Jelimo v Institute of Human Resource Management (Cause E708 of 2020) [2024] KEELRC 253 (KLR) (16 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 253 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E708 OF 2020

B ONGAYA, J

FEBRUARY 16, 2024

BETWEEN

NAOMI JELIMO ..... CLAIMANT

AND

INSTITUTE OF HUMAN RESOURCE MANAGEMENT ..... RESPONDENT

JUDGMENT

1. The claimant filed the Amended Statement of Claim on 30.11.2020 through Wambua Kigamwa & Company Advocates. The claimant prayed for judgment against the respondent for:

    a. A declaration that the non-confirmation of appointment as communicated in the letter dated the 23.10.2020 by the Ag. Executive Director of the respondent to the position of Head of Human Resource and Membership services is unfair, wrongful and unlawful.

    b. A declaration that the respondent by placing her on the indefinite leave while she is an employee is an unfair labour practise thus a breach of Article 41 of *the Constitution* of Kenya, 2010 and by engaging in discriminatory practices in breach Article 27 of *the Constitution* of Kenya, 2010 coupled with an award of damages.

    c. A declaration that the claimant having been previously engaged in public service she was not required to serve probation upon employment by the respondent by dint of section 41 (6) of the *Public Service Commission Act*, 2017 and the imposition of the said probation term in the employment engagement by the respondent is an unfair labour practise in breach of article 41 of *the constitution* of Kenya, 2010 coupled with an award of damages.

    d. A declaration that the claimant not being legally bound to serve on probation she was on term employment and the respondent was bound to comply with the law on termination of employment by observing the requirements of substantive and procedural fairness.

e. An order directing the respondent to confirm the employment engagement of the claimant as the head of human resource and membership services.

f. The claimant prays for an injunction restraining the respondent from unfairly and unlawfully terminating the employment engagement as the head of human resource and membership services.

g. 3 months' salary in lieu of notice at Kshs. 290,000 thus sh. 870,000

h. 12 months' salary as compensation for the unfair and unlawful termination of employment being in addition to being retained in employment @ sh 290,000 thus Kshs. 3,480,000

i. Salary for 12 months being the maximum statutory probation employment period she would have served at Kshs. 290,000 thus Kshs. 3,480,000.

j. Loss of 1 year's annual leave thus Kshs. 290,000.

k. Costs and interests.

2. The respondent filed the statement of response dated 30.04.2021 and filed through Kamotho Njomo & Company Advocates. The respondent prayed that the claimant's cause be dismissed with costs.

3. The claimant's case was that she was initially engaged in employment as the Chief Manager Human Capital and Administration under a contract dated 29.01.2018 and was earning a gross salary of Kshs 253,400 at the Lake Victoria North Water Works Agency.

4. That she was subsequently engaged by the respondent through a letter of appointment dated 15.07.2020 as the Head of Human Resources and Member services effective 03.08.2020 at a gross salary of Kshs 290,000/= per month.

5. The letter of appointment provided that she would serve probation for three months.

6. The claimant accepted the offer of employment on 15.07.2020. Her case is that she served diligently in the respondent's service until the 23.10.2020 when the respondent's Ag Executive Director issued her with a non-confirmation of appointment letter.

7. The terms of the letter declining the confirmation, referred to the 3 months' probation period, which was to expire on 03.11.2020. The claimant was informed that following a performance review and recommendations to the Human resource and finance committee of 14.10.2020, a decision had been taken not to confirm her appointment to the position of Head of Human Resource and Membership Services.

8. The claimant was required to hand over immediately to the head of operations and proceed on leave, and her salary was to be paid in full until the last day of the probation.

9. It is the claimant's case that the intended termination of employment during the probation period and the failure to confirm the employment engagement is unfair, wrongful and unlawful for reasons:

a. The respondent failed to give a one month notice of intended termination of the contract as required by section 2.5.10 of the Institute of Human resource management human resources manual (revised edition),2013, hereinafter referred to as the "manual".

b. The claimant was never engaged or involved by the respondent in close reviews and had never been given any progress reports on her work performance on a monthly basis despite a provision of carrying out the same having been put in place in section 2.5.10 of the manual.

c. Termination of probation employment could only be considered at the end of the probationary period, which was yet to come. Thus, the respondent intended to occasion an unfair and wrongful termination of employment in breach of section 2.5.10 of the manual.

d. A provision for extension of the probation period is in force which the respondent is yet to exhaust prior to making a decision not to confirm the employment engagement in section 2.5.10 of the manual.

e. Placing the claimant, while serving on probation employment engagement, on an in definitive leave is an unfair labour practice and flagrant breach of Article 41 of *the Constitution* of Kenya, 2010 as the same is not embodied in the employment contract, the *Employment Act*, 2007, the *Human resource Management Professionals Act*, No. 52 of 2012 and the manual.

f. The respondent never issued to the claimant a staff handbook, which contained brief summary of the important policies and practices to new employees to act as a guide to the claimant on the expectations of the employer during probation service as provided for in section 1.7 of the manual.

g. The employment relationship having commenced on the 03.08.2020, the respondent as an employer was duty bound in consultation with the claimant as an employee to revise the contract of employment to reflect a change and notify the claimant of the change in writing in terms of incorporating a job description despite the mandatory provisions of section 10 (5) of the *Employment Act*, 2007.

h. No performance targets were ever brought to the claimant's attention by the respondent despite section 4.6 of the manual.

i. No timely feedback of performance appraisal was ever given to the claimant despite section 4.7 of the manual so obligating.

j. The non-confirmation of employment militates against the spirit of staff appraisal as contemplated by the respondent in section 4.7 of the manual.

k. The respondent in summarily seeking to terminate the employment engagement over want of performance has acted in breach of section 4.8 (b) of the manual which requires that the standard disciplinary process be invoked if performance does not improve after 6 months of performance counselling.

l. The claimant was discriminated against as other employees whom were engaged on probation terms together such as Job Akuno the Manager Finance and Gerald Nyoro the Procurement officer were confirmed without any appraisal thus a breach of article 27 of *the constitution* of Kenya, 2010 section 5 of the *employment act*, 2007 and section 10.3.2 of the manual.

m. The respondent has acted in breach of the corporate code of governance of state corporations (Mwongozo code), section 9 of the *Human Resource Management Professionals Act* No. 52 of 2012 as the ultimate authority is the full council, and not the HR Committee alluded to in the letter in making the decision to terminate the employment engagement.

n. By section, B16 of the Public Service Commission Human Resources Procedure Manual, 2016 which binds the respondent it has breached the probation duration set therein of 6 months by prescribing 3 months in the claimant's case.

o. The respondent was obligated to consider the claimant's performance at least one month to the end of the probation period which was not done as provided for in section B16(3) of the Public Service Commission Human Resource Procedure Manual, 2016.

p. The respondent failed to comply with the provisions of section B16(4) of the Public Service Commission Human resources Procedures Manual, 2016 by failing to inform the claimant of unsatisfactory performance and extending the probation period by a maximum period of 3 months.

10. On the part of the respondent, it is stated that the claimant executed a letter of appointment dated 15.07.2020 with the respondent, which contained terms and conditions of employment including a probationary period of three months.

11. It is the respondent's case that as the Head of Human Resources & Member Services the claimant knew that her employment was subject to confirmation on successful completion of probation.

12. The claimant's supervisor, Irene Kimacia, the Ag Executive Director of the respondent, reviewed the claimant's suitability alongside her two(2) colleagues who had been hired at the same time on five main areas and her scores were as follows:

Areas Score

a. Time management Meets expectations

b. The quality of work below expectations

c. Work habits below expectations

d. Interpersonal skills below expectations

e. Leadership skills below expectations

13. Based on the foregoing the supervisor's overall observation was that her overall performance and suitability was below the acceptable level for the sensitive position of Head of human resource and member services at the respondent. Consequently, he did not recommend her confirmation to the respondent.

14. The supervisor escalated the matter to the council, the decision-making organ of the respondent, to make a final decision. That during its meeting of 14.10.2020, the matter was delegated by the Council to its Human Resource and Finance Committe for deliberation. The Committee noted instances of misconduct, incompetence and inability of the claimant to adapt during the probationary period as follows:

a. On 26.08.2020 the claimant sent a threatening message to Frank Owen Wafula via Whatsap accusing him of frustrating interns associated with her or rather belonging to her tribe as well as threatening Owen on a professional/career level.

b. Vide a facebook post on 25.09.2020 the claimant openly endorsed a candidate for the position of branch member for coast region.

c. The Committee noted tasks delegated to the claimant by her supervisor that led to an acute display of incompetence, inability to receive instructions and an act of insubordination.

d. Enwealth Financial Services requested for IHRM to nominate an officer suitable to make a presentation on retirement benefit & conflict management – HR perspective in a webinar that

was scheduled for 03.09.2020. The task was assigned to the claimant, and after sharing the presentation, Enwealth called back to report that the presentation submitted was not adequate in substance and that IHRM should reconsider revamping the presentation to mirror the expectations in the guidelines presented. Despite sharing the said feedback with the claimant, she insisted that the presentation should be presented as it was without improvements. After the response, Enwealth Financial Services Ltd expressed their reservations but rated the presentation below standard.

e. On 11.08.2020, the respondent received a request from the chief executive officer, Tourism fund seeking guidance on a policy matter regarding the process of staff separation by resignation in the midst of an investigation. The assignment was delegated to the claimant. The response drafted by the claimant was submitted to the Ag. Executive Director for review and she raised salient points that required referencing to particular laws in line with basic requirements of any advisory opinion and standardization of the response to meet the respondent's basic standards of report or letter writing. The claimant was requested to respond to the request having in mind the fact that this was an advisory opinion that ought to be drafted in a manner that assumes that the supposed recipient of the advisory is not necessarily an expert in that area. The claimant remained adamant and responded by saying that she found no reason why the response should include facts that the HR department at the Tourism Fund can as well advise on. The claimant concluded by telling the Ag Executive Director that she should proceed to write the advisory the way she deemed fit. This act the respondent found to amount to insubordination.

f. The claimant rudely dismissed an intern whose contract had come to an end, and the said intern reported the matter to the Head of operations for further dealing.

15. The HR & Finance Committee further considered a report done by M/s Precision Corporate Services which carried out a reference check on the claimant and concluded that her professional conduct was wanting based on the following:

a. Some of the claimant's former colleagues disclosed that they had filed numerous complaints regarding her tyrannical and hysterical behaviour and issuance of threats against them.

b. Her criminal history is on record for having threatened a colleague of grievous bodily harm.

c. In civil matter, she had a case in the labour relations court in Kisumu cause no. 16b of 2017 before Lady Justice Maureen Onyango. The claimant in the said case accused Lake Victoria North Water Services Board and the claimant for blatant disobedience and insubordination.

16. That based on the forgoing the HR & Finance committee recommended and advised the respondent not to confirm the claimant into full employment and the full council met on 16.10.2020 and ratified the committee's decision.

17. The claimant was found incompatible with the respondent and by way of a letter dated 23.10.2020 issued the claimant with a letter of non-confirmation of appointment on the instructions of the Council.

18. On receipt of the said letter, the claimant wrote an appeal dated 23.10.2020 against unlawful termination of probationary terms addressed to the Chairman of the respondent's Council. The claimant was invited for a hearing on 05.11.2020 by way of a letter dated 02.11.2020.

19. The claimant did not attend the hearing and offered reasons for the same through her advocate's letter sent to the respondent on the eve of the hearing.

20. It is the respondent's case that contrary to the claimant's allegations, the decision made by the respondent to decline to confirm the claimant was fair and within the legal provisions governing termination of employees during probation.

21. The respondent states that the claimant has put reliance on the Human Resource Policies and Procedures Manual for the Public Service of May 2016. However, the respondent is of the view that the same is inapplicable to employees working at IHRM, and states that the manual issued by the Public Service Commission established under *the Constitution* of Kenya with a mandate to develop human resources in the public service sector. The employees of IHRM are neither public officers nor do they hold public office as defined under *the Constitution*.

22. The respondent maintains that the claimant was not sent on indefinite leave as alleged. She was rightfully terminated from employment and does not deserve the prayers in the amended statement of claim for reasons that the court cannot re-write the employment terms of the contract by deleting the probationary clause therein.

23. The parties filed their respective submissions. The court has considered the parties' respective cases and makes finding as follows:

    a. As submitted for the respondent, the relationship between the parties was governed by the contract of service executed by the parties. The claimant has failed to show that the Human Resource Policies and Procedures Manual for the Public Service of May 2016 was incorporated in the contract of service and the Court finds that it did not apply to the contract of service between the parties. It is submitted for the claimant that the respondent was a statutory creature therefore bound by the Public Service Commission regulations and manuals or policies. However, in the instant case, the respondent had an elaborate contract with the claimant and the claimant cannot be allowed to run away from the clear contract. She is bound by the probationary clause.

    b. The Court finds that as urged for the respondent the contract of service ended by way of declining to confirm the claimant in appointment as the respondent assessed the claimant unsuitable for such confirmation as communicated in the letter dated 23.10.2020. The claimant has not established contractual or statutory breach on the part of the respondent in declining to confirm her after assessing the probationary performance. The claimant testified that she agreed to serve three months of probation.

    c. The Court finds that the respondent has established fair reasons leading to the termination per section 45 of the *Employment Act*. While testifying that she saw the supervisor's complaints in Court, the Court finds that the respondent has shown that the reasons existed. Under section 42(1) of the *Employment Act* as read with sections 41 (1), the Court considers that the respondent adopted a fair procedure as no elaborate disciplinary procedure was required to be invoked in terminating the claimant's probationary service. Even if justice, fairness and proportionality cannot be disregarded during termination of a probationary service, the circumstances of the instant case are such that the respondent is not shown to be culpable of arbitrariness and unfairness. The Court has specifically considered the reasons the respondent relied upon to terminate the employment and returns that the claimant fully contributed to his termination.

    d. The claimant has not established the alleged discrimination. Her case is not established to be like of or similar to the other officers she has mentioned. It was a unique circumstance personal to the claimant that occasioned the decision not to confirm her in permanent service.

Discrimination has not been established for want of a comparator and the respondent's submissions are upheld that no ground for discrimination envisaged in Article 27 of *the Constitution* has been established.

24. The Court returns that the suit will fail. It is amenable to dismissal. Considering all circumstances of the case, each party to bear own costs of the proceedings.

In conclusion, judgment is entered for the respondent against the claimant for dismissal of the suit with orders each party to bear own costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 16TH FEBRUARY 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE