



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 752 OF 2013**

**VITALIS OPONDO ODHORE.....CLAIMANT**

**VERSUS**

**LONGHORN KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed this suit on 22<sup>nd</sup> May 2013 seeking to resolve a dispute he framed as unfair, unlawful termination of employment and non-payment of outstanding terminal dues. He averred in his Memorandum of Claim that he was appointed as publishing manager by the Respondent on 1<sup>st</sup> November 2012 and was earning Kshs. 156,886/- a month at the time of his termination. He was put on probation for 3 months ending 31<sup>st</sup> January 2013 and this was extended for a further 3 months. At the time of extension the Respondent indicated that the Claimant had made positive strides in appreciation of the role of a publishing manager despite some performance gaps. On 27<sup>th</sup> March 2013 the Claimant's employment was terminated while on probation. The reason given was under performance. He averred that he was not subjected to any assessment and there existed no performance appraisal criteria with clear performance indicators that the Respondent could base its result on. He alleged malice and gave particulars of malice which included incorporating a deputy publishing manager a position that was not existing at the time of his appointment as well as personal vendetta from the managing director. He averred he was not given an opportunity to be heard as required by law. He sought compensation for the loss of income, trauma and inability to meet his obligations. He sought reinstatement, payment of pro rata leave, salary in lieu of notice, general damages for wrongful termination and costs of the suit.
2. The Respondent filed its Memorandum of Response on 25<sup>th</sup> October 2013. In the Response the Respondent averred that subsequent to discussions on his performance the Respondent wrote a memorandum to the Claimant outlining his weaknesses and significant performance gaps. In the memorandum the Respondent highlighted the expectations of the Claimant and outlined the key areas agreed by the parties that required further improvement by the Claimant in order to achieve the key responsibilities of the publishing manager. The Respondent averred that in the Claimant had not understood his role or met the Respondent's basic minimum performance expectations the probation period would be extended by a further term of 3 months to end on 30<sup>th</sup> April 2013. Following a further assessment of his capacity and noted skill gaps the Respondent's board of

directors decided not to confirm the Claimant's employment due to under performance and failure to address fundamental managerial performance gaps. The Respondent averred that the criteria for the Claimant's performance assessment was explained in the memorandum. The Respondent averred that the Claimant's termination was on account of under-performance which was a subject of constant review and discussion. The Respondent was at all times ready and willing to pay the Claimant his two weeks salary in lieu of notice, salary for the month of March 2013 as well as pro-rata leave days but that the Claimant failed to complete the clearing process by failing to hand over medical cards in his possession. The Respondent asserted the termination was justified and procedural and sought dismissal of the suit with costs.

3. The Claimant testified on 28<sup>th</sup> July 2014 and the Respondent's witness on 19<sup>th</sup> January 2015. The Claimant testified that he was employed in permanent and pensionable terms from 1<sup>st</sup> November 2011 at a gross salary of Kshs. 218,000/- which after statutory deductions came to Kshs. 156,886/-. He stated that probation was to run for 3 months until January 2013 and after the 3 months there was extension for a further 3 months to end in April 2013. He testified that there was communication to this effect and there were a number of reasons raised. He referred to a letter dated 30<sup>th</sup> January 2013 from the Respondent which stated that he had made strides in appreciating the role of publishing manager and that he was to focus on some areas that needed learning. He contested the allegations regarding the bid for **Kamusi ya Karne** in which the bid security was not included in the bid. He stated that due to oversight the team did not include the bid but he was not to blame for this. He asserted there was no evaluation, no complaint, no warning letter. He stated that in relation to Rwanda he organized everything and his junior, a senior editor named Moses travelled and left one box behind and he was blamed for it. In relation to allowances he wondered how he was to blame for the failure of the education editor to collect money from finance for his travel to Rwanda. He testified that reading the Human Resource Manual there were elements in the manual which were ignored. There was no fortnightly evaluation and there was no evaluation report. He stated that he was only informed of the two incidences in respect of his managers on the eve of his evaluation. His termination was on 27<sup>th</sup> March 2013 and the reason for the termination was capacity and noted skill gap. He testified that he had quite a number of accomplishments and that he guided the process of the atlas for Malawi, developed a proposal for acquisition of Malkiat Singh books, started the budget and that he had performed well. He stated that the case of having a deputy publishing manager was malice, to blame him for others fault was malice. He testified that after he left the deputy publishing manager took up his position and there was no other deputy publishing manager appointed. He sat in the management meeting in 2013 and nothing was raised about his performance. He was not aware of the board sat and it was his belief that if they sat he would have been informed. He stated he was not given any notice and his termination was unlawful, unfair and unprocedural. He sought damages for wrongful termination, costs, the two weeks payment in lieu of notice.
4. The Respondent's counsel cross examined the Claimant and he testified that he did not wish to be reinstated. He stated that his letter of employment did not expressly state that he was permanent and pensionable but that was implied. He stated the interview was rigorous and the position was delicate. He had 3 months probation which would have led to confirmation if successful. He was to be constantly reviewed but this did not happen. He testified that the company stated clearly that he had made positive strides. He stated that the appraisal or evaluation would have positives and negatives. He reported to the managing director and the managing director would make the evaluation. He conceded that the memoranda of 30<sup>th</sup> January 2013 was written by the managing director. He testified that he wrote a letter referring to the meeting held the previous day and stated that he was not to blame. He testified that he cleared with the Respondent and that he returned the medical cards.
5. In re-examination by his counsel he testified that there was no performance evaluation and that it was only in the letters that the issue was raised. He stated that the letter was generally positive and he was not subjected to any other evaluation until he was terminated.

6. The Respondent called the managing director James Musyoki Muli who testified that he was MD designate in 2012. He stated that the Claimant was appointed as a publishing manager which was a critical position as the Claimant led the publishing team and was to initiate publishing projects or by making proposals to management team for product release in the market. The position is critical as without it the company would not have the proper material in the region market. The publishing manager reports to the managing director and above that is the board. The Claimant was put on 3 month probation and this is to enable the company confirm if the person can perform the functions effectively. While on probation the Claimant's performance was under constant review. He was the Claimant's supervisor from the time of appointment. He gave the Claimant induction daily and was in constant interaction with the Claimant. He stated that the Claimant was very good as an editor but in report making there was a lapse. There were no innovations to have a competitive advantage. He sat with the Claimant and enumerated the areas the Claimant had to make progress and put it to him that the probation period would be extended by a further 3 months and wrote a memo immediately after the meeting to that effect. He testified that the Claimant had made good strides in terms of printing but had lapses and significant failure and the memo was a performance assessment. He testified that the Claimant had inability to focus on the projects, there was no progress in e-learning and backup was in disarray, there was failure to support sales staff in the field. He stated there was no improvement in the areas highlighted and there was lack in follow through. He had a meeting with the Claimant on 26<sup>th</sup> March 2013 and he advised the Claimant that there were no improvements and the board had recommended that there be no confirmation. On 27<sup>th</sup> March he wrote a letter indicating the Claimant had not qualified for confirmation and was to be paid 14 days in lieu of notice. He conveyed the decision of the board and his letter of 27<sup>th</sup> March 2013 asked the Claimant to clear so that he could be paid his dues.
7. In cross-examination he testified that the Claimant worked from 1<sup>st</sup> November 2012 for 5 months. He confirmed there was no position of deputy publisher before the restructure. He stated that the Claimant was a non-performer. In his letter to the Claimant he had not stated that he was satisfied with the Claimant's performance but appreciated the positive strides the Claimant had made. He testified it was impossible to have a record of all the assessments of the Claimant. He stated it was not possible to give the employee the written assessment. He confirmed there was a board meeting on 21<sup>st</sup> February 2013. The performance of the Claimant could not be discussed in his presence. The skills gap meant the Claimant could not perform properly. On being referred to the Claimant's email he stated the email did not capture what had transpired in the meeting and what was captured in the memo was on the gaps in his performance. He did not reply to the email. He opined that the Claimant wrote the email to lay foundation for his suit. He testified that the memo was written in January and if the Claimant had issues with it he would have raised it.
8. In re-examination he testified that the organization chart he had been referred to was totally outdated. He stated that he had not been authorised by the board to release confidential matters there was no court order to release documents.
9. The parties filed written submissions and in his written submission filed on 3<sup>rd</sup> February 2015 the Claimant submitted that the termination was in contravention of the provisions of the law and in particular Sections 45(1) & (2) and 45(4)(b) of the Employment Act. He further submitted that he had proved his case and relied on the cases of **Samuel G. Momanyi v The Hon. Attorney General & Another [2012] eKLR** and **Abraham Gumba v Kenya Medical Supplies Authority [2014] eKLR**.
10. The Respondent in its submissions filed on 24<sup>th</sup> February 2015 submitted that the Claimant's persistent under-performance and noted skill gaps led to the non-confirmation of the Claimant in employment. The Claimant, it was submitted, was dismissed on compliance with the Employment Act and the provisions of Clause 4(a) of the letter of appointment. The Respondent submitted that the provisions of Section 41 of the Employment Act did not apply to a probationary contract as provided under Section 42(1). The Respondent relied on the cases of **Linus Barasa Odhiambo v Wells Fargo Limited** and the case of **Danish Jalang'o & Another v Amicabre Travel Services**

**Limited [2014] eKLR.** The Respondent submitted that the reinstatement sought was not a suitable remedy. The payment of 2 weeks salary in lieu of notice was a contractual entitlement and the other remedies did not lie.

11. The Claimant's contract was dismissed during probation. This was common ground in the pleadings and testimony of witnesses. It was also common ground that the Claimant was entitled to the salary for 2 weeks in lieu of notice. He sought damages for the unfair and unlawful termination of his services.

12. The Respondent submitted that the Claimant's contract was terminated during probation and that the provisions of Section 41(1) and 42(1) of the Employment Act applied. The Respondent relied on the case of **Danish Jalang'o & Another v Amicabre Travel Services Ltd** (above) for the proposition that procedural fairness does not apply in probationary contracts. In the case of **Mercy Njoki Karingithi v Emerald Hotels and Resorts Limited [2014] eKLR** Radido J. held that protections against unfair and unlawful dismissal under Section 43 and 45 of the Employment Act are available in full to employees on probation. The Claimant was notified of the skills gaps but was not given the procedural fairness expected. For that I would award him some recompense which is one month salary. He is entitled to the terminal dues namely 2 weeks salary in lieu of notice, the pay for days worked. He is not entitled to any leave as the leave is only earned upon service for one year.

13. In the premises I will enter judgment for the Claimant for

1. One month salary as compensation
2. 2 weeks salary in lieu of notice
3. salary for days worked in March 2013
4. No order as to costs

Orders accordingly.

**Dated and delivered at Nairobi this 16<sup>th</sup> day of April 2015**

**Nzioki wa Makau**

**JUDGE**