyu Hospital Board Chairperson*
- *Mrs. Ruth G.N. Kariuki*

(4) The contract of employment provided for the Claimant's benefits and entitlements. Annexure 3 on the verifying affidavit is the Human Resources Policy Manual, 2009 which applied to the Claimant.

(5) The Respondents maintained a job group system as per the human resource structures. Annexure 4 on the verifying affidavit shows the job group structure and the Claimant testified that she was not designated to the correct job group as the matron (Nursing officer in-charge) which in the structure was Job Group 'R'.

(6) In January 2009 the Respondents sponsored the Claimant for a training course in Masters of Science in Health Systems Management. Annexure 5 on verifying affidavit is the admission letter dated 9.01.2008 from the Kenya Methodist University, Nairobi Campus. By minute PC.13/2008 of the meeting of the Respondent Personnel Committee held on 18.11.2008, the meeting resolved to recommend to the Executive Board the training request by the Claimant to undertake the training but subject to a bonding agreement and a further discussion on clause on exclusion on the 80% rule.

Annexure 7 on the Claimants' verifying affidavit are minutes of the PCEA Kikuyu Hospital Board meeting held on 19th November, 2008. Minute FB.26/2008 was on adoption of the minutes of the Personnel Committee. The Board was informed that the matron (the Claimant) was willing to pay 50% of the fees asked for and to take 3 months time off from work and thereafter one week for the next 15 months. The cost of the course was approximately Ksh.500,000.00 and the training was to be held at Kenya Methodist University. Further the Board was informed that all training rules in the hospital must apply uniformly. The minute then recorded, thus, ***“members deliberated at length and agreed that all conditions relating to training must be met before any training commences and the staff must abide by the set rules:***

- ***Obtaining admission letters from the University***
- ***Bonding documents signed***
- ***Undertaking to comply with the rules during training and after training”.***

(7) By the letter dated 8.12.2008 being annexure 8, the Hospital's Chief Executive Officer one Mr. William M. Wambugu wrote to the University Registrar stating that the claimant was an employee of the Hospital working as the Hospital matron. He further wrote that the claimant had applied to the University for training to undertake Masters in Health Care Services Management and the Hospital would undertake her sponsorship and allow her time off during the period of training. The letter requested the university to issue her with the admission letter.

(8) Annexure 9 on the claimant verifying affidavit was the bonding form. The claimant signed it on 13/01/2009 and witnessed by one Rachael Muriithi. The Hospital Management committee bonded the Claimant as signed by the Finance & Administration Manager on 14.01.2009 and the Chief Executive Officer on 13.1.2009. The bond set out the conditions of training as follows:

“(a) The Hospital Sponsorship is given on condition that on completion of the training the participant will work for P.C.E.A Kikuyu Hospital, for a period of 5 (five) years before being released from the bond.

(b) The P.C.E.A Kikuyu Hospital will meet the 50% full tuition and other fees to the college.

(c) Whilst on training the following will be applicable :-

(i) Your own contribution to the training will be 50% (499,389.67/=) of the total cost of training which will be treated as a loan repayable over a period of 5 years with no interest.

(ii) You will be required to take your annual leave for additional time off towards the course.

(iii) Whilst on training you will still be covered by Hospital Medical Scheme. This will be communicated to the college principal

(iv) In the event of failing to honour the terms of this bond, the participant will have to refund to the hospital Kshs.667,932.78/= as the cost incurred for training and an amount equivalent to the salary and house benefit paid to the employee whilst in training.

(v) On completion of training you will only be entitled to a promotion when a vacancy occurs.”

(9) The Claimant testified that upon concluding the bond agreement, the consequence was that she was to work for the hospital for five years. The Hospital Board and the management had thereby expressly undertaken to remain in employment relationship with the claimant at least for the five years as agreed upon between the parties.

(10) The Claimant was due to finish her studies in June 2010. Her second contract, the bond terms aside, was schedule to end on 01.04.2010. The bond period was to run for five years from the date of completion of the studies being, for the Claimant, June 2010 when she was to be through with attending the classes.

(11) As at 01.04.2010 the Claimant stated that she had taken steps to renew her contract of employment. The Claimant had written the letter dated 24.12.2009 being annexure 9 on her verifying affidavit. She informed the Respondents in that letter that her contract would expire on 01.04.2010 and clause 6 of the contract provided, **“less than three months before the date of this expiration of this contract the hospital board shall inform the officers as to whether or not it wishes to renew the contract”**. In the letter the claimant stated that she wished to renew the contract under new terms to be agreed on and requested to be informed whether the Respondent wished to renew the contract as per the renewal claim. The Claimant wrote to the Respondents a further letter dated 26.02.2010 being annexure 15 on her verifying affidavit and a further letter on 24.03.2010 being annexure 16 on the affidavit as reminders for the renewal of the contract. She did not receive a response on the issue.

(12) The claimant testified that in the meantime, the Finance and Administration office was vacant and by the letter dated 5.03.2010 annexure 17 on the verifying affidavit, the Hospital Chief Executive Officer addressed the Claimant, thus, **“In the absence of the Finance & Administration Manager the following reporting systems will apply until the position is filled. Chief Executive officer will be responsible for:-**

(1) Finance (Accounts and Stores)

(2) Procurement - The Procurement officer will report to the Chief Accountant.

Nursing Officer in Charge will be responsible for the service departments which include:

1. House Keeping/Cleaning

2. Catering

3. Security

4. Maintenance

5. *Funeral Home*

The Claimant testified that she undertook the extra duties as assigned and she was not paid. She prayed for compensation.

(13) In April 2010 the claimant testified that she was informed by the Chief Executive Officer that she was not going to receive the salary in absence of a communication from the head office. So she was not paid her April 2010 salary yet she had worked in the normal manner with the due care and diligence. During her service she had performed well and the appraisals in annexure 11 to her verifying affidavit were a clear testimony to her good work.

(14) The Claimant further testified that the minutes and the appraisal attached at folio 11 to 15 of amended response was shown to her in court. That alleged appraisal signed on 29/3/2010 had misleadingly made comments and recommendations that the Claimant did not perform well during the period of her contract. Such conclusion was contrary to the open appraisals known and produced by the Claimant in her verifying affidavit. The minutes on the amended response being extract of minutes of the Executive Committee meeting held on 31.03.2010 were signed on 1.4.2010 by one Mr. Amon Nderi Nga'ng'a as Chairman and Mr. William Wambugu as Secretary

(15) The Claimant stated that she had started repaying the study loan immediately she started attending the training. She was deducted about Ksh.7,000/= per month to recover the loan. At termination of the contract of employment she had repaid a substantial amount. She did not recall the sum of the amount deducted and unpaid as at the time of the termination.

(16) The Claimant testified that she was not paid her April and May 2010 salary. The bonding contract entitled her to work for five years but the Respondents, despite being Christian establishments with a sense of fairness, decided to breach the contract.

(17) In re-examination the Claimant testified that she performed many administrative duties, assigning duties to the nurses. On 5.05.2010 she was served with the letter of termination dated 5.05.2010 being annexure 26 on the amended memorandum on claim. The letter stated as follows:-

“5th May 2020

Miss Ruth G. Ngotho – Kariuki

Kikuyu Hospital

P.O. Box 45

KIKUYU

Dear Ruth

RE: EXPIRY AND NON-RENEWAL OF CONTRACT

Greetings in the name of our Lord and Saviour Jesus Christ.

This is to confirm to you that the Hospital will not renew your contract which ended on 31st March 2010.

Kindly clear with the Hospital Administration and vacate the premises immediately. Thank you for the terms you have been able to serve in the Hospital and may God bless you.

Yours in the Lord's Service

Rev. Festus K. Gitonga

SECRETARY GENERAL

C.C - Moderator - 19th G.A

- **Deputy Secretary General/Secretary Health Board**
- **Chairman - Kikuyu Hospital Board**
- **Chairman - Health Board**
- **CEO - Kikuyu Hospital**

(18) The Claimant also testified that she had suffered a lot because prospective employers had declined to employ her in view of the pending case between herself and the Respondents.

The parties agreed to proceed by way of both written and oral submissions. The Claimant's written submissions were filed on 05.12.2012. The Respondent's counsel's position was that no witness would be called and the Respondent's written submissions were filed on 06.12.2012. Both parties made oral submissions on 6.12.2012.

The issues for determination in this case are as follows:-

1. Whether the Respondents breached the fixed term three years contract of employment commencing on 1.04.2010.
2. Whether the Bonding Contract for training dated 13.01.2009 was breached and whether that bonding contract amounted to a contract of employment.
3. Whether the Claimant was unlawfully and unfairly terminated from employment
4. Whether the Claimant is entitled to the prayers made on the memorandum of claim.

The first issue for determination is whether the Respondents breached the fixed term three years contract of employment that started running on 01.04.2010. It was submitted for the Claimant that the initial contract of employment was entered into on the 29.03.2004 to run for three years. That initial contract was renewed on the 1st April, 2007 to run for a further term of three years. The letter of appointment is annexure 2 on the verifying affidavit of the Claimant supporting the amended memorandum of claim. Clause 2 on terms of appointment stated, thus,

“The Hospital’s Board shall renew your contract and you shall serve the Hospital as Nursing Officer in Charge of the Kikuyu Hospital for 3 years renewable contract commencing April 2, 2007”. The letter, in clause 6 on renewal of the arrangement, stated thus ***“Not less than three months before the date of this expiration of this contract the Hospital Board shall inform the officer as to whether or not it wishes to renew the contract”.***

The court finds that under the provisions of the contract, the Hospital Board was obligated to inform the claimant three months before the date of expiry of the contract that the contract would or would not be renewed. The contract in issue was lapsing on 31.03.2010. Under the terms of the contract, the Respondents were required to inform the Claimant that the contract would not be renewed on or about 01.01.2010. The court finds that such information conveyed after 01.01.2010 would be in breach of the express provisions of the contract. In the instant case, the Respondents by the letter dated 5.05.2010 informed the Claimant that her contract which lapsed on 31.03.2010 would not be renewed and that she was required to immediately vacate the Hospital premises on 5.05.2010. The court finds that the information that the contract would not be renewed was conveyed late long after lapsing of the contract

term.

It was submitted for the Respondent that in fixed term contracts, the employer did not need and was not required to give any reason for termination. Counsel for the Respondent referred the court to the decision in **Bernard Wanjohi Muriuki Vs Kirinyaga Water and Sanitation Company Limited and Tana Water Services Board at page 17 of the typed court's Cause No.1541 of 2010 Industrial Court at Nairobi at page 17** of the typed court's Award where the Honorable Justice James Rika stated,

“The old contract was coming to an end. Parties went to great lengths to justify why it ought to have been renewed or renewal refused. In view of the court, there is no obligation on the part of an employer to give reasons to an employee why a fixed – term contract of employment should not be renewed. To require an employer to give reasons why the contract should not be renewed, is the same thing as demanding from an employer to give reasons why a potential employee should not be employed. The only reason that should be given is that the term has come to an end, and no more. The contract required the Claimant to express his interest to renew six months before the expiry. He did this in December 2009. This clause did not create any obligation on the 1st respondent to renew; it merely directed the Claimant on the procedure of seeking renewal. Reasons, beyond effluxion of time, are not necessary in termination of fixed-term contracts, unless there is a clause in the contract, calling for additional justification for the termination.”

Counsel for the Respondent further referred the court to the decision by the Honorable Justice James Rika in **Francis Chire Chachi - Vs Amatsi Water Services Company Limited, Cause No. 1548 of 2010 in the Industrial Court of Kenya at Nairobi.**

The learned Judge at page 13 of the award upheld his earlier decision and stated, thus ***“...The Court finds that there was no second contract created between the parties; any claims could only be made with respect to the unexpired three year term. There is no justification in asking the court to Award salaries for the unexpired 36 months at Ksh.4,260,000, this contract was never made, and could not be terminated, and result in any remedies. This court has recently stated that employers are not under any obligation to give employees reasons for non-renewal of fixed term contracts, unless there is such an obligation created in the expiring contract. (See Industrial Court Cause Number 1541 of 2010, Bernard Wanjohi Muriuki Vs Kirinyaga Water and Tana Water Services Board).”***

The court upholds the learned Judge's holding that employers are not under any obligation to give employees reasons for non-renewal of fixed term contracts, unless there is such an obligation created in the expiring contract. The expiring contract may create such an obligation by, like in the instant case, making it mandatory for the employer to renew the expiring contract and setting timelines for communication of the decision to refuse the renewal. In the instant case, the renewal was to be mandatory, thus, ***“The Hospital Board shall renew your contract....”*** was such an imperative provision of the contract that entitled the Claimant to unwavering legitimate expectation to the renewal of her contract of service. The only intervening contractual provision was that if renewal was to be refused, then the Claimant was to be informed the refusal three months before the expiry of the contract. The Respondents having failed to comply with the three months conveyance of refusal to renew, the court finds that the three years fixed term contract intended to lapse on 31.03.2010 did not so lapse.

Did a contract of service exist between the parties after 31.03.2010 even after the Respondents failed to renew the lapsing fixed three years contract? This court considered the point in the case of **Robert Muriithi Ndegwa versus The Minister for Tourism, Industrial Court of Kenya at Nairobi at page 19** of the judgment. In that case, the court stated,

“The court has also carefully considered the circumstances of this case and its wide jurisdiction to make any other appropriate relief as the court may deem fit to grant as provided for in Section 12(3) (viii) of the Industrial Court Act, 2011. It is the court considered opinion that an appointment takes place in circumstances where the employee is entitled to the appointment by reason of the employer's conduct. In the instant case, the petitioner was entitled to deem the contract renewed in view of the provisions of the circular, failure of the respondent to convey his refusal to renew and

the entitlement to renew as per the terms of the contract. The court considers that in employment relationship there exist a reciprocal duty of cooperation and the employer must respect express provisions of the contract, the personal dignity of the employee and the legitimate expectation that consultative framework that underpin the relationship shall be respected. Thus, in the special circumstances of this case, the court finds that the petitioner's contract of service was constructively renewed for three years with effect from 18.10.2012".

Similarly, in the present case the court finds that the Claimant's contract of service was constructively renewed with effect from 01.04.2010. The Claimant was entitled to be informed by the Respondents the refusal to renew within the contractual three months before the lapsing of the expiring conduct. By that conduct of the Respondents, the contract thereby was constructively renewed. The timelines in the contract for conveying the decision of refusal to renew created express trust, confidence and expectation that the Respondents' silence, despite the Claimant's inquiry, that the contract had or would be renewed. The contract of employment was obviously one of the most important things in the Claimant's life. It was therefore important that the Respondents strictly comply with the contractual provision on the renewal failing which the Claimant would be entitled to claim under the contract.

The contract having been constructively renewed with effect from 1.04.2010 the issue for determination is whether the Respondents breached the contract of employment when on 5.05.2010 they wrote informing the Claimant that the contract had lapsed on 31.03.2010 and she was to vacate the Hospital premises immediately. Section 43 of the Employment Act, 2007 provides as follows:

"43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believe to exist, and which caused the employer to terminate the services of the employee".

The reason given for the termination of the Claimant's contract of service was that the fixed term contract had expired by effluxion of time. In the opinion of the court that was not a genuine reason because the respondents had failed to discharge their obligation in relation to the expiry of the term contract namely, to notify the Claimant the refusal to renew three months before the expiry. The reason for the termination was not genuine as it was outside the contractual provisions and the purported contractual reason for termination did not genuinely exist. The termination proceeded outside the contractual provisions and it was in breach of the contract.

There is one more reason why the termination was in breach of the contract between the parties. Clause 5 of the contract provided for termination of appointment. The clause stated as follows:-

"5. TERMINATION OF APPOINTMENT

This appointment can be terminated by:-

(i) The Hospital Board:

(a) By giving three months notice or intention to do so

OR

(b) By paying three months salary plus special allowance, in lieu.

(c) In case of gross misconduct by either summarily dismissing the appointee or giving such notice as it deems fit."

The court having found that the contract was constructively renewed effective 01.04.2010, the

Respondents could not validly terminate it without complying with the quoted contractual provision. The agreed notice or payment in lieu of notice was not complied with and the termination was unfair and in breach of the contract.

The second issue for determination is whether the Bonding Contract between the parties dated 13.01.2009 was breached, and, whether that bonding contract amounted to a contract of employment. It was submitted for the Claimant that the Bonding contract was in accordance with the Hospital policy which provided that Educational loans for the employees on contract shall be repaid within the tenure of the contract and therefore confirms that the Claimant was under contract for the duration of 5 years as from the date of signing of the Bonding Contract. Appendix 3 to the Claimant's verifying affidavit is the Respondents' Human Resources Policy Manual, 2009 which applied to the Claimant. Paragraph 6.5.3 of the manual provided that privately sponsored employees will qualify for a fifty percent rebate after qualification, subject to training being relevant to job and prior approval of the course. Paragraph 6.8.1 provided that the Hospital shall establish individual staff development plans which will be subject to review every year in order to address the human resource planning and staffing needs. The Bonding contract provided that the P.C.E.A. Kikuyu Hospital would meet 50% full tuition and other fees to the college. It further stated that on completion of the training the Claimant would work for the Hospital for a period of 5 years before being released from the Bond. The Bonding contract provided that the Claimant would contribute 50% tuition which would be treated as a loan repayable over a period of 5 years with no interest. In the event of failing to honour the terms of the bond, it was provided that the Claimant would refund the hospital Ksh.667,932.78/= and costs incurred for training and an amount equivalent to the salary and house benefit paid to the Claimant whilst in training.

It was submitted for the Respondents as follows:

- (a) That the bonding did not amount to a contract of employment for five years.
- (b) The bond did not alter the Claimant's then existing contract of employment which was for a fixed term of three years. It only bound the Claimant as a recipient of a sponsorship from her employer to give something in return, by agreeing to serve the employer for 5 years on completion of the training. The employer did not bind itself to employ the Claimant for five years. The bond did not take away the employer's right not to renew the fixed term contract which was in force at the time the bond was executed. That the Respondents did not ask the Claimant to refund the money (one-half of the tuition) which it paid for the Claimant and the Respondents only recovered the loan it granted to the Claimant and nothing more.

The court has considered the submissions made by the parties and finds that the bonding contract amounted to a contract of service within the definition provided for in the Employment Act, 2007. The definition in Section 2 of the Act provides thus, "**contract of service**" means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time. Under the Bonding Contract, the employee was the Claimant and the Respondents were the employers. It was an agreement that the Claimant would work for the Respondents for five years before being released from the agreement to so get employed for the five years. The court finds that the commencement date of the contract of employment flowing from the Bonding contract was the effective date of completion of the training. In view of the contract of employment under the Bonding contract, (which was a contract of service independent of the three year fixed term contract of service that was lapsing) the court finds that the claimant fundamentally shifted her position. She invested in 50% of the tuition fees and exercised due diligence and discipline to attend the training. She was not a full time student and she had to shoulder the pressure associated with working and studying at the same time. The court finds that the existence of the three year fixed contract and its renewal was a fundamental implied term that was a foundational precondition for the contract of service flowing from the Bonding contract. The court further finds that for the Respondents to terminate the Bonding contract being a contract of service, it was vital to comply with the provisions of Section 41 of the Employment Act, 2007 prescribing a notification and a hearing before making the decision to terminate. Accordingly, to answer the second issue for determination, the court finds that the Bonding contract amounted to a contract of employment and the Respondents breached and unfairly terminated that contract of service; the Bonding contract.

The third issue for determination is whether the Claimant was unlawfully and unfairly terminated from employment. In view of the earlier findings of the court in this judgment, the court has responded to the issue affirmatively.

The final issue for determination is whether the Claimant is entitled to the prayers made in the memorandum of Claim. The court makes the following finds:

1. The Claimant has prayed for gratuity of Ksh.543, 495/=. It has been submitted that the claim is admitted by the Respondents and the court finds that the Claimant is entitled to a gratuity of **Ksh.543,495.00/=**
2. The Claimant has prayed for Ksh.36,694.33/= on account of leave days due. To this claim it has been submitted for the Respondent, thus, *“the Claimant only worked for three months in the year 2010. These months were January, February and March 2010. The payment due to her on account of leave for these months were admitted by the Respondents. The amount due is Kshs.34,896.14/=. The Claimant is however claiming Kshs.36,694.33/=. The difference seems to be arising from the Claimant’s allegation that she worked for Respondents up to 5th May, 2010.....”* The court has found that the claimant’s services were terminated on 5.05.2010 when she was asked to leave the Hospital premises with immediate effect. There is no doubt that she worked up to that date. The court finds she is entitled to the **Ksh.36,694.33/=** as prayed for.
3. The Claimant testified that she did not take her leave for 2009. The Respondents did not produce any documents or evidence to rebut the Claimant’s case. The Claimant has proved her case on a balance of probabilities and she is entitled to the **Ksh.55,041.50/=** as claimed. The court further finds that the Respondents failed to show and prove that they had maintained the record of annual leave entitlement, days taken and days due with respect to the Claimant and as stipulated under Section 74(1)(f) and 28 of the Employment Act, 2007.
4. The Respondent has admitted to pay **Ksh.11, 811/=**for the claim on weekend coverage. The same is awarded.
5. The Claimant prays for Ksh.7,338.87 for pay of two off days spent in Naivasha workshop. The Respondent agrees to only one day being Ksh.3,937/=. There is no material before the court for the Claimant’s evidence and claim for two days to be doubted. She is entitled to **Ksh.7,338.87** as claimed.
6. The Claimant has prayed for **Ksh.121,091.30/=** being salary for April 2010 to 5th May 2010 when she was terminated and asked to vacate immediately. The court finds that the Claimant has proved the claim and is entitled to the sum as prayed for.
7. The Claimant has prayed for fees balance of **Ksh.37,250/=** under the Bonding contract. The court finds that the Claimant is entitled as prayed as she is entitled to be put in a position she would be enjoying had the Respondents not breached the contract of service.
8. The fixed term contract has been found by the court to have been constructively renewed in view of the conduct of the Respondents. Under the contract the Claimant was entitled to three months salary in lieu of notice and she is entitled to **Ksh.330, 249/=** as prayed for.
9. The Claimant has prayed for Kshs.80,000/= being medical reimbursement for the year 2009. It was submitted for the Respondents that when the Claimant made this claim while she was still an employee, her employer explained to her why the money could not be reimbursed. The letter explaining why the claim could not be paid is dated 12.01.2010 and it was because the Claimant did not prove that she had a prior written referral from a doctor of the Respondents’ hospital. It has been submitted for the Claimant that a prior written referral could not be practicably obtained in a case of medical emergency. The court has considered that between 12.01.2010 and the termination date of 5.05.2010 the Claimant did not dispute the clear reason advanced for the Respondents and the claim shall fail as a mere after-thought.

10. The Claimant has prayed for Ksh.233,333.34/= being pay for the extra duties allocated. It is not disputed and the Claimant proved that she was assigned extra duties when the office of the Finance and Administration Officer was vacant. The extra duties included housekeeping and cleaning, catering, security, maintenance and funeral home. The Respondents have not disputed the Claimant's evidence. It is obvious that the extra duties were heavy and exerted high responsibility and due care on the Claimant as an employee of the Respondent in a big hospital establishment. The Respondents have submitted that the Claimant should have proved that she was entitled to be paid for such heavy duties. Article 41 of the Constitution entitles every person to fair labour practice and the court finds that it is unfair labour practice for an employer to impose duties beyond the contractual duties and, after the employee has delivered on the duties, the employer alleges that there is no contractual obligation to pay. The court finds that it is an implied and an invariable condition in contracts of service that wherever the employer imposes duties beyond the contractual duties, the employer must pay reasonable wage for such imposed duties. If an employer extracts labour of an employee without paying for it, the same would amount to slavery and servitude; converting the employee into a property of the employer, totally subject to control and use of the employer. Such a state of relationship of slavery and servitude cannot be justified even if it were by legislative fiat. Thus, Article 25(b) of the Constitution provides that despite any other provision in the Constitution, freedom from slavery or servitude shall not be limited. Accordingly the court finds that **Ksh.233,333.34/=** is reasonable and justified pay for the extra duties that were allocated to the Claimant when the office of the Finance and Administration Officer was vacant. The Claimant is entitled as prayed for.

11. The Claimant has prayed for Ksh.8,484,600/= being five years salary as per the contract of service flowing from the Bonding contract. The Claimant has submitted that the court should take into account the reasonable expectation of the employee as to the length of time for which her employment with the Respondents might have continued but for the termination. The court has considered Section 49(4) (f) of the Employment Act, 2007 that provides for such expectation of the employee.

The court has found that the three year fixed term contract was constructively renewed. The court has also found that the termination was unfair because the reason for termination was unfair because the reason for termination was not genuine. The Claimant was not given a hearing and a notification as envisaged under Section 41 of the Act. Such notification and hearing was mandatory if the grounds of poor performance were to be relied upon as the Respondents purported to allege and claim against the Claimant.

The issue before the court is whether the Claimant is entitled to be paid for the period of thirty six months following the constructive renewal and in view of the loss of future earnings. During the hearing the Claimant testified that she had been unable to secure employment in view of the court proceedings between the parties in this cause. She had suffered loss of employment. Section 49(1)(c) of the Act provides that in event of unjustified termination the employer may pay to the employee the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

The Court has to resolve whether to award the Claimant the twelve months gross salaries for unfair termination or to award the Claimant all the expected salaries in view of the expectation to serve for the constructively renewed contract of three years. First, the court holds that in such circumstance, it is equitable and just only to award on one of the claims and not both of them. In making the finding, the court's opinion is that the parliament by enacting section 49 of the Employment Act, 2007 created a statutory condition that dismissal or termination of employment must be exercised fairly or in good faith and provided statutory remedies to guide the court in awarding reliefs to aggrieved parties. The enactment prescribe a policy and an attempt by parliament to balance justice for employees as against economic interests of employers and the society in general.

It is the court's considered opinion that if the employee is awarded compensation for loss of future employment and earnings, that is, reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination, then the balance of justice for the employee and the employers' or community economic interests would demand that such

an employee is not at the same time entitled to and awarded the twelve months gross salaries for unfair termination. The court's opinion is that compensation for reasonably expected future employment would adequately cover for the otherwise unfair termination.

In the instant case the court finds that the Claimant is entitled to **Ksh.3,764,844/=** being 36 months gross salary at monthly rate of Ksh.104,579/= for loss of reasonable expectation of employment for three years.

The court further finds that the Claimant was not entitled to the five years because as at the time of the termination, the contract of service emerging from the Bonding contract had not yet come into effect. The effective date was the date the Claimant would complete the training. Usually completion of training meant graduating following the university studies evidenced with the subsequent issuance of the relevant academic certificate. The Claimant had not completed the studies and is not entitled as claimed. The court having awarded the Claimant her specific claims on the Bonding contract, it is the court's finding that the claimant is adequately compensated for the breach and the ends of justice have been met.

In conclusion, judgment is entered for the Claimant against the respondent for:

- a) the respondent to pay the Claimant a sum of **Ksh.5,141,148.34/=** plus interest at court rates from the date of judgment till full payment;
- b) the respondent to issue and deliver to the Claimant her certificate of services; and
- c) the respondent to pay the costs of the cause.

Signed, dated and delivered in court at Nairobi this 11th December, 2012.

BYRAM ONGAYA

JUDGE