



Odenyo v National Gender & Equality Commission (Cause E6451 of 2020) [2024] KEELRC 1231 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 1231 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E6451 OF 2020
NZIOKI WA MAKAU, J
MARCH 7, 2024**

BETWEEN

PETER SHIBIRA ODENYO CLAIMANT

AND

NATIONAL GENDER & EQUALITY COMMISSION RESPONDENT

JUDGMENT

1. The Claimant instituted this suit against the Respondent, a constitutional commission vested with legal personality and operating as such pursuant to Articles 59(1) & (4) and 248(2)(a) of *the Constitution* of Kenya, 2010 as operationalized by the *National Gender and Equality Commission Act*, 2011. Through a Memorandum of Claim dated 10th November 2020, the Claimant seeks: unlawful, unfair and unconstitutional dismissal from employment; and violation of his right to fair administrative action, right to access information, right to a fair hearing and a right to legitimate expectation.
2. The Claimant averred that he was employed as an Internal Auditor of the Respondent on a five (5) years contract he signed on 16th May 2017, until the purported termination of his contract of employment on 5th October 2018. That he had never had any disciplinary case pending or brought against him except for the notice to show cause and the unrelated subsequent termination, the subject of this Claim and both of which are null and void for being unlawful. The Claimant's case was that on 5th October 2018, he received a letter from the Respondent signed by the then acting Secretary/CEO Sora Katelo, terminating his contract on the alleged grounds of "unsatisfactory performance". The Termination Letter took account of the Show Cause Notice issued on 8th February 2018 that cited only one ground, namely, a failure on the Claimant's part to submit his rated performance appraisals for discussion by the Commission. The Claimant then proceeded to request the Respondent to consider his appeal in a letter dated 12th October 2018 and that more than three months later, the Respondent declined to have the appeal heard while maintaining the decision to terminate the Claimant's contract.



He further averred that in response to the Notice to Show Cause, he had satisfactorily explained the reasons for the inadvertent delay on his part to submit the requisite documents of performance evaluation, which explanation the Respondent accepted. According to the Claimant, the Office of the Chief Executive Officer/Secretary failed and/or blatantly neglected to facilitate his appraisal on time. That he nevertheless submitted a performance evaluation with stellar results; having been awarded a mean score of over 80% by his then supervisor, Mr. Martin Muli, as per the appraisal tool designed by the Respondent. That noteworthy, the Respondent intentionally avoided the involvement of the Audit Committee, whose chair was supposed to appraise him as required by law. That if there was any purported threshold he did not meet or any unsatisfactory performance in relation to the appraisal items, the same was neither communicated to him nor any explanations given as would reasonably be expected by the Principles of Natural Justice. The Claimant's contention was that the termination on the alleged grounds of unsatisfactory performance was unrelated to the initial show cause notice.

3. It was the Claimant's averment that considering his stellar performance, the Respondent had created a ground for him to accrue a legitimate expectation that he would be retained in its employ there being no pending performance related issues against him. He further averred that he was neither informed nor notified of the alleged grounds of termination until he received the letter of termination. That the said grounds were as such extraneous, unsubstantiated wild allegations well calculated to defeat his right of claim to a legitimate expectation that he would be retained in the service of the Respondent. The Claimant asserted that given the sequence of events, namely the issuance of the Show Cause Letter on the same date as the extension of the probation period, his dismissal on grounds that had never been subject of any inquiry or disciplinary procedure followed by a blatant refusal to hear his appeal, the Respondent was actuated by malice in terminating his contract of employment and was out to punish him for unspecified reasons only known to it. That the Respondent neither followed the procedure for settlement of disputes internally as laid out in its policies nor conformed to the edict, letter and spirit of the laws applicable to employment contracts in Kenya. The Claimant's averment was that the Respondent also failed to consider the fact that he had never been involved in any disciplinary case throughout his employment period and that if at all there were any reasons for disciplinary measures, he should have been informed and a possibly more lenient disciplinary action meted out against him such as a warning or further training.
4. The Claimant averred that consequently, the Respondent had infringed on his right to a fair trial, an inviolable constitutional right and the right to a fair administrative process that is expeditious, efficient, lawful, reasonable and procedurally fair. He averred that the unlawful and cruel act of the Respondent caused him severe medical injury through acute depression that he is yet to recover from and for which he is still undergoing medication while incurring huge medical expenses. He thus prayed for judgment against the Respondent as follows:
 - i. The dismissal of the Claimant is in breach of the fundamental rights of the Claimant and is hereby declared unfair and unlawful hence null and void.
 - ii. The dismissal of the Claimant constitutes unfair termination.
 - iii. Damages for violation of the Claimant's constitutionally protected rights.
 - iv. Damages for the medical injuries sustained as a consequence of the unfair termination of the Claimant's contract of service.
 - v. Costs of the Claim.
 - vi. Interest on (iv) from the date of judgment till payment in full and on the accrued salaries and benefits under prayer (iii) from date when they fell due until payment in full.



- vii. The Respondent issue to the Claimant a letter of service.
 - viii. Any other or further relief as this Honourable Court may deem fit to grant in order to meet the ends of justice.
5. Respondent's Case
- In response, the Respondent filed a Memorandum of Reply dated 8th February 2021 averring that the Claimant's contract had not been confirmed due to his wilful and inexcusable failure to submit his rated performance appraisal by 17th December 2018, when his probationary period came to an end. It denied that the Claimant satisfactorily executed his duties as Internal Auditor as demonstrated in Appendix A annexed to the Reply and that on various occasions, he was accused of negligence of duty and or failure to take instructions, late reporting to work, and absenting himself from work without informing the HR Office contrary to his Contract and the Respondent's HR Manual. That for instance in regards to an Internal Memo by the Ag. Commission Secretary/ CEO dated 3rd October 2017 whose subject was submission of Internal Audit Review of Statement of Accounts 2016/7, the Claimant was unable to submit the said report within the stipulated timelines without plausible explanation. That Appendix C evidences email communication with the Claimant concerning his absence from work without informing the HR Office.
6. The Respondent further averred that the aforesaid are the reasons why it failed to confirm the Claimant's contract of employment after his probationary period of six (6) months. That his contract had been extended by a further three (3) months vide a letter dated 8th February 2018 to expire on 7th May 2018. That at the point of expiry of the extended probationary period on 7th May 2018, the Respondent did not have quorum at the Commission level to deliberate on the Claimant's case hence the delay in making the decision not to confirm his employment during its meeting of 26th September 2018 and that it communicated the decision to him in the letter dated 5th October 2018. It was the Respondent's averment that on 30th October 2018, the Claimant filed an appeal against its decision not to confirm his contract of employment but which appeal was dismissed and communication to that effect given to him vide a letter dated 15th January 2019. That the Claimant was then paid his final dues including a certificate of clearance.
7. The Respondent denied the Claimant's assertion that failure to submit his rated performance appraisal by 17th December 2018 was inadvertent, that the appraisal was satisfactory and accepted and or that the Office of the CEO/ Secretary failed or refused to facilitate his appraisal on time. It averred that the Claimant submitted his rated performance appraisal on 27th April 2018, which was two (2) months and about 20 days since extension of the probationary period on 8th February 2018, and more than four (4) months from when it was initially due by 17th December 2018. According to the Respondent, this delay was inordinate and unexplainable thus its decision not to confirm the Claimant's contract of employment. It contended that it adequately addressed the Demand and Notice of Intention to sue from the Claimant through a letter dated 6th October 2020; specifically, that the remedy for reinstatement is not available in his contract, having not been confirmed and his final dues having been promptly paid. It was the Respondent's prayer that the Claimant's Claim be dismissed with costs.
8. In a rejoinder, the Claimant averred in his Response to the Memorandum of Reply that he was dismissed from employment without a disciplinary process. He denied that the termination was based on the alleged reasons set out in the Respondent's Reply and averred that his extended contract was unilaterally terminated by the CEO on unsubstantiated grounds of unsatisfactory performance. The Claimant's averment was that in any event, being put through a further period of probation after a contract of one (1) year was illegal and unlawful as under the *Employment Act*. He further affirmed



that he was dismissed from employment not because of delayed submission of performance appraisal but because of unexplained and unsubstantiated unsatisfactory performance and that he was not given a right of reply in a properly convened disciplinary process. He asserted that if indeed he committed unsatisfactory performance, no remedial training, re-evaluation, guidance, counselling or warning letters were issued to him during his entire service or extended probation.

9. Evidence

The Claimant testified that his appeal was heard in his absence and that he went through depression for about one year after the dismissal as he could not cater for his family and would have panic attacks when going for interviews. He further stated that it took him about two years to secure new employment. The Respondent on the other hand relied on the documents it filed in court including the Memorandum of Reply and exhibits.

10. Claimant's Submissions

It was the Claimant's submission that having started employment with the Respondent from 18th June 2017 and placed on probation for six (6) months, the date of 8th February 2018 when he received a confirmation extending his contract for a further three (3) months was more than the 6 months' probation period. That he accepted the further probation even though the same was not provided in his Contract and at the end date of the extended probation on 8th May 2018, he yet again did not receive any communication from the Respondent. That he continued to serve and discharge his duties for a further five (5) months while drawing his salary as usual until 5th October 2018 when he received the Letter of Termination. The Claimant averred that the fact the Respondent remained silent on the confirmation of his Contract, continued to pay him his salary and he continued working for it meant he was at that time serving the five-year contract he had signed. It was the Claimant's submission that in any case, the second period of probation after the initial probation of six (6) months was contrary to section 42(2) of the [Employment Act](#), which requires that the probation period of six months can only be extended once for a further period of six months with the concurrence of the Claimant. That accordingly, he was deemed an employee of the Respondent no longer on probation from 8th May 2018 and that he therefore enjoyed the full benefits of an employee and protection under section 41 of the [Employment Act](#) at the time of his termination from employment.

11. The Claimant submitted that the Respondent had made wild allegations without evidence or substantiation and that the termination of his employment was not based on allegations of negligence of duty, late reporting to work, failure to take instructions, absenteeism or drunkenness. It was the Claimant's submission that under section 41 of the [Employment Act](#), the Respondent was required to give valid and fair reasons before termination and further accord him a fair disciplinary process. He averred that the termination on the alleged ground of unsatisfactory performance was not related to the initial show cause notice, and that any act of the Respondent pursuant thereto was without any valid reasons and amounts to unfair termination in breach of sections 43 and 45 of the [Employment Act](#).

12. The Claimant submitted that to have been dismissed from employment without an opportunity to be heard or having the dispute referred to any internal adjudicatory or disciplinary procedures, and a further exhaustion of all appellate processes, was in violation of the non-derogable right to a fair trial entrenched in Article 25(c) of [the Constitution](#) of Kenya. He further submitted that his right to a fair administrative process that is expeditious, efficient, lawful, reasonable and procedurally fair was therefore infringed by the Respondent. As regards the issue of having suffered medical injury, the Claimant referred the Court to the medical records indicating his treatment at page 3 of the bundle of documents. He noted that Dr. Mulongo of the Nairobi Women's Hospital found that he had insomnia caused by depression and panic attacks and then put him on medication.



13. Regarding his prayer for damages for unfair dismissal and violation of his right to a fair trial, the Claimant cited the case of *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR wherein the Court of Appeal stated that general damages are awarded if the claimant establishes in principle his legal entitlement to them, and that a trial Judge must make his own assessment of the quantum of such general damages. The Claimant submitted that under section 49(1)(c) of the *Employment Act*, the Court may award wages or compensation equivalent to or not less than 12 months' salary or wages of the employee at the time of dismissal or termination. However, that this does not preclude any general damages that the Court may award for unfair termination. That the Court of Appeal categorically stated in the case of *Oi Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR that the trial Judge must justify or explain why a claimant is entitled to the maximum award and that the exercise of discretion must not be capricious or whimsical.
14. Further, the Claimant asked the Court to grant him one month's salary for termination in lieu of notice as per clause 14 of the Employment Contract. He also urged the Court to consider the claim for general damages for the medical injury suffered, breach of the right to a fair trial and the right to a fair administrative action and find Kshs. 3,000,000/- to be reasonable compensation. On this submission, he cited the case of *John Atelu Omilia & another v Attorney General & 4 others* [2017] eKLR wherein the Court awarded Kshs. 2,000,000 per person and stated that this would be a reasonable amount for violation of their rights. The Claimant also relied on the case of *M W K & another v Attorney General & 4 others* [2017] eKLR, in which the Court held as follows:
- “ 123. Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury.
124. The petitioners claim a sum of Kshs. 7,000,000/- as compensation. It is not clear how this amount was arrived at. In the submissions, there is no serious argument to support this amount.
125. However considering the nature of the violations, the legal principles discussed above, the nature of the violations, and bearing in mind the fact that it may not be easy to quantify infringement of fundamental rights in a case of this nature, and doing the best I can, I find that an award of a global sum of Kshs. 4,000,000/- would be reasonable in the circumstances.”
15. The Claimant abandoned the prayer that sought that the Respondent reinstate or re-engage him to employment with back pay from the date of dismissal without any loss of benefits. The Claimant thus urged the grant of the balance of his prayers in the claim.
16. Respondent's Submissions
- The Respondent submitted that since the Claimant reported to work on 17th May 2017 and the date of expiry of the extended probation period being 7th May 2018, the period was less than 12 months. It asserted that this Court should take judicial notice that the Commission's lack of quorum to deliberate on whether or not to confirm the Claimant's Contract can be attested from the fact that three (3) more Commissioners were only gazetted on 20th August 2018 to make the total of five (5) and that the two Commissioners could not have deliberated on the Claimant's matter as at May 2018. The



Respondent argued that it simply declined to confirm the Claimant's appointment and he had in any event not submitted his performance targets and rated performance appraisal for consideration. Moreover, that the Claimant was not entitled to further disciplinary procedure, having undergone the same during probation period and there being no change of circumstances. The Respondent cited the case of *Anytime Limited v Fredrick Mutobera Omuraya* [2022] eKLR in which the Court while addressing probationary contracts, opined that 'probation is not a form of contract in itself'.

17. The Respondent further submitted that had it had quorum as at May 2018, the strict provisions of section 42(3) of the *Employment Act* would apply, but not in this case. That the Claimant was as such and as provided in section 42(1) of the Act, not entitled to be taken through the procedures under section 41(1) and could be terminated at will by simply giving notice to that effect. Additionally, that such an employee would not be entitled to the remedies for unlawful termination under section 45. It was the Respondent's submission that this Court should note that the Claimant was paid Kshs. 374,976/- on 24th January 2019 which he accepted.
18. The Respondent submitted that the allegation of violation of the Claimant's right to a fair trial has not been proven. That it had evidenced that it indulged the Claimant for so long during the probation period as shown by the numerous correspondence both on email and vide Internal Memos but he failed to comply. That the allegation of 'severe medical injury' was also not proved and the purported medical report in Court was made close to 2 years since termination of the Claimant's contract and cannot thus be related to his termination which was in any event lawful. The Respondent urged the Court to consider the foregoing and to dismiss the Claim with costs to the Respondent.
19. The Court has distilled the following issues to be germane to the resolution of the dispute between the parties.
 - i. Was the Claimant's probation extended or did his contract of employment take effect?
 - ii. Was the Respondent guilty of any of the constitutional and statutory violations asserted by the Claimant?
 - iii. Was the termination of the Claimant proper?
 - iv. Do any remedies lie for the Claimant?
 - v. Who is to bear the costs of the suit?
20. The Claimant asserts he was terminated after the period that was set for probation having come to an end by effluxion of time. He thus argues he was terminated unfairly and contrary to the rules of natural justice as he was not given an opportunity to be heard. The Respondent on its part asserts the Claimant was given an extension of his probationary period and when the Respondent was dissatisfied further with his performance opted to terminate the Claimant's service as he was not a proper fit. To the Respondent, the termination was above board and should be upheld with the suit being dismissed with costs.
21. The terms of the engagement of the Claimant were as follows at clause 11 thereof:- You will be placed on probation for a period of six (6) months to confirm suitability for confirmation in the position. In regard to performance appraisal, clause 12 of the contract provided as follows:- Your performance will be appraised annually on the basis of assigned duties and responsibilities. The contract made no provision for extension and for that, the *Employment Act* has the answer in section 42(2) and (3) of the Act. It provides as follows:-



- (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.
- (3) No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2).
22. A plain reading of the foregoing provisions of the law demonstrate that any probationary contract of employment that does not accord with section 42 is manifestly unlawful. The Claimant was employed on 16th May 2017 after successful interviews for the position of Internal Auditor. The Respondent did not confirm him into position on 16th November 2017. The Respondent purported to extend his probation for a period of 3 months on 8th February 2018. The Respondent was of the view the probationary period was to end on 17th May 2018. Given the provisions of section 42 of the *Employment Act*, the Claimant could not have any extension of probation since he had not agreed to the extension and because it was beyond the window the Respondent had to offer an extension. This in essence means the contract the Claimant held by this time had been automatically confirmed. That disposes of the first issue isolated by the court. The employment contract took effect.
23. The failure by the Respondent to follow the provisions of the law in regard to the probationary contract opened the pandoras box the Respondent has been trying to close in this suit. By failing to adhere to the provisions of the contract it offered on 16th May 2017 as well as section 42 of the *Employment Act*, there was a breach of the fundamental rights of the Claimant. The Respondent was guilty of material lapses in as far as upholding the rules of natural justice in the manner it dealt with the end of the Claimant's contract. The Claimant was dismissed after a show cause issued to the Claimant resulted in a discussion at the Respondent's Commissioners meetings on 26th September 2018 and 5th October 2018. The Claimant was not heard and as such the provisions of section 41 were not adhered to. Having failed to extend the probation as per section 42(2) of the Act, the Respondent was required to conduct a hearing in terms of section 41 of the *Employment Act* prior to termination. The Claimant was accused of poor performance which is a ground for hearing as contemplated in section 41(1) and (2). Having failed to do what the law required, the termination was ipso facto unfair and unlawful. That disposes of the second and third issues as isolated by the court.
24. The Claimant sought a raft of reliefs some of which cannot be granted. He abandoned some of the prayers before court and the court noted the allegations of trauma though difficult to pin on the Respondent must be a factor of the experiences the Claimant underwent post termination. In the absence of a medical report by another doctor, the Court will not determine whether there was direct nexus between the anxiety the Claimant feels and the apprehensions he felt when he faced interviews for new positions or the feelings he had when he felt he could not provide for his family.
25. The *Employment Act* recognises there are remedies under section 49 the Claimant can avail. He seeks damages for the unfair and unlawful termination and he will have those but limited since he did not make out a case for the award of maximum compensation. The Court will limit the award to 5 months given he only served for slightly over one year and is young, capable of getting alternative employment as his prospects for employment were not greatly diminished or obliterated. That disposes of the fourth issue isolated by court leaving the fifth one. Who will bear the costs of the suit? The Claimant having been largely successful will be entitled to costs as well as interest at court rates on the sum awarded.
26. In the final result I enter judgment for the Claimant against the Respondent as follows:-
- i. A declaration that the termination of the Claimant's services was unfair and unlawful.
 - ii. An award of 5 months compensation for the unfair termination – Kshs. 900,000/-.



- iii. Interest at court rates on the sum in (ii) above from the date of judgment till payment in full.
- iv. A certificate of service.
- v. Costs of the suit.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH 2024

Nzioki wa Makau

JUDGE

