



**Ouma v Consolidated Bank of Kenya Limited (Cause 908 of 2017)
[2024] KEELRC 1267 (KLR) (3 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1267 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 908 OF 2017
MA ONYANGO, J
MAY 3, 2024**

BETWEEN

DAN HAROLD OUMA CLAIMANT

AND

CONSOLIDATED BANK OF KENYA LIMITED RESPONDENT

JUDGMENT

1. The claimant herein filed a memorandum of claim dated May 12, 2017 seeking: -
 - a. A declaration that the termination of the claimant is unlawful, wrongful and unfair.
 - b. Twelve months' compensation – Kshs. 1,620,000.00
 - c. Damages for unfair labour practice.
 - d. Costs of the cause.
 - e. Interest on 2-4 above.
 - f. Any other relief this Hon. Court may deem fit and just to grant.
2. The memorandum of claim was accompanied by the claimant's verifying affidavit sworn on May 12, 2017; claimant's list of witnesses dated May 12, 2017; claimant's statement filed on May 16, 2017 and claimant's list of documents dated May 12, 2017.
3. In response to the memorandum of claim dated May 12, 2017, the respondent filed a statement of response dated June 28, 2017, together with a list of witnesses dated August 6, 2021; witness statement; list of documents dated August 6, 2021; and supplementary list of documents dated February 22, 2022.



Claimant's case

4. The claimant's claim is that he was employed by the respondent on May 23, 2016 as a Business Development Officer Grade 3 at a starting salary of Kshs. 135,000/-per month, and charged with the responsibility of growing the respondent's credit portfolio. That he was initially employed on a six month probationary contract which was extended for a further three months from December 1, 2016 to February 28, 2017, *vide* a letter dated 21st December 2016. The reason for the extension was that the claimant's performance was unsatisfactory, which the claimant states was false. It is averred that on February 17, 2017, the Claimant was issued with a letter appointing him to the position of internal quality auditor, an additional responsibility that he would be appraised on. Despite performing his duties with diligence, which diligence led to him being given the additional responsibilities, the claimant contends that he was issued with a letter terminating his services for alleged unsatisfactory performance on April 5, 2017.
5. The claimant postulates that The Respondent did not point out any areas where the claimant's work was unsatisfactory throughout his employment, save to make general sweeping statements which were calculated to make room for termination of the claimant. That although the Claimant solicited and introduced to the respondent customers who sought credit facilities from it, the respondent declined to issue credit on the grounds that it either had reached its maximum exposure or could not issue credit to individual customers, a fact which had not been disclosed to the claimant beforehand.
6. The claimant was emphatic that he was not informed of the Respondent's intention to terminate his employment prior to the termination, or given an opportunity to defend himself against the allegations of poor performance. That further, the probationary extension which he was subjected to was discriminatory as other employees were put on probation for 6 months after which they were confirmed to permanent employment.
7. The claimant avers that the termination of his employment is unlawful, wrongful and unfair for failure to adhere to both procedural and substantive fairness, as provided by law. That the respondent's actions of unfairly terminating the claimant's employment have a far-reaching effect on the employability of the claimant, in that it threatens his ability to secure employment with financial institutions within and without the Republic of Kenya.

Respondent's case

8. On the respondent's part, it admits that the claimant's gross salary at the time of termination was Kshs.135,000/- and that the claimant was put on probation for an initial period of six months. It avers that the claimant's probationary contract was extended for another six months for purposes of monitoring his performance which was at the point unsatisfactory. It denies that the claimant was a diligent and dutiful employee, instead insisting that the claimant's performance was unsatisfactory, rendering him a liability to the respondent.
9. The respondent avers that the letter of termination dated April 5, 2017 was issued procedurally and clearly states the reasons for the termination, hence denies that the claimant was unlawfully, wrongfully and unfairly terminated from employment. It states that the reasons for the termination were just, fair and valid and that due procedure was followed.
10. That the claimant was employed on a permanent contract which was subject to confirmation after the successful completion of his probationary period. Unfortunately, his performance turned out to be unsatisfactory which necessitated the termination. The Respondent states that it paid the Claimant all the terminal dues that he was entitled to including his salary up to 5th April 2017, 8 pending leave



days earned as at the date of dismissal and one month's salary in lieu of notice as per his contract of employment. The Respondent categorizes the Claimant's suit as unfounded and frivolous and urges this Court to dismiss it.

Evidence

11. At the hearing the claimant testified on his behalf as CW1. The Respondent called one, Rose Mukoba, its Human Resources Manager who testified as RW1. Both witnesses adopted their witness statements and documents filed in support of their respective cases and reiterated the evidence in the witness statements. Parties thereafter filed written submissions.

Claimant's Submissions

12. The Claimant filed submissions dated March 9, 2022, where he identified two issues for determination, namely: -
 - a. Whether the claimant was working under a probationary contract at the time of termination;
 - b. Whether the termination was lawful and fair; and
 - c. Whether the claimant merits the reliefs sought.
13. On the first issue, the claimant submits that he was issued with a six-month probationary contract dated May 3, 2016, a fact which is not disputed by the respondent. On December 21, 2016, he was issued with a letter extending the probation period for a further 3 months, from December 1, 2016 to February 28, 2016, a fact which is again not disputed by the respondent. It is the claimant's position that his employment was confirmed by operation of the law on December 6, 2016, and any purported extension of the probationary period after expiry of the initial period is unlawful, especially since the decision was made unilaterally without the consent of the Claimant.
14. The claimant relies on the definition of a probationary contract under section 2 of the *Employment Act* 2007, and section 42 (2) and (3) for the submission that a probationary contract shall not be for more than 6 months but may be extended for a further 6 months with the agreement of the employee. That it is trite law that if an employer desires to extend probation the extension should be done before the expiry of the probationary period or on the date of the expiry. That if the extension is not made by consent, the employee becomes automatically confirmed. To buttress the above submissions, the claimant relies on the cases of *Frank Zawadi Wanjala Mudibo & 5 others v Zircon Group Limited* [2016] eKLR, *Narry Philemons Onaya-Odeck v Technical University of Kenya* [2017] eKLR, and *Ascrat Gilamichael Woldegabriel v Five Forty Aviation Limited* [2015] eKLR. Pursuant to the foregoing, the claimant submits that he was not on probation at the time of the termination.
15. In relation to whether the termination of his employment was lawful and fair, the claimant relies on the definition of unfair termination as contained in section 45 of the *Employment Act* 2007. Further, he relies on the provisions of section 41 of the *Employment Act* to state that statutory procedure should have been followed before terminating his employment on the ground of poor performance. That RW1 testified that the Claimant was neither issued with a notice to show cause nor granted an opportunity to be heard on the allegations of unsatisfactory performance.
16. It is submitted by the Claimant that since he had been confirmed, the position taken by RW1, that the Claimant was on probation and did not merit a hearing is not correct. Owing to the failure to inform him of his wrongdoing and/or grant him an opportunity to be heard, the Claimant concluded that his employment was terminated unlawfully. He relied on various cases to support his submission that the



- termination of his employment was unfair, including the decision in Walter Ogal Anuro v Teachers Service Commission [2013] eKLR.
17. The claimant insists that the respondent did not have a fair and valid reason to terminate his employment as it failed to discharge its burden of proving that it had a valid reason under section 43 of the Employment Act 2007. This is because the claimant's employment was not target based. His employment contract does not provide for any targets or that his employment would be predicated on targets. The respondent only introduced targets after employment. It is stated that although RW1 testified that the claimant agreed to the targets, she did not produce any evidence to support this assertion. Further, she admitted that the performance templates were signed at the time of review and not before the period of review.
 18. The claimant states that under section 10(5) (sic), where any changes are made to the terms of employment, the employer shall, in consultation with the employee, revise the contract to reflect the changes and notify the employee in writing. It is submitted that the Respondent did not demonstrate that it consulted with the Claimant prior to setting targets and that the targets were agreed to by the Claimant. The variation of his contract of employment to introduce targets is therefore unlawful. The Claimant continued to state that his performance for the period between 25th January 2017 and 4th April 2017 was not reviewed, his last review being on 24th January 2017. He submitted that the Respondent also failed to demonstrate what assistance it gave to the Claimant to help him deliver. This Court is therefore urged to find that the termination of the Claimant's employment was unfair and unlawful for lack of substantive justification and procedural fairness.
 19. On the second issue, the claimant submitted that he is entitled to compensation as prayed pursuant to section 49(1)(c) of the Employment Act 2007, as read with section 50 thereof. The Claimant relies on the cases of Irene Akoth v Tobias See & 8 others [2021] eKLR and Hesbon Ngaruiya Waigi v Equitorial Commercial Bank Limited [2013] eKLR to support his submission that he should be awarded 12 months' gross salary as compensation.
 20. The claimant further submitted that under article 41 (1) of the Constitution of Kenya, 2010, every person has the right to fair labour practices. That in the present suit, the respondent subjected the claimant to unfair labour practices by unlawfully extending his probation period after it had lapsed on December 5, 2016, and failing to communicate the status of his employment after the lapse of the unlawfully extended period on February 28, 2017, only to terminate his services on April 5, 2017. That in the Hesbon Ngaruiya Waigi case (supra), the unlawful extension of a probationary contract was held to be an unfair labour practices with the claimant being awarded damages of Kshs. 100,000/- in addition to compensation for wrongful dismissal. This Court is urged to find similarly, and to award the Claimant costs of the suit.

Respondent's Submissions

21. The Respondent filed submissions dated June 6, 2022, where it identified 3 issues for determination, namely: -
 - a. Was the claimant's termination in accordance with the offer of employment letter, the Employment Act and fair labour practices i.e. was the claimant under probationary contract at the time of termination; and was the termination carried out in accordance with section 42 of the Employment Act 2007;
 - b. Whether the claimant is entitled to the reliefs sought in his memorandum of claim; and
 - c. Who should pay the costs of this case.



22. On whether the claimant was under a probationary contract at the time of termination, the respondent submits that a probation period is a trial period and relies on the case of *John Muthomi Mathiu v Mastermind Tobacco (K) Limited* [2018] eKLR to support this submission. It states that the Claimant confirmed in his pleadings and evidence in court that he was never confirmed to the position of an employee outside his probation contract. That he was subjected to the standard business development officer review and his performance found to be wanting. That the probation period allows the employer to determine whether the employee is a good fit for the job, and ultimately terminate or retain the employee. As such, the Respondent was well within its rights to terminate the Claimant's employment as per the Offer of Employment Letter while still within the probationary period. The Claimant consented to the extensions of the probationary period by agreeing with the terms of the letter dated December 21, 2016 and the performance review templates dated December 14, 2016, January 24, 2017 and March 18, 2017; and continuing to report and utilize his salary even after the extension of the probation period without complaint or objection.
23. On whether the termination was effected in accordance with section 42 of the *Employment Act* 2007, the respondent states that section 42(1) expressly excludes the procedural requirements under section 41. Owing to the fact that the claimant was on probation and performed poorly throughout his probation period, he was terminated under section 42 for being unsuitable for the job. That section 42 allows termination of a probationary contract without giving a reason where the employee is unsuitable for the job. That the Respondent went above and beyond its legal obligations by giving the reason for termination, and issuing the claimant with a certificate of employment per section 51 of the Act. The respondent relies on the case of *Danish Jalang'o & another v Amicabre Travel Services Limited* [2014] eKLR to buttress the above submission and to state that the provisions of section 43 and 45 are not applicable to persons under probationary contracts.
24. On whether the termination was effected in accordance with the Offer of Employment Letter, the Respondent submits that paragraph 3 of the Offer of Employment Letter provides that "...your services may be terminated by either party giving one month's notice or one month's pay in lieu of such notice." It is submitted that the Respondent paid the Claimant one month's salary in lieu of notice and therefore complied with this provision, and the Human Resources Policy Manual, which were the authority for the Claimant's terms of employment.
25. With regard to the second issue of whether the Claimant is entitled to the reliefs sought, the Respondent submits that the present case is not one of unfair termination as held in the *Danish Jalang'o case (supra)*, but of termination of a probationary contract. The Respondent also states that the Claimant was performing very poorly despite being given countless chances to improve. That he was not the only Business Development Officer who was employed by the Respondent during that period, yet the others were able to meet their targets in the same circumstances. Further, the Claimant admitted that he was paid his terminal dues. As such, he is not deserving of the 12 months' compensation sought. That this Court should not place reliance on the collective agreement produced by the Claimant as his position was within the management grades and was not governed by the collective agreement. That having not discharged his burden under section 107 of the *Evidence Act*, he is not entitled to the reliefs sought. This position was stated in *Kenya Plantation & Agricultural Workers Union v Unilever Tea Kenya Limited* [2017] eKLR.

Analysis and Determination

26. Having considered the pleadings, evidence and submissions on record, the issues arising for determination are whether the Claimant was on probationary contract or not at the time of



termination of his employment; whether the termination was unfair and if he is entitled to the orders sought.

27. It is common ground that the Claimant was employed by the Respondent on May 23, 2016 as a Business Development Officer subject to a probation period of 6 months. It is further common ground that the probation period was extended by 3 months from December 1, 2016 to February 28, 2017 on grounds of poor performance and that the Claimant's employment was terminated by letter dated April 5, 2017.
28. The dates of the Claimant's extended probation were specific, from December 1, 2016 to February 28, 2017. The Respondent ought to have communicated to the Claimant before the last date of the probationary period whether or not his performance was satisfactory.
29. There is no evidence that the Claimant's performance was reviewed after 24th January 2017. This means that there was no reason why on the date the probationary period ended the Claimant was not informed of the decision to terminate his employment or informed of what action was being taken between 28th February and April 5, 2017 when he was issued with the letter of termination of employment.
30. The Claimant having completed the extended probationary period on 28th February, 2017, he was no longer on probation on April 5, 2017, when his employment was terminated. There is no evidence that the Claimant was informed that his performance was unsatisfactory upon expiry of the extended probationary period. He worked for the whole of March 2017 outside the probationary period. He did not receive any communication from the Respondent extending the probationary contract for the period between the expiry of the extended probation period and the date of termination. I therefore find that the Claimant was no longer on probation at the time of termination of his employment.

Whether the termination of the Claimant's employment was unfair

31. Having found that the Claimant was not on probationary contract on the date he was issued with the letter of termination of his employment, the Claimant was entitled to be given a hearing as provided under section 41 of the *Employment Act*. Having not been given a hearing, the termination was unfair in terms of section 41 the *Employment Act*.

Whether the Claimant entitled to the remedies sought

32. The Claimant did not pray for terminal dues. The same was paid by the Respondent at the time of termination. He prayed for compensation, damages, costs and interest.
33. In awarding damages, the court is enjoined to consider the factors set out in section 49(4) of the *Act*. Among such factors is the length of service and the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination. In the instant case the Claimant was aware that he was performing unsatisfactorily as he had been placed on extended probation. The only reason the court found that his employment was terminated unfairly was because of the failure of the employer to communicate its decision to the Claimant immediately after or before the expiry of the extended probationary period.
34. Taking all these into account, it is my view that a nominal compensation of two months' salary in the sum of Kshs. 270,000 is reasonable. I accordingly award the Claimant the same.
35. The claimant did not prove that he is entitled to damages. The prayer is declined for want of proof.
36. Having only partially succeeded, the Claimant is awarded 50% of taxed costs.



DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 3RD DAY OF MAY, 2024

MAUREEN ONYANGO

JUDGE

