



REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL NO. 157 OF 2011

AMOS ADHIAMBO ONYANGO.....APPELLANT

VS

KENYA OIL COMPANY LIMITED.....RESPONDENT

(Being an Appeal from the Judgment of the Chief Magistrate Honourable C.G Mbogo in Eldoret Civil Case No. 758 of 2007, dated 17th August, 2011)

JUDGMENT

The appeal rises from the judgment of C.J Mbogo, Chief magistrate, that was delivered on 17th August 2011. The appellant filed a suit in the subordinate court seeking kshs. 651,677/-. The cause of action arose from a termination of a contract between the parties. The appellant was appointed a sales representative by the respondent on 3rd august 2004 vide a contract with a 12-month probation period. After the probation period lapsed on 31st August 2005, there was no extension of the contract.

The plaintiff continued working in the absence of an extension and express confirmation of the extension. On 19th September 2005, the defendant terminated the employment of the appellant without notice and the plaintiff filed the suit claiming that his employment was terminated unlawfully.

The defendant confiscated the appellants motor vehicle registration number KAP 851Z as the appellant had an outstanding loan to the defendant. The appellant disputed the amount owed to the respondent and claimed that he was owed a refund as the value of the vehicle exceeded the arrears due. He also claimed terminal benefits from the respondent. The trial court entered judgment dismissing the appellant's claims with costs. The appellant appealed on nine grounds that he proceeded to address under 4 headings including; whether he was on probation as at 19/9/2005. Whether he was unlawfully terminated, whether he has established a claim against the respondent in respect of repossession of the vehicle and whether he was entitled to the reliefs he sought.

APPELLANT'S CASE

The appellant submitted that it is not in dispute that he was employed as a sales representative on 1/9/2004 and was to be on probation for 12 months which ended on 31/8/2005. There was no confirmation of extension and such extension required notification to the employee. The appellant submitted that he was not on probation and that his employment had been confirmed. The appellant submitted that based on that it was erroneous for the trial court to conclude that he was still on probation when there was no evidence adduced in that regard.

The relationship between the appellant and respondent was regulated by the contract dated 29/7/2004. The appellant does not dispute that the probation was to last until 31/8/2005 or that the probation was not extended. Further, the appellant submitted that he continued to work beyond the date his probation was to end and was given a day off by his supervisor beyond his probation period. The conduct of the respondent to retain the appellant and afford him benefits enjoyed by other employees implied that employment had been confirmed. Consequently, if the appellant's employment was to be terminated, he should have been afforded an opportunity to be heard before the said termination

DW1 claimed that the appellants' performance was below par and that is why he was terminated from employment. That there were several appraisals conducted whose results revealed this. However, other than the letter dismissing him, there were no appraisals provided to the appellant. He further contended that it was upon the employer to prove that the termination was warranted and referred to section 45 of the Employment Act 2007 which states;

A termination of employment by an employer is unfair if the employer fails to prove that the reason for termination is valid.

There was no such demonstration made and it was erroneous for the trial court to shift the burden of proof to the appellant when the respondent did not present anything before the court. He ought to have been given one month's notice or payment in lieu but there was no

such notice given and the same was conceded by DW1. The trial court erred in dismissing the appellants' suit when there was a case made out for unfair termination.

The appellant submitted that he had bought the motor vehicle registration No. KAP 851Z while working for Total Kenya but which loan was taken over by the respondent upon his employment. He further submitted that at the time of termination the outstanding loan was Kshs. 587,500/-. The vehicle had a resale value of kshs. 995,000/- and as such if the vehicle was sold then the appellant was entitled to kshs. 420,000/-. The respondent was silent on how much the car was sold for given that no valuation was done before the car was sold. The appellant further submitted that DW1 had indicated the book value of the car at Kshs. 750,000/- and in the absence of any document by the respondent that the car was sold for exactly kshs. 587,500/-, the appellant was at least entitled to kshs 162,500 if not kshs. 420,000/-. The court erred in failing to find as much.

The appellant claimed kshs. 50,000/- as payment in lieu of accrued leave. The respondent conceded that the appellant was entitled to accrued leave amounting to kshs. 49,999.60 on pg. 10 of the record of appeal, therefore the court erred in failing to award the conceded amount.

The appellant claimed kshs. 31,667/- as payment for the days worked as per pg. 5 of the record and the respondent conceded that the appellant was entitled to the same. It was therefore erroneous for the court to dismiss the suit despite the concession.

The appellant claimed kshs. 150,000/- as salary in lieu of notice as there was no notice issued before termination and the appellant's probation was not extended after expiry which implies that he was for all intents and purposes entitled to benefit from the benefits afforded to ordinary employees.

The respondents' claim that the appellant was offered the aforesaid amounts and refused is hollow and that the appellant is entitled to the claimed amounts.

RESPONDENTS' CASE

The respondent contends that the appellant's employment was confirmed by dint of an employment letter dated 29/07/04 and the employment commenced on 1/09/04 where he was placed on probation for 12 months. The employment letter stated that upon satisfactory completion of the probation, he would be confirmed as an employee. He completed the 12 months.

The respondent submits that the appellant was issued with a termination letter on 19/09/2005, 18 days after the probation lapsed. The respondents' actions were within the terms and conditions of the employment contract.

The termination letter indicated that the said termination was necessitated by appraisals which noted that his performance was below expectation. He acknowledged receipt of the appraisals on pg. 24 of the record. The appellant concedes in his own testimony that he received the appraisals as per page 49 of the record and that it was issued by Mr. Mbugua. The appellant failed to produce the appraisals as evidence as they were not in his favour and would prejudice his case.

The appellant had obtained a loan from Standard Chartered bank to the tune of kshs. 1,410,000/- which he used to purchase KAP 851S whereof the respondent became a guarantor. In the appellants' testimony, there is no indication as to the amount he paid and what was accruing as and when his termination came to effect. The respondent has concealed material facts which the trial court noted and arrived at a decision. The appellant's failure to produce statements or evidence to prove he serviced the loan is prejudicial to his claim.

The appellant conceded that he owed the respondent kshs. 587,500/- and despite that not being the actual amount, there is acknowledgement of debt. The appellant did not produce a valuation report showing the value of the vehicle at the time he believed the respondent repossessed it to recover the amount owed. The magistrate rightly held that the appellant did not produce any document in support of his contention regarding the Plaintiff's armorialization.

The appellant voluntarily executed the transfer agreement and knew the consequences of the same which were that the guarantor would have the rights to sell the motor vehicle to recover from the proceeds of sale any amount due from the borrower.

The presumption of confirmation of employment is not backed by evidence and the termination letter that was issued 18 days later was communication of the termination.

The respondents contend that the magistrate did not in any way misdirect himself and the decision was made based on the evidence adduced and on record.

ISSUES FOR DETERMINATION

- a) Whether the appellant was on probation as at 19th September 2005
- b) Whether the appellant was unfairly terminated
- c) Whether the appellant is entitled to some refund out of repossession of KAP 851Z

Whether the appellant was on probation as at 19th September 2005

The confirmation letter to the appellant provided that his employment commenced on 1st September 2004. It expressly stated that he would

be on probation for 12 months and that the same would be terminated by 2 weeks' notice. In my understanding it meant that if he was to have his employment terminated during the probation period he was to be given 2 weeks' notice or payment in lieu thereof.

This therefore leads us to determine whether any such notice was given. The respondent contended that the termination letter was given 18 days after the probation had lapsed. By the respondents' own submission, it is evident that the notice was not given in accordance with the terms and conditions of the employment contract. Section 2 of the Employment Act states;

“probationary contract” means a contract of employment, which is of not more than twelve months' duration or part thereof, is in writing and expressly states that it is for a probationary period;

Section 42(2) of Employment Act states as follows:

“A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee”.

In *James O Oloo v Tana and Athi River Development Authority [2016] eKLR* the court expressed itself on section 42(2) as follows;

This Section is couched in mandatory terms in respect to the probationary period. In case of the claimant then this probation period be extended, then it would have been done in agreement with the Claimant.

In *Narry Philemons Onaya-Odeck v Technical University of Kenya [Formerly, the Kenya Polytechnic University College] [2017] eKLR* the court cited *Peris Nyambura Kimani versus Dalbit Petroleum Ltd, Petition No.63 of 2013* held as follows;

Parties to an employment contract are allowed to set their own parameters as to the applicable period for probation. Such a period must however follow the basis of law and cannot go beyond the legal maximum of 12 months. Such a probation period shall not be for more than 6 months but it may be extended for a further period of not more than six months with the agreement of the employee. As much as an employer has long latitude with exercise of their powers within the probation period, the legal requirements therein are set in mandatory terms. Such a probation time can be for up to 6 months and may be extended with the agreement of the employee.

This therefore means that the probation period was in contravention of the statutory provision Section 42(2) of the Employment Act. Further, he was issued with a letter of dismissal 16 days after the contractual probationary period which leads to conclusion that he was not on probation as of 19th September 2005.

WHETHER THE APPELLANT WAS UNFAIRLY TERMINATED

The respondents' choice to exercise the right to extend the probation period was available but was not utilised. The parties remained bound by the contract of service which must be upheld. By operation of the law and in accordance with Section 42 of the Employment Act, the claimant successfully completed his probation period and by conduct of the respondent, his employment was confirmed.

Section 45 of Employment Act states as follows:

- 1. No employer shall terminate the employment of an employee unfairly.**
- 2. A termination of employment by an employer is unfair if the employer fails to prove:**
 - a. that the reason for the termination is valid;**
 - b. that the reason for the termination is a fair reason: -**
 - i. related to the employee's conduct, capacity or compatibility; or**
 - ii. based on the operational requirements of the employer; and**
 - c. that the employment was terminated in accordance with fair procedure.**

The appellant was terminated for non-performance. He also admits that he was issued with appraisals thrice. His main contention is that the respondents did not produce any evidence to prove that the dismissal was based on the poor performance as indicated in the appraisals. Upon perusal of the record of appeal, it is apparent that the only document that informed him of the termination was the termination letter. The appraisals were not produced, yet they would have confirmed the validity of the alleged non-performance.

Section 41 of the Employment Act states;

41. Notification and hearing before termination on grounds of misconduct (1) Subject to section 42(1), an employer shall,

before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

It is clear that there were no such hearings conducted and the appellant was not afforded an opportunity to make any representations to the employer. Up to this juncture, it is clear that the termination was unfair. However, Section 45(3) of Employment Act states as follows:

” (3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated”.

Given that the appellant served for less than thirteen months, he has no right to claim that he was unfairly terminated.

WHETHER THE APPELLANT IS ENTITLED TO A REFUND OUT OF REPOSSESSION OF MOTOR VEHICLE REG. NO. KAP 851Z

The vehicle was subject of an agreement where his employer was to act as guarantor. The appellant admitted that he owed the respondent kshs. 587,500/- at the time of termination. He further stated that the car had a book value of kshs. 995,000/- but he did not provide a valuation report to support the claim and the court finds the claim unsubstantiated.

The appellant was bound by the agreement he signed. As per paragraphs 10, 11 and 12 of the agreement (page 33 of the record) it is apparent that the guarantor was entitled to sale of the vehicle to recover the outstanding balance. The appellant was therefore not entitled to return of the vehicle or any sums of money in refund.

In conclusion I do find that the appellant is entitled to some form of relief for the termination. He should be awarded 1 months' gross salary in lieu of notice (kshs. 50,000/=) and payment for the days worked (kshs. 31,667/=). The court also do award payment in lieu of accrued leave to the sum of kshs. 50,000/=.

The awards are based on the findings in the case of *James O Oloo v Tana and Athi River Development Authority [2016] eKLR* where the claimant was dismissed under similar circumstances.

Cost of the appeal goes to the appellant.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 4th day of June, 2019

In the presence of:

Mr. Kivame holding brief Mr. Mukabane for the appellant

And absence of firm of Gitonga for the Respondent

Ms. Sarah – Court assistant