



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. E572 OF 2021**

(Before Hon. Lady Justice Maureen Onyango)

**SANDRA M. WASWA.....CLAIMANT**

**VERSUS**

**ARTICLE 19: GLOBAL CAMPAIGN FOR FREE EXPRESSION.....RESPONDENT**

**JUDGMENT**

1. Vide her Memorandum of Claim dated 12<sup>th</sup> July, 2021 and filed in Court on 15<sup>th</sup> July, 2021, the claimant herein avers that her employment was wrongfully and unfairly terminated by the Respondent.
2. The Claimant avers that she was employed by the Respondent on 13<sup>th</sup> April, 2011, on contractual terms, in the position of Senior Programme Officer Access to Information and was earning a monthly salary of Kshs.180,000/-
3. That she performed her duties diligently and to the Respondent’s satisfaction in strict adherence to the terms of her employment contract and achieved her targets as a result of which she earned promotions, salary increments as well as contract renewals.
4. The Claimant states that her contract was extended until 30<sup>th</sup> June, 2020 and her salary reviewed to Kshs.314,049/- per month in the position of Senior Programme Officer – Access to Information, Article 19 Eastern Africa.
5. She further averred that prior to the 30<sup>th</sup> June, 2020, the Respondent expressly or impliedly in meetings and communications between the parties promised to formally renew her employment contract upon its expiry.
6. Despite not being served with formal communication renewing her employment contract, the Claimant continued to serve the Respondent in the same capacity and without changes in salary until 8<sup>th</sup> March, 2021 when the Respondent terminated her employment by giving her one (1) month’s notice.
7. The Claimant contended that at the time of separation she was earning a monthly salary of Kshs.358,343.41/-. She holds that the termination was unfair, discriminatory guised redundancy that singled her out from other members of staff.
8. In her claim the Claimant seeks the following reliefs:
  - a. A declaration that the Claimant’s termination is illegal and unlawful.
  - b. An order compelling the Respondent to immediately reinstate the Claimant to work with full benefits and pay up to date including any salary arrears and all dues not paid as at the date of reinstatement.
  - c. In the alternative to prayer b) above an order directing the Respondent to pay the Claimant the following dues
    - i. Three months’ salary pay in  
 lieu of notice..... Kshs.1,026,709.05
    - ii. Two years pay for the contractual

Period..... Kshs.8,213,672.40

iii. Twelve months compensation damages for unlawful termination ..... Kshs.4,106,836.20

iv. Leave days, 210 days at 14,274.95/-

per day..... Kshs.2,997,740.10

v. Gratuity Pay at 30 days for every year

Worked..... Kshs.4,282,485.00

vi. Exemplary and punitive damages

vii. Such other reliefs as may be found due to our client

viii. Costs and Interest

9. The Respondent in its Reply to the Memorandum of Claim dated 2<sup>nd</sup> August, 2021 admits that it engaged the Claimant on a fixed term contract with an option of provisional extension subject to discussions on its renewal on terms to be agreed between the parties.

10. The Respondent further averred that contrary to the Claimant's assertion it did not at any given time make any promise be it express or implied to renew or extend the Claimant's contract and that such a process is consultative and by mutual consent.

11. The Respondent admits having issued the Claimant with a Notice of non-renewal of her fixed term contract after the parties failed to agree on the terms of renewal.

12. The Respondent avers that it did not terminate the Claimant's employment as pleaded but rather that her contract ended by effluxion of time.

13. It further denied any malice and/or discrimination as contended by the Claimant insisting it has at all times treated the Claimant and all its members of staff with utmost dignity and respect.

14. The Respondent maintained that the Claimant is not entitled to any of the reliefs that she seeks and consequently urged this Court to dismiss it in its entirety with costs to the Respondent.

15. Parties agreed to dispose of the Claim by way of Witness Statements and written submissions.

16. In support of her claim the Claimant relied on her witness statement dated 12<sup>th</sup> July, 2021 and a further statement dated 28<sup>th</sup> September, 2021 in which the Claimant reiterates the averments made in her Memorandum of Claim.

17. The Claimant further averred that she received the draft contract from the Respondent for purposes of review. She confirmed having reviewed her contract and informed the Respondent that the terms contained therein were favourable with her and that she had accepted it.

18. She further stated that the issue of renewal of her contract is an afterthought by the Respondent and is not the reason behind her termination and that the reason is as contained in her letter of termination dated 8<sup>th</sup> March, 2021.

19. In support of its case the Respondent filed and relied on the Witness Statement of **Mugambi Kiai** dated 27<sup>th</sup> August, 2021, in which he avers that the Claimant was employed on a fixed term contract that ended by effluxion of time.

20. He further stated that upon the expiry of the fixed term contract parties commenced negotiations with a view of renewing the contract and agreed on a quasi-formal arrangement whereby the Claimant was paid a monthly salary based on her last contract.

21. RW1 however maintained that no promise was made by the Respondent to unilaterally renew the Claimant's contract as contended by the Claimant.

22. The Respondent maintains that it rightfully served the Claimant a Notice of non-renewal of contract after parties failed to agree on terms of renewal of the Claimant's contract, the Claimant having failed to review and communicate her acceptance to the draft contract sent to her by the Respondent.

23. It is on this basis that the Respondent argues that the Claim is devoid of merit and urged this Court to dismiss it with costs to the Respondent.

#### **Claimant's Submissions**

24. The Claimant submitted that the Respondent by its conduct of retaining her in employment after the expiry of her last contract for a

period of nine months created a scenario where her employment was now permanent and further created legitimate expectation on the renewal of the employment contract. It is on this basis that the Claimant urged this Court to protect her rights by finding in her favour. To fortify this argument the Claimant relied on the case of **Council of the Civil Service Union v Minister For The Civil Service 1985 AC 374 H.L.**

25. The Claimant further submitted that the Respondent is estopped from denying the legal effects of its actions as it was clear in its conduct of retaining her in employment and various oral promises that it would retain her, which led her to legitimately expect the renewal of her employment Contract. To buttress this argument the Claimant relied on the cases of **Combe v Combe 195 1 All ELR 766**, **John Nduba v Africa Medical and Research Foundation (Amref Health Africa) (2020) eKRL** and **Teresia Carlo Omondi v Transparency International Kenya (2017) eKLR** all on *Legitimate expectation on fixed term contracts*.

26. The Claimant argued that the Respondent's failure to renew her employment contract was tantamount to unfair and unlawful termination by way of redundancy. For emphasis the Claimant cited the reason for her termination as indicated in her termination letter dated 8<sup>th</sup> March, 2021 being: *"due to financial strains arising from the non renewal of Article 19 grant contracts and Covid-19 related slow-downs which have resulted in significant pressure on the budget in Article 19 Eastern Africa."*

27. The Claimant further argued that the Respondent's actions were in clear contravention of the mandatory provisions of Section 40 of the Employment Act, 2007 and the principles of redundancy as set out in the case of **Thomas De La Rue Ltd v David Opondo Omutelema (2012) eKLR**.

28. The Claimant submitted that the Respondent did not tender any evidence to this Court to show that it was facing any financial constraints and that it in fact proceeded to employ new members of staff and promoted several others. The Claimant maintained that a claim for redundancy cannot be sustained by the Respondent. For emphasis the Claimant relied on the cases of **Paul Ngeno v Pyrethrum Board of Kenya Limited (2013) eKLR**, **Francis Maina Kamau v Lee Construction (2014) eKLR** and **Fredrick Mulwa Mutiso v Kenya Commercial Bank Limited** where the courts emphasised on the need for the employer to comply with the mandatory conditions set out in Section 40 of the Employment Act, 2007 in declaring its staff redundant.

29. The Claimant urged this Court to be guided by the findings in the case of **JWN v Teachers Service Commission (2014) eKLR** and order her immediate reinstatement to her position without loss of benefits. She argued that she is eligible for reinstatement for the reason that she has been unable to secure any other employment after her termination and the position she held at the Respondent's offices is still available.

30. The Claimant argued that she is entitled to an award of salary arrears as pleaded by dint of the provisions of Sections 18 and 49 of the Employment Act, 2007 for the months of April, May and June, 2021 which amount continues to accrue until her reinstatement. To buttress this argument the Claimant relied on the case of **Patrick Lumumba Maikura v Kenya Ports Authority (2013) eKLR**.

31. In the alternative to the above the Claimant urged the Court to award her compensation in terms of the specific prayers made in her Memorandum of Claim. She argued that she is entitled to the same having proved that her untimely termination was unlawful and unfair. She relied on and cited the cases of **NRB Industrial Cause No. 2525 of 2012 Abisalom Ajusa Magomere v Kenya Nut Company Limited, Linet Ndolo v Registered Trustees of the National Council of Churches of Kenya (2014) eKLR** and **Enos Olungo Mang'ong'o v Kenya Commercial Bank (2015) eKLR** where the Courts awarded the Claimants 12 months compensation for unfair termination of their employment.

#### **Respondent's Submissions**

32. The Respondent on the other hand submitted that it did not terminate the Claimant's employment as contended but rather her fixed term contract lapsed by effluxion of time. It relied on the Court findings in the case of **Trocaire v Catherine Wambui Karuno (2018) eKLR** where the Court held that upon the lapse of a fixed term contract an employer is under no obligation to justify termination on other grounds beyond the lapse of the fixed term contract.

33. The Respondent further submitted that it did share a draft contract with the Claimant and sought to have her duly filed appraisal forms for consideration with respect with renewal of her contract. It maintains that the Claimant failed to supply it with the said documents leaving the Respondent with no option but to release the Claimant from its employment.

34. The Respondent further submitted that the Claimant's employment is governed by the provisions of Section 7, 8, 9 and 10 of the Employment Act, 2007 and that this Court cannot purport to rewrite the contract for parties.

35. The Respondent further submitted that being a fixed term contract the Claimant's contract carries with it no expectation of renewal and as a result the Claimant cannot purport that she legitimately expected the renewal thereof. To buttress this argument the Respondent relied on the cases of **Stephen M. Kitheka v Kevita International Limited (2018) eKLR**, **Amatsi Water Services Company Limited v Francis Shire Chachi (2018) eKLR** and **Cleopatra Kama Mugenyi v Aidspan (2019) eKLR** in which the Courts held that fixed term contracts cannot be renewed automatically and that Claimants can therefore not claim that they had legitimate expectation of renewal.

36. The Respondent further submitted that the Claimant has not proved that her termination was unfair as required under Section 47 (5) of the Employment Act, 2007. It urged the Court to dismiss the Claim with costs to the Respondent. For emphasis the Respondent relied on the case of **Pius Machafu Isindu v Lavington Security Guards Limited**

**(2017) eKLR.**

37. In conclusion the Respondent submitted that the Claimant is not entitled to the reliefs sought in her Claim and urged the Court to dismiss

the Claim in its entirety with costs to the Respondent.

### **Determination**

38. I have considered the pleadings, the evidence, submissions filed by the parties and authorities cited therein. The issues for determination are:-

- i. Whether the Claimant's termination valid both procedurally and substantively;
- ii. Whether the Claimant is entitled to the reliefs sought in the Claim.

### **Whether the Claimant termination of the Claimant's contract was valid**

39. The parties are in agreement that the Claimant's last contract lapsed on 30<sup>th</sup> June 2020 and the Claimant continued working on the same terms until 8<sup>th</sup> March 2021 when she received the letter giving her one month's notice of non-renewal of her contract.

40. The parties are also in agreement that upon the lapse of the contract on 30<sup>th</sup> June 2020, the parties held discussions on renewal of contract and the Respondent issued a draft contract to the Claimant which according to the Respondent, the Claimant chose not to execute.

41. The Claimant on the other hand avers that the Respondent on several occasions before and after 30<sup>th</sup> June 2020 expressly and impliedly in meetings and communications promised to formally renew the Claimant's contract thereby raising her legitimate expectation as to the renewal.

42. In the letter of termination, the Respondent refers to non-renewal of the contract due to financial strains arising from the non-renewal of Article 19 grant contracts and COVID 19 related slow down which resulted in significant pressures on the budget in Article 19 Eastern Africa.

43. The letter of termination dated 8<sup>th</sup> March, 2021 is reproduced below:

“March 8, 2021

Dear Sandra

I hope you are well,

We regret to inform you that we will be unable to renew your contract with Article 19 Eastern Africa, which has been extended from June 2020 on a monthly renewable basis. This is due to financial strains arising from the non-renewal of Article 19 grant contracts and COVID 19- related slow-downs, which have resulted in significant pressures on the budget in ARTICLE 19 Eastern Africa.

This communication serves as the required one month's notice under current contractual terms. This was not an easy decision, and we will endeavour to ensure a smooth transition out of ARTICLE 19 Eastern Africa, including payment for all untaken leave.

Best regards

(Signed)

**Mugambi Kiai**

**Regional Director”**

44. In the witness statement of Mugambi Kiai he states as follows –

“The Claimant's fixed term contract ended by effluxion of time where upon parties entered into discussions on entering a new contract. The Respondent shared a draft of a proposed contract to the Claimant which the Claimant in her own opinion chose not to execute. In the absence of the meeting of minds between the parties, the Respondent was left with no option but to determine the relationship. It is indeed true that once the Claimant's contract lapsed, it was hoped that a new contract would be entered into and in the interim, the parties related on a quasi formal arrangement whereupon the Claimant was paid monthly salary based on the old contract.

The Respondent gave the Claimant a Notice of non renewal of a fixed term contract after parties failed to agree on the terms of renewal of the contract. In particular, the Respondent avers that it offered the Claimant a draft of a proposed contract to review and communicate her acceptance of the same and the Claimant failed and or refused to accept the said terms thereby leaving the Respondent with no option but to issue notice of non renewal of contract. It is therefore incorrect for the Claimant to aver that she was terminated from employment when in actual sense the existing contract between the parties lapsed by effluxion of time and the Claimant chose not to accept the terms of a proposed contract that was shared with her by the Respondent.”

45. It is therefore not clear whether the reason for nonrenewal was because the Claimant failed to sign the draft contract, which she denies, or because of the reasons stated in the letter of termination.

46. Be that as it may, the Claimant was in employment for more than nine months after lapse of the contract. She was therefore on a month on month open ended contract and was entitled to be subjected to the provisions of Section 41 and 43 of the Employment Act which provide for fair hearing and valid reason for termination of contract.

47. The Respondent's reason in the letter is obviously not the genuine reason for termination, taking into account the averments of the Respondent in the defence, witness statement and the submissions, that the Claimant failed to sign the renewal contract.

48. For these reasons, I find the termination of the Claimant to be unfair for both invalid reason and want of fair procedure.

### **Remedies**

49. The Claimant prayed for the following remedies

#### **i. A declaration that the termination was unlawful**

50. I have already held above that the termination was unfair and declare accordingly.

#### **ii. Reinstatement**

51. The circumstances under which an employee can be reinstated are set out under Section 49(4) of the Employment Act. Among them is that reinstatement is only available where the Claimant demonstrates exceptional circumstances.

52. The Claimant has not demonstrated any exceptional circumstances to entitle her to an order of reinstatement.

#### **iii. Notice**

53. The Claimant is awarded one month's salary in lieu of notice and not three months as prayed as her contract provides for only one month's notice or pay in lieu thereof. I award her **Kshs.358,343.41**.

#### **iv. Two years' contractual pay**

54. The Claimant is not entitled to this prayer as it is not provided for by law and neither was it provided for in her contract.

#### **v. Compensation**

55. In view of the circumstances under which the contract of the Claimant was terminated, her legitimate expectation raised by the offer of renewal of contract issued to her, her length of continuous service of about 10 years and taking into account all the factors under Section 49(4) of the Employment Act, I award the Claimant 10 months' salary as compensation at **Kshs.3,583,434.10**.

#### **vi. Gratuity**

56. The Claimant did not adduce any evidence to prove that her terms of contract provide for gratuity. This prayer has not been proved and is **declined**.

#### **vii. Leave days**

57. The Claimant did not prove that she is entitled to 210 leave days.

#### **viii. Exemplary and punitive damages**

58. The Claimant did not demonstrate that she is entitled to this head of damages. The same is **declined**.

**59. In conclusion judgment is entered in favour of the Claimant against the Respondent in the total sum of Kshs.3,941,777.51**

60. Having demonstrated that her employment was unfairly terminated, the Claimant's costs for this suit shall be borne by the Respondent.

61. Interest shall accrue on the award at Court rates from date of judgment.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2022**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**