



REPUBLIC OF KENYA



KENYA LAW
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**Kainika v Lucent Insurance Brokers Limited (Cause E373 of 2022)
[2024] KEELRC 1124 (KLR) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1124 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E373 OF 2022
BOM MANANI, J
MAY 2, 2024**

BETWEEN

OLIVER TERESIA NJOKI KAINIKA CLAIMANT

AND

LUCENT INSURANCE BROKERS LIMITED RESPONDENT

JUDGMENT

1. The parties to this action entered into an employment relation on 3rd May 2021 when they signed a contract in that respect. By this contract, the Respondent hired the Claimant's services as Head of Business Development.
2. The Claimant's monthly salary was agreed at Ksh. 350,000.00. However, it is not obvious from the contract that the amount was inclusive of house allowance.
3. The contract had a probationary period of six months. Although section 42 of the *Employment Act* entitles the employer, with the concurrence of the employee, to extend this period by a further six months, there is no indication in the agreement that the Respondent reserved this right.
4. The contract also provided for the right by the employee to take maternity leave for a maximum of ninety (90) days. This was in consonance with section 29 of the *Employment Act*.
5. It would appear that shortly after the Claimant reported to work, she proceeded on her three (3) months' maternity leave starting from 4th August 2021. This was approximately three (3) months into her probationary term.
6. The Claimant contends that whilst she was on the maternity leave, the Respondent insisted that she resumes duty in contravention of the law. As such, she was forced to work intermittently for part of the leave.



7. In response, the Respondent denies that this was the case. The Respondent contends that it is the Claimant who asked to be copied into the office email communication which affected her docket presumably to keep tabs with what was going on.
8. From the evidence on record, the contract between the parties was terminated on 9th March 2022. According to the Claimant, the decision to terminate the relation was without proper basis. She contends that the Respondent neither had valid reasons to anchor the decision nor did it follow due process in making the decision.
9. The Claimant contends that the Respondent's assertion that the contract was terminated due to her poor performance is without basis. According to her, the available data demonstrates that her performance was good.
10. The Claimant avers that the Respondent did not evaluate her performance to demonstrate that it was wanting. She contends that all that her supervisor did after reviewing her previous key performance indicators was to require her to develop new performance indicators for the next quarter. As such, she contends that there was no basis for the conclusion that she had performed dismally.
11. The Claimant further argues that the Respondent could not invoke the probationary clause in the contract to terminate her employment because her probation period of six months had lapsed. In her view, her contract was constructively confirmed at the close of the probationary period.
12. In response, the Respondent avers that when the Claimant was due for review in November 2021, she was asked to input her self-assessment but failed to do so until December of that year. As a result, it became impossible to review her performance at the close of the probation period due to her own inaction. As such, the review was postponed to January 2022 after the Respondent received the self-assessment report.
13. It is the Respondent's case that after the Claimant was evaluated, it became apparent that she had failed to meet the agreed key performance indicators. Consequently, her probationary term was extended by a further three months.
14. The Respondent asserts that the decision to extend the Claimant's probation period was acceded to by her. According to the Respondent, the email exchanges between the parties speak to this fact. As such, the decision to extend the probationary term was not unilateral but consultative.
15. The Respondent avers that after the extended probationary period, the Claimant's performance did not improve. As a result and after a series of meetings to discuss the issue, a decision was taken on 9th March 2022 to terminate her contract and a notice to that effect issued to her.
16. The Respondent contends that the Claimant was paid all her terminal dues before she exited employment. Thus, the contract between the parties was lawfully closed.
17. The Claimant's brief rejoinder to the foregoing is that she was forced to sign the document which set out her terminal dues. As such, the instrument does not absolve the Respondent from the obligation to make good this claim.

Issues for Determination

18. After evaluating the pleadings and evidence on record, I am of the view that the following are the issues that require resolution in the cause:-



- a. Whether the probationary period in the contract of service between the parties was legitimately extended or whether it was not extended with the consequence that the Claimant's contract was constructively confirmed.
- b. Whether the contract between the parties was legitimately terminated.
- c. Whether the payment voucher that was executed by the Claimant settled the claim between the parties and discharged the Respondent from further liability.
- d. Whether the Claimant is entitled to the reliefs that she seeks in her Statement of Claim.

Analysis

19. Probationary contracts are provided for under section 42 of the *Employment Act*. By virtue of this provision, the employer is entitled to include a probationary clause in the employment contract. However, the period of probation must be limited to six (6) months in the first instance. If it has to be extended, this should only be done once by a further term not exceeding six (6) months and with the concurrence of the employee.
20. In the introductory part of this decision, I mentioned that although the contract between the parties has a probationary clause, it is apparent that it was limited to six (6) months. There is no indication that this period was amenable for extension.
21. Ordinarily, an agreement that has been reduced into writing cannot be altered except through an instrument in writing which is signed by the parties to the contract. Further, parole evidence cannot be admitted to vary the terms of a written contract.
22. Although the Respondent contends that the Claimant agreed to the extension of the probationary period in her contract, there is no written instrument executed by the parties extending this period. The purported oral discussions between the parties to extend the period are inadmissible as evidence that the term which had initially been fixed for a period of six (6) months was extended. As such, the Claimant's contract became constructively confirmed after the lapse of the six (6) months probationary period.
23. It is apparent that the Claimant spent almost half of the probationary period on her maternity leave. Understandably therefore, the Respondent may have considered it appropriate to extend the term in order to get sufficient time to evaluate her performance.
24. However, since the probationary clause in the contract was silent on extension of the probationary period, the only way that the term could be extended was by the parties executing an addendum to the agreement. As the record demonstrates, this was not done. As such, the purported extension of the probation period was ineffective for all purposes and intents.
25. The Respondent has stated that the main reason it terminated the Claimant's employment was her poor performance. It is averred that the Claimant's performance was evaluated in various meetings where she was in attendance where-after a decision was taken to relieve her of her duties.
26. The Respondent contends that termination of an employee for non-performance is not a disciplinary issue. As such, the employer has no obligation to issue such employee a notice to show cause before the decision to terminate her services is made.
27. Section 41 of the *Employment Act* entitles the employer to terminate the services of an employee on various grounds including poor performance, physical incapacity and misconduct. The provision obligates the employer to give the employee a hearing before the decision to terminate her services is



- made. The employee is entitled to be informed of the reasons for the proposed decision in the presence of a co-employee of her choice or a trade union official. In addition, the employee is entitled to be given a chance to proffer her defense.
28. The above requirement applies to termination of employment on account of poor performance in much the same way that it does in respect of termination on account of misconduct (*National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR). The law contemplates a hearing where the employee who is accused of poor performance is notified of the possibility of her contract being terminated unless she is able to justify why it should not.
29. As such, the session for processing the release of an employee on grounds of poor performance is similar to one that is strictly considered as a disciplinary hearing. The only difference is that in the case of poor performance, the action against the employee is not triggered by misconduct on his part. Thus, the Respondent's assertion that it was not obligated to issue the Claimant with a formal charge and take her through the motions that are contemplated under section 41 of the *Employment Act* is a misconception.
30. There is no evidence to suggest that the Respondent warned the Claimant that the meeting of 9th March 2022 was going to consider termination of her contract due to her alleged poor performance. There is no evidence that the Claimant was notified of the need to have a representative during the session.
31. The available evidence suggests that the session was an ordinary performance evaluation meeting. Such meeting cannot by any stretch of imagination qualify as a hearing session contemplated under section 41 of the *Employment Act*.
32. Case-law requires that where an employee fails to meet the agreed performance targets, the employer should offer her (the employee) assistance to improve (*Jane Samba Mukala v Ol Tukai Lodge Limited* [2013] eKLR). There is no evidence to demonstrate that the Respondent offered the Claimant such assistance. There is no evidence that the Claimant was placed on a clear performance improvement plan with clear performance improvement indicators. As such, I have no hesitation in finding that the Respondent's decision to terminate the contract between the parties was flawed both in terms of the validity of the reasons for the decision and the procedure that was adopted to arrive at it.
33. The next question for determination relates to whether the discharge voucher which the parties executed released the Respondent from further liability under the contract. The answer to this question will concomitantly address the question whether the Claimant is entitled to the reliefs that she seeks in her Statement of Claim.
34. The evidence on record shows that the parties signed a document dated 22nd March 2022 which is titled "Final Dues". On the basis of the instrument, the Respondent forwarded to the Claimant a cheque for Ksh. 258,986.00 being her final dues.
35. At the bottom of the instrument the following words are inscribed on it:-
" I Oliver Teresa Njoki Kainika ID Number 26464099 do hereby declare that I [and] have no further claims whatsoever against Lucent Insurance Brokers Limited. I acknowledge receipt of cheque No. 570301 for Ksh. 258,986 being payment of my final dues.
Signature..... Date 23rd March 2022.
Witness Name:..... Signature:..... Date: 23rd March 2022."
36. The Claimant confirms that she signed the instrument. The document shows that her signature was attested by an independent witness on the same day that she signed it.



37. The document is plain in its tenor. By it, the Claimant was paid Ksh. 258,986.00 purportedly as her final due. In return, she is shown to have signed the instrument acknowledging the amount as her final dues and pledging that she had no further claims whatsoever against the Respondent.
38. This instrument is deemed as a contract between the parties. It has a binding effect on them (Saimon Ntasikoi Noonkanas v Resolution Insurance Limited [2021] eKLR).
39. Unless the contrary is demonstrated, the instrument is presumed to have been voluntarily executed. As such, the court is obligated to respect it in order to uphold the sanctity of the agreement between the parties.
40. The Claimant has asserted that her signature on the document was procured through coercion. She argues that the Respondent's management told her that she was not going to receive her cheque unless she signed the instrument.
41. It is noteworthy that the Claimant's signature on the instrument was affixed in the presence of an attesting witness. Ordinarily, where parties to an attested instrument dispute the voluntariness of their signatures on the instrument, the attesting witness should be called to shed light on the circumstances under which the instrument was signed. It is therefore curious that the Claimant chose not to call the attesting witness to testify on the circumstances under which the instrument was executed.
42. Importantly, when a party to a transaction pleads coercion, fraud, mistake or undue influence as vitiating elements for the transaction, he is obligated to provide particulars of the coercion, mistake, fraud and undue influence (Patel & another v MJC & another (Suing as the guardians of PJP) (Civil Appeal 182 of 2019) [2022] KECA 364 (KLR) (4 February 2022) (Judgment)). As the record shows, the Statement of Claim is lacking particulars of the alleged coercion.
43. Further, such party must provide persuasive evidence to back his or her claim of coercion, fraud, mistake, or undue influence. Significantly, the standard of proof in respect of these assertions is higher than on a balance of probabilities (Patel & another v MJC & another (Suing as the guardians of PJP) (supra)). It is for this reason that it was critical for the Claimant to have called the attesting witness.
44. In my view, the Claimant's assertion that the settlement voucher was procured through coercion has not been proved to the standard that is required in law. As such, I arrive at the conclusion that the instrument was voluntarily signed.
45. Once the Claimant signed the voucher, she released the Respondent from further claims in respect of their contract. As such, the court is not entitled to re-open the issue of compensation between the parties (Thomas De La Rue (K) Ltd v David Opondo Omutelema (2013) eKLR and Coastal Bottles Limited v Kimathi Mithika (2018) eKLR). For this reason, the Claimant's prayer for compensation for unfair termination of her contract must fail.

Determination

46. In the final analysis, I arrive at the following findings and make the attendant orders:-
 - a. The Claimant's contract of service was constructively confirmed after 15th November 2021 when her probationary term lapsed.
 - b. The Claimant's contract was unfairly terminated.
 - c. However, the court declines to make orders for compensation of the Claimant for unfair termination of her contract because the parties signed a release voucher which closed the issue of further compensation arising from the contract of service between them.



d. There is no order as to costs.

Dated, signed and delivered on the 2nd day of May, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

ELRC CAUSE NO E 373 OF 2022	0
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