



**Mwithali v One Residence Limited (Cause 1154 of 2018)
[2024] KEELRC 452 (KLR) (21 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 452 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1154 OF 2018
DKN MARETE, J
FEBRUARY 21, 2024**

BETWEEN

IMAANA SILAS MWITHALI CLAIMANT

AND

ONE RESIDENCE LIMITED RESPONDENT

JUDGMENT

1. The matter was originated by way of O Memorandum of Claim dated 6th July, 2018. The issue in dispute is therein cited as unfair, unlawful termination.
2. The Respondent in undated Statement of Response denies the claim and prays that this be dismissed with costs.
3. The Claimant's case is that on or about March 2018, the Respondent called and offered him a possible recruitment as Finance and Administration Manager. He and a similar position of Hubble Innovations Limited but was promised better working condition and terms. This was a negotiated state and he signed the letter of appointment in acceptance. His duties included;
 - a. Overall responsibility for all aspects of financial management and control;
 - b. Effective financial reporting in a timely, accurate, relevant and informative manner;
 - c. General administration duties including
 - i. Supervising the finance department;
 - ii. Daily/weekly financial activity reporting to the CEO;
 - iii. Maintain accounts general ledger;
 - iv. Processing monthly payroll;



- v. Management of cash flow and preparation of monthly cash flow projections;
 - vi. Revenue compliance;
 - vii. General office administration.
4. The claimant's further case is that he reported to work on 16th April 2018. He was not inducted on his new role and barely 4 days into his new job, the CEO left the country for a business trip. The claimant was during the period of the CEO's absence left in charge of the operations of the company.
 5. The Claimant avers that the CEO returned back into the country towards the end of April 2018 and left again on 3rd May 2018 for yet another business trip that lasted for three weeks. The claimant states that during the second trip, he was once again left in charge of the operations of the company. The claimant states that upon the return of the CEO, he gave the requisite feedback on the operations of the company during the period of the CEO's absence and no complaint was received on possible failures.
 6. The claimant's other case is that immediately after submission of the May 2018 payroll for payment, the CEO ordered the withholding of the claimant's salary on grounds that its payment was subject to all tenants having paid rent for the month of June. All the other salaries were paid on time.
 7. The claimant further avers that the deadline for payment of rent for the month of June had not arrived at the time of withholding of his salary as the tenants had signed tenancies that stipulated that rent was payable on or before the 5th day of every month. In this case the said rent would have been due on 5th June 2018.
 8. The claimant's penultimate case is that on 5th June, 2018, he was summoned to the CEO's office where he was informed that she was unwilling to allow him to continue working for the claimant and terminated his employment for no reason. He was not even awarded an opportunity to be heard. This amounted to unfair termination of employment for reasons that;
 - a. No cause was shown; and
 - b. Due process was not followedHe prays thus;
 - i. A declaration that the dismissal of the claimant from his employment without cause and was unfair.
 - ii. An order for the Respondent to pay the Claimant 12 months gross salary in compensation for loss of employment @Kshs.180,000/= totalling (Kshs.2,160,000/=).
 - iii. Costs and interest.
 9. The Respondent's case is a total and unmitigated denial of the claim.

The issues for determination therefore are;

 1. Whether the termination for employment of claimant by the Respondent was wrongful, unfair and unlawful.
 2. Whether the claimant is entitled to the relief sought.
 3. Who bears the costs of this cause.



10. The 1st issue for determination is the termination for employment of claimant by the Respondent was wrongful, unfair and unlawful. His case and submission is in reliance to Section 42, 43 and 45 of *Employment Act* which provides for substantive and procedural fairness in cases of termination of employment. It is his case that in the process of terminating his employment he was not awarded an opportunity to be heard or even valid reasons for such termination.
11. The Respondent's case is largely in reliance to Section 42(1) of the *Employment Act*, 2007 which comes out as follows;

Section 42 (1) of the *Employment Act* states that the provisions in law relating to notification and hearing before termination on grounds of misconduct, poor performance or physical incapacity shall not apply where a termination of employment terminates a probationary contract.
12. Despite this, Section 42(1) of the *Employment Act* was declared unconstitutional in the case of *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party) [2021]* eKLR. Due process must be followed by employers.
13. Further, the Respondent submits that said judgment was that decisions made prior to the issuance of the said judgment should not be applied if an employer honestly believed and applied the law as it was prior to the pronouncement in the Munira Kibuchi case cited above.
14. In the circumstance of this present case, it involves a termination of an employee who was still on probation. In an email sent on 4th July 2018 sent by the CEO of the Respondent in response to the demand letter dated 19th June 2018, the CEO defined what she understood probationary period to be, which was that,

“probationary period is a time for assessment whether both the employee and the employer are the right ‘fit’ for a long term engagement.” The Respondent’s decision to terminate the Claimant’s employment during probation was wholly premised on the fact that the Respondent believed it did nothing wrong in the process it followed leading up to termination.
15. Circling back to Paragraph 60 of the Munira Kibuchi case, the 3-judge bench observed that, “Having so found, the next question is whether the Respondent is liable for terminating the services of the Petitioners, without according them a hearing as stipulated under Section 41 of the Act. The answer to this question would be in the negative. The Respondent honestly believed and applied the law as it was prior to the pronouncements contained in this judgment. It would therefore be unjust to condemn the Respondent for applying the Law as enacted by Parliament even if that Law is, as we have found it be, inconsistent with *the Constitution*.”
16. Further, at Paragraph 61, the judges proceeded to exonerate the employer by finding, that:

“Further, it naturally flows from the finding that the respondent could not be faulted for applying the impugned law enacted, that no order for compensation as sought in the Petition can be made.”
17. To this end, we humbly submit and rely on the Munira Kibuchi case and plead that the Respondent should not bear responsibility for then applying the law as it was at the time of termination of the Claimant’s employment during probation since the decision was made and applied prior to the declaration of Section 42(1) as unconstitutional.



18. The application of the Munira Kibuchi authority cannot be used to bar the claimant from realizing his claim. This is because the decision not to apply the matter to cases where an employer honestly believed and applied the law was always the onus of the Respondent to establish in evidence.
19. For the Respondent to enjoy this facility, she must adduce evidence to proof that at the time of termination of employment, she was living in the Munira Kibuchi era. This is not the case here and therefore the Respondent is not so exempt.
20. Even in a case of probation like we are engage in now, the principles of Section 42 of the *Employment Act*, 2007 apply. I therefore find a case of lawful termination of employment and hold as such.
21. The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is. Having warn on a case of unlawful termination of employment, he becomes entitled to the relief sought.
22. I am therefore inclined to allow the claim and order relief as follows;
 1. One (1) months salary in lieu of noticeKshs.180,000.00
 2. Six (6) months salaryKshs.1,080,000.00
 - Total of claimKshs.1,260,000.00
 3. The costs of the claim shall be born by the Respondent.

DELIVERED, DATED AND SIGNED THIS 21ST DAY OF FEBRUARY 2024.

D. K. NJAGI MARETE

JUDGE

Appearances:

Miss Mathu instructed by Gitau Mathu & Associates Advocates LLP for the claimant.

Mr. Hodari instructed by Clay & Associates Advocates for the Respondent.

