



**Mwawasi v Board of Management Makini Schools (Cause
139 of 2020) [2024] KEELRC 856 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 856 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 139 OF 2020
BOM MANANI, J
APRIL 18, 2024**

BETWEEN

JANE SAMBA MWAWASI CLAIMANT

AND

BOARD OF MANAGEMENT MAKINI SCHOOLS RESPONDENT

JUDGMENT

Background

1. The parties to this action had a brief employment relation before it came to a close. On 17th May 2019, they signed a contract of service whose date of commencement was 1st July 2019.
2. Clause 7 of the instrument provided that the contract will have a probationary term of six (6) months. During this period, the Claimant was required to establish her suitability for the position that she had been hired into. At the same time, the Respondent reserved the right to extend the probationary period if it was not satisfied with the Claimant's performance during the first six (6) months of the probationary window.
3. In addition, the clause on probation provided that during the probationary period, either party was at liberty to terminate the contract without offering reasons for the decision. All that such party was obligated to do was to issue the other with a fourteen (14) days' notice of the intention to terminate or pay an amount that was equivalent to the notice period.
4. On 1st July 2019, the Claimant embarked on her duties as Chief Operating Officer of the Respondent. She continued to serve in this position for twenty four (24) days until 25th July 2019 when her services were terminated.
5. According to her averments in the Statement of Claim, the relation could only have been terminated in accordance with clause 7 of the contract which required either party to issue a fourteen (14) days'



- notice to terminate or pay salary that was equivalent to the notice period. However, this was allegedly not done.
6. In her Statement of Claim, the Claimant contends that she worked diligently and in accordance with her job description (JD) until 25th July 2019 when the Respondent terminated the contract on account of her alleged poor performance. She accuses the Respondent of having disregarded due process in terminating the contract. She contends that the Respondent did not allow her to serve the notice period. She further contends that the Respondent failed to pay her the accrued terminal dues.
 7. As such, the Claimant avers that the Respondent acted in breach of its obligation to uphold fair labour practice. She also avers that the Respondent's actions breached the rules of natural justice and violated provisions of *the Constitution* and the *Employment Act*.
 8. She avers that the Respondent did not provide her with reasons for terminating her contract. She accuses the Respondent of violating her legitimate expectation to be subjected to performance evaluation during the probationary period.
 9. The Claimant avers that before joining the Respondent, she was in stable employment with another employer. She accuses the Respondent of having lured her to quit the job with her previous employer only for her to be rendered jobless.
 10. She accuses the Respondent of having offered her the position of Finance Director only to later unilaterally switch it with Chief Operating Officer. She asserts that the position of Chief Operating Officer was established as a bait to provide her with the illusion of employment only for the Respondent to swiftly eliminate it after her services were terminated.
 11. In response, the Respondent asserts that the contract between the parties had a probationary clause. That the clause entitled either party to terminate the contract during the probationary period without assigning reasons for the decision as long as the party taking such decision served the other with a fourteen (14) days' notice of this intent or paid salary in lieu thereof.
 12. The Respondent contends that the Claimant was given a contract of service which she voluntarily signed. The contract allocated her the role of Chief Operating Officer, a function that included overseeing the human resource docket within the Respondent's institution. The Respondent avers that the Claimant was issued with a JD which outlined her functions.
 13. It is the Respondent's case that at the time of hiring the Claimant, it was undergoing a restructuring process. As such, there was an ongoing staff re-deployment and redundancy process.
 14. The Respondent avers that it expected the Claimant to oversee the flawless steering of the process in strict compliance with the law. However, on 19th July 2019, the Human Resource Department which was under the Claimant's supervision issued redundancy notices to various employees without regard for the law. Some of the notices were issued to employees who had been earmarked for retention and who had received letters of promotion around the same time that they were issued with the redundancy notices.
 15. The Respondent avers that the impugned redundancy notices were subsequently successfully challenged in court and the employees reinstated into employment. The Respondent blames the Claimant for this chaotic state of affairs in its human resource department.
 16. According to the Respondent, the chaotic manner in which the redundancy process was handled demonstrated the Claimant's inability to handle her docket. As such, a decision was taken to terminate her contract.



17. It is the Respondent's case that the Claimant's employment was terminated during the probationary window. At this time, all that the law and the contract between the parties required of it (the Respondent) was to issue the Claimant with a fourteen (14) days' notice of intention to terminate the contract or pay her salary in lieu of such notice.
18. The Respondent avers that it complied with this requirement of the law and the contract between the parties by paying the Claimant salary for fourteen (14) days in lieu of notice. As such, the instant action is unfounded.
19. The Respondent avers that at the time that the decision to terminate the Claimant's contract was made, the *Employment Act* did not obligate an employer to provide reasons for terminating a probationary contract. Neither was it a requirement that the employee be granted the protection offered by section 41 of the Act. As such, the decision was, at the time, within the law.

Issues for Determination

20. After analyzing the pleadings and evidence on record, I consider the following to be the issues that require resolution in the cause:-
 - a. Whether the contract of service between the parties was terminated lawfully.
 - b. Whether the parties are entitled to the reliefs that they seek through their pleadings.

Analysis

21. Section 42(1) & (4) of the *Employment Act* provides as follows:-
 - i. The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.
 - ii. A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice.
22. Section 41 (1) & (2) of the Act provides as follows:-
 - i. Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
 - ii. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
23. In effect, section 41 of the Act prohibits an employer from terminating a contract of service for an employee without justifiable cause and without following fair procedure. Therefore, an employer can no longer terminate an employee's employment whimsically. However, by virtue of section 42(1) of the Act, this protection is not extended to probationary contracts.



24. The evidence on record shows that the parties to this action entered into a contract of service which had a probationary clause. As mentioned earlier, the clause provides that either of the parties can terminate the contract by giving the other notice of fourteen (14) days or salary in lieu thereof. The clause provides that the party seeking to terminate the contract need not state the reason for the decision.
25. In her Statement of Claim, the Claimant has not suggested that she was coerced into signing this contract. Neither has she indicated that the terms of the contract were misrepresented to her or that she was mistaken about them. All the evidence on record points to the fact that she voluntarily signed the contract
26. In her evidence, she asserts that although she had been offered the position of Finance Director, the Respondent unilaterally changed the position to that of Chief Operating Officer after she had resigned from her previous employment. As such, she felt obligated to take the new position. However, this is not evidence of coercion or undue influence against her.
27. The effect of the probationary clause in the contract was to remove the employment relation between the parties from the protections that are offered by the *Employment Act*. In effect, the Claimant cannot technically plead that her contract was irregularly terminated on the grounds that she was not provided with the reason for the decision and was not afforded due process.
28. Section 42(1) of the *Employment Act* was considered a claw back on the gains that had been made by the 2007 employment law regime in Kenya. The fact that the provision purported to exclude employees serving on probationary contracts from the protections offered by the Act was considered discriminative to this cadre of employees.
29. This feeling led to the filing of a Petition before the Employment and Labour Relations Court to challenge the constitutionality of the provision. In the Petition (Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party) [2021] eKLR), the court stated as follows regarding the provision:-

“.....we find and hold that Section 42(1) insofar as it excludes an employee holding a probationary contract from the provisions of Section 41 of the *Employment Act*, is inconsistent with Articles 41 and 47 of *the Constitution* hence null and void.”
30. As matters stand now the above provision has been rendered invalid for want of compliance with *the Constitution*. However, this declaration took effect from 30th July 2021 when the Monica Munira (supra) decision was rendered.
31. The evidence on record shows that the decision to terminate the Claimant’s contract was rendered on 25th July 2019. At this time, section 42(1) of the *Employment Act* had not been declared unconstitutional. What was the legal effect of this state of affairs?
32. Until a piece of legislation is declared invalid for want of compliance with *the Constitution*, it remains alive in the statute books. Therefore, it remains an efficacious legal edict.
33. At the time that the Respondent terminated the Claimant’s contract, it acted in accordance with section 42(1) of the *Employment Act* which was still efficacious in Kenya’s statute books. Therefore and to that extent, the impugned decision was, prima facie, legitimate. At the time, the Respondent was under no obligation to justify its decision to terminate the Claimant’s contract. At the time, the Respondent had no obligation to hear the Claimant.
34. It is correct as asserted by the Claimant that *the Constitution* protected her right to fair labour practice at the time. However, as no attempt had been made to declare the limitation that section 42 (1) purported



to impose on the right as unconstitutional, this limitation remained in the country's statute books. This was the case until 2021 when the Employment and Labour Relations Court declared the provision unconstitutional.

35. Indeed, this matter was considered in the Monica Munira Kibuchi case (*supra*) when the court observed as follows:-

“To this extent therefore, we find and hold that Section 42(1) insofar as it excludes an employee holding a probationary contract from the provisions of Section 41 of the *Employment Act*, is inconsistent with Articles 41 and 47 of *the Constitution* hence null and void.

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 [to] be, inconsistent with *the Constitution*.”

36. Section 42 (4) of the *Employment Act* obligates a party to a probationary contract who wishes to terminate it to either issue a seven (7) days' notice of such intention or pay salary in lieu thereof. On the other hand, clause 7 of the contract between the Respondent and Claimant provided for an improved notice of fourteen (14) days or salary in lieu thereof. As has been stated above, the clause absolved the parties to the contract from justifying their decision or indeed going through the motions of a hearing.
37. The record shows that the Respondent took the option of paying the Claimant an amount that was equivalent to her salary for fourteen (14) days in lieu of issuing her with notice to terminate her contract. In effect, the Respondent complied with the requirements of the contract between them and the law at the time.
38. In their closing submissions, counsel for the Claimant argue that the Claimant had legitimate expectation that she would serve for at least six (6) months after which her performance was to be evaluated. Therefore, the decision to terminate her contract within twenty five (25) days of its commencement smirks of unfair labour practice contrary to article 41 of *the Constitution*.
39. This suggestion is not correct. A perusal of clause 7 of the contract between the parties shows that the parties agreed that the relation could be terminated during the currency of the probationary term as long as the party terminating it issued the other with a fourteen (14) days' notice or paid to the other an amount that was equivalent to salary for the notice period. The Claimant having voluntarily submitted to this arrangement which had the backing of the law at the time cannot turn around and argue that she did not anticipate that the contract could be terminated before the close of the probationary period.
40. In her evidence, the Claimant suggested that she was not issued with a JD for her new role of Chief Operating Officer. As such, she did not appreciate the full stretch of her mandate.
41. This averment is given prominence by the Claimant's advocates in their final submissions. They argue that the Respondent did not provide their client with the JD. Further, they contend that the role that was assigned to their client was an expanded one and that she was not given a chance to settle into it.
42. On the other hand, the Respondent insists that it issued the Claimant with her JD. It argues that this fact is self-evident from the contract between the parties which indicated that the JD was annexed to it.



43. The suggestion by the Claimant that she was not issued with her JD is discounted by her own pleadings. At paragraph 10 of her Statement of Claim, she asserts that for the few days that she served the Respondent, she executed her duties diligently in line with the latter's laid down rules and regulations as outlined in her JD. Thus, to turn around and assert that she was unaware of her JD appears a contradiction in terms.
44. Importantly, the parties entered into a contract which relieved the Respondent of the obligation to justify the reasons for terminating it (the contract) during the probationary period. Therefore, it did not matter that the reason for terminating the contract was alleged poor performance. The Respondent was still seized of the power to bring the relation to a close anyhow as long as it complied with the requirements as to notice or pay in lieu thereof. At the time, this approach to ending the relation between the parties was entirely within the law, unfair as it may appear.

Determination

45. Having regard to the foregoing, I arrive at the conclusion that the Claimant's contract of service was, at the time of its termination, validly terminated in accordance with section 42(1) of the Employment Act which was yet to be declared invalid for want of compliance with the Constitution.
46. As such, the Claimant's suit against the Respondent is without merit.
47. Accordingly, the case is dismissed.
48. Each party to bear own costs.

DATED, SIGNED AND DELIVERED ON THE 18TH DAY OF APRIL, 2024

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Claimant

.....for the Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

