



**Were v Contemporary Electricals Enterprises Ltd (Cause
972 of 2017) [2024] KEELRC 1171 (KLR) (6 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1171 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 972 OF 2017**

JK GAKERI, J

MAY 6, 2024

BETWEEN

ADDAH CLAIRE WERE CLAIMANT

AND

CONTEMPORARY ELECTRICALS ENTERPRISES LTD RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim filed on 25th May, 2017 alleging unfair/unlawful termination of employment.
2. It is the Claimant's case after an interview in October 2016, the Respondent offered her employment vide letter dated 3rd October, 2016 at a gross salary of Kshs.65,000/= per month for one year renewable contract.
3. That the contract had no probationary clause.
4. The Claimant avers that she was given a copy of the agreement, terms and conditions of service and a code of conduct and served diligently.
5. The Claimant further avers that the Respondent was using the Tally Accounting Software which she was unfamiliar with and was not inducted on its use and had to buy a textbook to train herself.
6. The Claimant alleges that the Chairman was harsh and abusive and employees feared him.
7. That the Chairman called her to his office and gave her a termination letter and no reason was given and had hired a replacement.
8. The Claimant prays for;
 - i. A declaration that termination of employment by the Respondent was illegal and in contravention of labour laws.



- ii. Untaken leave days.
- iii. 12 months' salary compensation Kshs.780,000/=.
- iv. Days worked in February 2017 Kshs.10,883.00.
- v. 6 leave days Kshs.13,000/=.
- vi. Certificate of service.
- vii. Costs of this suit.
- viii. Any other remedy that the court may deem fit to grant.

Response

9. The Respondent filed a Memorandum of Reply on 30th May, 2018 and admits that it employed the Claimant on 3rd October, 2016 having falsely represented herself as highly trained and competent accountant pursuing a B Com Degree at Catholic University and had worked at the Aga Khan Hospital, Airtel Networks and Sketchers Design.
10. It is the Respondent's case that the Claimant's employment contract was subject to a probationary period of 3 months as per Clause 3.7 of the Respondent's Human Resource Manual, 2016.
11. The Respondent avers that there was a probability that the Claimant altered the letter of employment as it was discovered that she had stolen some documents from her personal file and the same was reported to the Kilimani Police Station under OB No. 40/15/2/2017.
12. That the letter of appointment incorporated the other documents of the Respondent and the Respondent reserved the right to terminate the Claimant's employment at any time by 7 days notice while on probation.
13. The Respondent avers that the Claimant was not up to the task and was trained on the Tally Accounting Software by one Duke Ombogi.
14. That the Claimant's performance led to her dismissal on 6th February, 2017.
15. Finally, the Respondent prays for dismissal of the Claimant's suit with costs.

Claimant's response

16. In her response to the Respondent's Reply, the Claimant denies having been given a copy of the Respondent's Human Resource Manual, 2016. That the Respondent gave parts of the document only.
17. That Mr. Duke Ombogi only installed the Tally Accounting Software and her performance was never discussed.

Claimant's evidence

18. On cross-examination, the Claimant confirmed that she could not name the person who worked in fear of the Chairman or were not paid after termination of employment.
19. She admitted that her statement had no date on when he was summoned by the Chairman.
20. The witness further admitted that she signed the Agreement on the Terms and Conditions of service.
21. The witness confirmed that the contract was terminable at any time at the instance of the Respondent.



22. That under paragraph 37, all employees had to undergo probation and the Human Resource Manual, 2016 had no signature.
23. The Claimant admitted that she had challenges with the use of the Tally Accounting Software and was given neither a written appraisal of her performance nor warning letter.
24. It is the Claimant's testimony that she was not given a copy of the Respondent's Human Resource Manual.

Respondent's evidence

25. The Respondent had 3 witnesses.
26. RWI, Mr. George Ochodo confirmed that the Claimant's letter of appointment had no probationary clause.
27. He admitted that he signed the summary dismissal letter dated 6th February, 2017 and the Claimant signed the letter too.
28. That the Claimant read the HR Manual but the witness had no copy the Claimant had signed.
29. RWI confirmed that the letter of dismissal had no reason for dismissal and he had no letter extending the Claimant's probation or raising concerns about the Claimant's performance.
30. RWI testified that all employee records were kept by the Human Resource Manager. The witness confirmed that the allegation that the Claimant stole documents from her personal file had no supportive evidence and there was no criminal case pending in court.
31. On re-examination, the witness testified about the unsigned and undated letter allegedly sent to the Claimant on her unsuccessful completion of the probationary period October 2016 – December 2016 and maintained that according to the Human Resource Manual, all employees were subjected to probation.
32. The witness further maintained that the Claimant was still on probation on 6th February, 2017.
33. RWII, Mr. Duke Ombogi confirmed that he was a Tally Software Trainer, an Accounting Software and that he trained the Claimant as she was not familiar with the software and would enquire regularly.
34. That he trained the Claimant with one Steve Okello for 1^{1/2} weeks and by phone.
35. RWIII, Mr. Steve Okello, the Accounts Assistant confirmed that he reported to the Accountant and the Auditor and the Claimant was the Accountant.
36. That he was trained on the Tally Software System by Mr. Ombogi and was comfortable with it and worked in the same office with the Claimant.

Claimant's submissions

37. Strangely, the Claimant's counsel did not file page 2 and 6 of the submissions.
38. Counsel submitted on three issues.
39. On probation, counsel submitted that since the Claimant had not signed the Respondent's Human Resource Manual, 2016, it did not exist and the Respondent could only rely on the documents signed by the Claimant.
40. Counsel urged the court to disregard the Human Resource Manual.



41. Counsel urged that even in probationary contracts, an employee has the right not to be terminated from employment unfairly as held in *Mercy Njoki Karingithi V Emerald Hotels Resorts & Lodges Ltd* (2014) eKLR.
42. Counsel faulted the termination letter for lack of a reason contrary to Section 45 of the *Employment Act*, 2007.
43. Counsel submitted that the Claimant was not accorded due process as she was not given a fair hearing.
44. Finally, counsel submitted that the undated and unsigned letter on probation ought to be treated contemptuously and the report to the police was an afterthought.
45. Concerning termination of the Claimant's employment, counsel relied on the provisions of the *Employment Act*, 2007 and case law to urge that termination of the Claimant's employment was substantively and procedurally unfair.
46. As regards the reliefs sought, counsel submitted that the Claimant was entitled to all of them including costs.

Respondent's submissions

47. On 21st February, 2024, the Respondent was accorded 21 days to file and serve submissions, owing to the late service by the Claimant but had not filed by 27th March, 2024 when the court retired to prepare this judgment.

Determination

48. It is common ground that the Respondent employed the Claimant as its Accountant effective 27th May, 2016 at a gross monthly salary of Kshs.65,000/= under a renewable one year contract.
49. As part of the documentation, the Claimant completed and signed a Personal Record Form.
50. She additionally signed the;
 - i. Letter of Appointment
 - ii. Agreement on Terms of service and condition, and
 - iii. Code of conduct for staff.
51. All the documents were signed on the same day.
52. The letter of appointment was explicit that the Claimant was expected to observe the company's terms and conditions, Code of ethics and "other policies as appropriate."
53. Under paragraph 3.0 of the letter of appointment, the terms and conditions of employment were attached for the Claimant's reference.
54. It is also not in contest that the Respondent summarily dismissed the Claimant vide letter dated 6th February, 2017 on the ground that "it was in the best interest of the Finance Department" and no notice was given.
55. The Claimant acknowledged receipt of the letter on the same day.
56. In the court's view, the bone of contention is whether the Claimant's contract had a probationary clause or the Claimant was on probation as at 6th February, 2017 and termination of employment.



57. The issues that commend themselves for determination are;
- i. Whether the Claimant was serving on a probationary contract as at the date of dismissal.
 - ii. Whether termination of the Claimant's employment by the Respondent was fair.
 - iii. Whether the Claimant is entitled to the reliefs sought.
58. Concerning probation, counsels have adopted contrasting positions with the Respondent's witness maintaining that the Claimant was serving under a probationary contract. The Claimant's counsel argued otherwise.
59. On cross-examination, RWI admitted that the letter of appointment executed by the Claimant on 3rd October, 2016, which the witness had signed as Managing Director of the Respondent had no probationary clause.
60. He further confirmed that the Agreement on Terms and Conditions executed on even date had no probationary period but Clause 6.0 provided that employees serving the probationary period were liable to be terminated from employment by 7 days written notice.
61. RWI admitted that the Respondent filed a copy of its Human Resource Manual, 2016 which neither the Claimant nor the witness had executed to confirm having read and agreed with the terms and conditions therein.
62. Significantly, Claus 3.7 of the Human Resource Manual provides that "All employees shall be placed on probation from the date of employment for a period of 3 months and the Board of Management could after evaluation of an employee extend the probationary period".
63. The Claimant's evidence is emphatic that she was not given a copy of the Human Resource Manual and RWI had no evidence to prove that the Claimant was indeed given a copy of the manual.
64. Was the manual part of the employment package or were its provisions incorporated by reference?
65. Based on the evidence availed by the parties, the court is not persuaded that the Respondent gave the Claimant a copy of the Human Resource Manual.
66. First, the Letter of Appointment makes direct reference to the document attached to it, namely; Agreement on the Terms and Conditions of service.
67. Second, the copy of the manual on record expressly provide for execution by the employee and the Claimant did not sign any copy as evidence of having received it.
68. Third, the Respondent provided no evidence as to when a copy of its manual was handed over to the Claimant or sent to her via email.
69. Finally, the probationary period is so essential in employment that if not provided for by the contract of employment, the document containing the clause must be brought to the employee's attention on the date he or she executes the contract of employment.
70. The clause cannot be in a document not brought to the employee's attention on employment. It is a fundamental term of the contract of employment.
71. Having found that the Respondent's Human Resource Manual was not brought to the Claimant's attention on 3rd October, 2016 or any other time and none of the documents availed by the Respondent or the Claimant provided for probation, it is the further finding of the court that the Claimant was not serving under a probationary contract by 6th February, 2017.



72. Would the position have changed if the court had found that the Respondent's Human Resource Manual was part of the Claimant's contract of employment?
73. Under Clause 3.7 of the Manual, all employees were subjected to a 3 months probations, which could be extended after evaluation by Board of Management.
74. RWI confirmed, on cross-examination that the Claimant had not been evaluated nor the probationary period extended. He had no evidence of either of the actions.
75. The foregoing suggests that the Claimant served the three months' probation period up to 2nd January, 2017 and continued serving for another one (1) month and 3 days before the summary dismissal.
76. Section 42(2) of the *Employment Act*, 2007 provides that;
 - (2) "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."
77. In the absence of an evaluation of the Claimant's performance during the 3 months probationary period, or a letter extending the same, it would be overstretching imagination to argue that the Claimant was still serving under a Probationary Contract.
78. There is sufficient judicial authority from this court to the effect that where an employer refuses, fails or neglects to confirm an employee's employment after expiry of the probationary period, the employee is confirmed by operations of law. (See Mbaru J. in *Peris Nyambura Kimani V Albeit Petroleum Ltd* (2014) eKLR among others).
79. By 6th February, 2017, the Claimant had transitioned from the probationary contract of 3 months to full-time employment.
80. In the end, it is evident that the outcome would have been the same whether the Claimant was subject to a probationary period or not.
81. As to whether termination of the Claimant's employment was fair, the Claimant argues that it was not as the provisions of the *Employment Act*, 2007 were not complied with.
82. The Respondent's testimony is to the effect that it terminated an employee who was serving a probationary contract for non-performance.
83. Surprisingly, RWI confirmed on cross-examination that he had no document communicating concerns on the Claimant's performance yet the Respondent had an operational human resource section under a Manager.
84. The provisions of Sections 41, 43, 44, 45 and 47(5) of the *Employment Act*, 2007 lay it bare that for a termination of employment to pass the fairness test, it must be demonstrable that the employer had a valid and fair reason to do so and conducted the termination in accordance with a fair procedure.
85. Put differently, must be proved that the employer had a substantive justification for the termination of the employee's employment and a fair procedure was employed, as exquisitely captured by Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR and the Court of Appeal in *Naima Khamis V Oxford University Press (E.A) Ltd* (2017) eKLR.



Reason for termination

86. As adverted to elsewhere in this judgment, the summary dismissal letter dated 6th February, 2024 had no specific reason for termination of the Claimant's employment. The letter only referred to the dismissal being in the best interest of the Finance Department.
87. Surprisingly, and as mentioned earlier, RWI testified about a letter the Respondent had availed allegedly written by one Lillian Njaya, the Manager Human Resource under the subject: Unsuccessful Probationary Period October 2016 – December 2016 allegedly addressed to the Claimant.
88. The letter accuses the Claimant for poor performance.
89. RWI testified that the reasons set out in the letter led to the Claimant's dismissal.
90. More fundamentally, RWI failed to explain why the letter was not under the Respondent's letter head and had no address. Equally, the letter is undated and unsigned and thus lacks authenticity.
91. Finally, RWI tendered no evidence to prove that the letter was handed over to the Claimant or she received it.
92. In the court's view, the letter in question is inconsequential for want of authenticity.
93. Finally, on the alleged poor performance, the Respondent adduced no evidence of any indication that it had concerns with the manner in which the Claimant was discharging her duties.
94. RWI, the Respondent's Managing Director admitted that he had no evidence of the Claimant's evaluation or appraisal or recorded concerns.
95. Similarly, RWIII, who was the Claimant's supervisee adduced no evidence of the Claimant's alleged poor performance yet they worked in the same office.
96. The principles governing termination of a person's employment on the ground of poor performance were addressed in detail by Mbaru J. in *Jane Samba Mukala V Ol Tukai Lodge Ltd (2013) eKLR* and the Respondent adduced no evidence of having conducted itself as by law required.
97. Finally, RWI appeared to suggest that the Claimant stole or was responsible for loss of documents, a matter which he testified was reported to the Kilimani Police Station.
98. Intriguingly, the witness did not provide details of the alleged lost documents, and when they got lost.
99. Equally, the witness did not avail a copy of the report made to the police or the action taken by the police. The witness, however confirmed that the police did not prefer charges against the Claimant.
100. The totality of the evidence on record is that the Respondent has failed to demonstrate that it had a valid and fair reason to terminate the Claimant's employment on 6th February, 2017.

Procedure

101. From the evidence on record, it requires no emphasis that the Respondent did not comply with the mandatory provisions of Section 41 of the *Employment Act*, 2007. (See *Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR*).
102. RWI, testified on re-examination that the Claimant was on probation when her employment was terminated.



103. The rough logic of the testimony is that an employee on probation may be dismissed without adherence to procedural fairness which is not the case in law.
104. Having found that the Claimant was not serving under a probationary contract as at 6th February, 2017, the Respondent was obligated to comply with the provisions of Section 41 of the [Employment Act, 2007](#) to ensure that the termination of employment was procedurally fair and as it did not, it is the finding of the court that the termination was procedurally flawed and thus unfair within the meaning of Section 45 of the [Employment Act, 2007](#).

Whether the Claimant is entitled to the reliefs sought

i. Declaration

105. Having found that termination of the Claimant's employment by the Respondent was unfair for want of a substantive justification and procedural fairness, a declaration that the termination was unlawful is merited.

ii. Days worked in February 2017

106. The Respondent adduced no evidence to prove that it paid the Claimant for the days worked in February 2017.
- The prayer is granted.

iii. 6 leave days

107. Neither the Claimant's written statement nor the oral testimony adduced in court show that she had 6 leave days outstanding.
- The prayer is declined.

iv. 12 months compensation

108. Having found that termination of the Claimant's employment was unfair, the Claimant is entitled to compensation in accordance with the provisions of Section 49(1)(c) of the [Employment Act, 2007](#).
109. In determining the quantum of compensation, the court has considered the fact that the Claimant was an employee of the Respondent for a very short time, about 4 months. Second, contributed to the termination. Third, the Claimant did not express her wish to remain in the Respondent's employment or appeal the decision of the Respondent.
110. In the circumstances, the court is satisfied that the equivalent of 3 months gross salary is fair.

v. Certificate of service

111. The Claimant is entitled to a certificate of service by dint of Section 51 of the [Employment Act, 2007](#).
112. In conclusion, judgment is entered in favour of the Claimant against the Respondent as follows;
- a. Declaration that termination of the Claimant's employment was unlawful.
 - b. Salary for days worked in February 2017.
 - c. Equivalent of 3 months gross salary.
 - d. Certificate of service.



e. 50% costs of this suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6TH DAY OF MAY 2024

DR. JACOB GAKERI

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 15th March 2020 and subsequent directions of 21st 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.

DR. JACOB GAKERI

JUDGE

