



**Achungo v IBM East Africa Limited (Cause 365 of 2019)
[2023] KEELRC 902 (KLR) (13 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 902 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 365 OF 2019
MN NDUMA, J
APRIL 13, 2023**

BETWEEN

LOUIS MUKASA ACHUNGO CLAIMANT

AND

IBM EAST AFRICA LIMITED RESPONDENT

JUDGMENT

1. The claimant filed suit on 10th June, 2019 seeking the following reliefs:-
 - (a) A declaration and/or finding that the Respondent's termination was unlawful and wrongful.
 - (b) An order for compensation to the claimant to the maximum of the twelve (12) month's salary on the gross monthly salary at the time of dismissal for unfair/unlawful termination and/or loss of employment.
 - (c) An order for compensation to the claimant for one (1) month's salary in lieu of notice at Kshs.728,922.00.
 - (d) An order for salary, allowances and benefits to the claimant for the month of May and June, 2016 at Kshs.1,457,844.00.
 - (e) Certificate of Service and
 - (f) An order for payment of costs of this claim.
 - (g) The Honourable Court do make such this and further orders that it deems fit to meet the ends of justice.



2. C.W.1, the claimant testified that he was employed by the respondent on 1st November, 2015 as an Enterprise Content Management Client Solution Specialist and was placed on six (6) months probation. The claimant had a written contract of employment. The claimant was to earn Annual Reference Salary of Kshs 7,200,000.00 which included guaranteed salary of Kshs 6,300,000.00 on Target Earnings (OTE) of Kshs 9,000,000 and incentive (at target)/not guaranteed at Kshs 2,700,000.
3. The guaranteed salary was payable in arrears at the end of each month.
4. In terms of the contract, the claimant's performance was to be assessed during probation to ensure that the claimant met company standards. During the probation period, the contract was terminable by either party giving a 7 days' notice or payment in lieu thereof.
5. The Clause on probation also provided for extension of probation to a further six (6) months by agreement of the parties, if performance, attendance or conduct of the claimant has been unsatisfactory during the initial probationary period.
6. The claimant was supervised by one Gerald Nkusi and was assigned a 'buddy' one M/s Jane Adero who walked the claimant through the respondent's systems of operation and orientation upon coming on board.
7. The claimant testified that he commenced work on 4th January, 2016 and her buddy was on maternity leave until April, 2016 thus the claimant was not taken through any orientation by the respondent to learn the ropes in the company. The claimant testified further that no targets were set or agreed upon between the claimant and Mr. Nkusi, the supervisor nor was the claimant issued with any Key Performance Indicators to be used to gauge performance during probation period.
8. That notwithstanding, the claimant testified that he diligently and faithfully administered his duties and responsibilities as assigned to him by the supervisor.
9. The claimant testified further that it was not until March, 2016, when he was informed of a Sales Connect System which he was supposed to key in every single task he did on a daily basis. No one had informed him about it until the Operations Manager remarked in March, 2016 that he did not know what the claimant was doing. The claimant testified that he was shocked and dismayed by this turn of events despite having worked for two (2) months without the supervisor telling him about the Sales Connect System.
10. That the claimant was granted access to the portal in March, 2016 and started keying in his activities religiously. The claimant however was learning on his own since the 'buddy' had not yet reported to work.
11. The respondent failed to provide the claimant with any Key Performance Indicators (KPIs) until 30th April, 2016 four (4) months into the probation period.
12. The claimant requested for another buddy who was assigned to him in May, 2016. The new buddy was one Mr. Kioni who never showed up in the office. That Mr. Nkusi constantly harassed him until the claimant escalated the matter to Mr. Nkusi Supervisor. Mr. Nkusi remarked "If I made him look bad, he would make me look bad."
13. The claimant testified that his supervisor would ridicule and belittle the claimant in front of his peers. At one point Mr. Nkusi told the claimant that he was the worst mistake and investment the respondent had made in 2016.



14. That no performance review of the claimant was done until 3rd May, 2016 when the claimant was summoned to attend a performance review meeting with the respondent.
15. At the meeting, the claimant testified that he was informed that his performance was below the expected standards of the Respondent and was placed on a Performance Improvement Plan (PIP). At the meeting the claimant was informed that he was in the rank of Band 8 which was the position of a Manager which fact had not been disclosed to him. The position at Band 8 placed the claimant at a position where he was required to perform on more areas than were disclosed on the Performance Improvement Programme. This information was never disclosed to the Respondent.
16. The claimant testified that his placement on Performance Improvement Programme was not justified since there was no appraisal on key performance indicators given to the claimant to gauge his skills and competencies. The claimant was never informed of his area of his job that needed improvement thus placement on Performance Improvement Plan was arbitrary and meant to help the respondent to avoid confirming the employment of the claimant.
17. The claimant testified that despite recognizing that the placement on Performance Improvement Plan was unfair, he proceeded to adhere to the programme with a view of preserving his job before 31st July, 2016 when he was scheduled for another review by the respondent.
18. However, the employment of the claimant was terminated before that date arrived on 15th June, 2016. The claimant testified that the termination was unlawful, wrongful and unfair as it was arbitrary, malicious and not based on any valid reason. The allegation that the claimant had failed to complete his probation period successfully was false.
19. That the claimant was not paid May and June 2016 salary. That the claimant was not given notice nor paid in lieu of notice. That the claimant prays to be granted the reliefs sought in the Statement of Claim.

Defence

20. The respondent filed a memorandum of defence on 2nd July, 2019 in which the respondent objects to the suit on grounds that it does not disclose any cause of action since the termination of the employment of the claimant was within the probationary period.
21. The matter however proceeded to trial as this matter was not canvassed in limine. Section 42 of the *Employment Act*, No. 11 of 2007 provides:-
 - “(1) 1) The provision of Section 41 shall not apply where a termination of employment terminates a probationary contract.
 - (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).
 - (4) A party to a contract for a probationary period may terminate the contract by giving not less than seven days’ notice of termination of contract, or by payment by the employer to the employee, of seven days’ wage in lieu of notice.”



22. The effective date of the contract of employment dated 8th October, 2015 between the claimant and the respondent was 11th November, 2015. The six (6) months' probation period ended on 1st May, 2016.
23. The claimant continued working between 1st May, 2016 until 11th May, 2016, when the respondent purported to extend his probation period for a further six (6) months period.
24. In the case of *Catherine Catherine Kathina Kelly – Vs- Ilkisonko Sacco Limited [2016]* eKLR, this Court stated:-

“There is no requirement for a letter of confirmation upon expiry of probationary period. It suffices that the employee continues to work under the contract of employment granted to the employee upon expiry of the probationary period and in the absence of a letter of confirmation, the employee converts to a permanent employee by operation of the law.”

25. In the circumstances of this case, the respondent lost opportunity to lawfully extend the probationary period of the claimant. The claimant became a permanent employee on the 1st May, 2016. The contract of employment of the claimant became subject to the minimum and mandatory terms of employment provided under Sections 36, 41, 43 and 45 of the *Employment Act* 2007 upon expiry of the probationary period on 1st May, 2016. The subsequent reintroduction of probationary period was null and void ab initio. The respondent was bound to follow the provisions of the *Employment Act*, referred to herein before in terminating the contract of the employment of the claimant for poor work performance as alleged.
26. The purported performance review of the claimant by the respondent on 3rd May, 2016, was done outside the six (6) month's probationary period.
27. The claimant testified that on 11th May, 2016, he was coerced by the respondent to sign an unlawful extension of the probationary period to give him room to improve his performance. The position of the law is that the purported extension was unlawful and null and void whether it was signed by the claimant as he alleged under coercion, or not.
28. The Court in arriving at this position on the probationary contract has followed the dictates set out by the Court of Appeal in *Barclays Bank of Kenya Limited –vs- Evans Ondusa Onzere* where the Court stated:-

“It is the duty of the trial Court to consider and evaluate the entire evidence on record placed before it. The trial Court by failing to consider and evaluate the evidence disclosed during cross-examination erred in fact and law thereby arriving at a wrong conclusion.”

29. The Court has considered the evidence by the claimant in Chief and under cross-examination and has also considered that of R.W.1 on the issue of probation. The Court faults the credibility of R.W.1 on the particular matter and finds the testimony by the claimant credible and believable.
30. The claimant stated that he was head hunted by the respondent. He forfeited other opportunities upon the promise of employment by the respondent on better terms. The claimant stated that he was not evaluated during the first six months probationary period to justify any extension of the period. That indeed the probationary period ended and he continued to work.
31. The claimant testified further that the termination of his employment followed soon after on 15th June, 2016. That if the respondent had any desire to genuinely extend the probation period of the claimant for a further period of six (6) months, the respondent did not provide the claimant with any opportunity to improve his performance during the purported extended probation period. That the



respondent did not place before Court any Performance evaluation reports to elaborate its unfounded allegations of poor work performance.

32. One month was hardly sufficient time to evaluate the performance of the claimant. The conduct by the respondent betrayed its intention which was to immediately terminate the employment of the claimant without being bound by Sections 36, 41, 43 and 45 of the *Employment Act*, 2007. Unfortunately, the conduct by the respondent could not cushion it from the mandatory provisions of the Act.
33. The respondent therefore terminated the employment of the claimant without giving him sufficient notice; opportunity to be heard; or the reasons, if any why his employment was no longer tenable. The respondent operated under a misconception that the claimant was still under probation and the process violated Section 36, 41, 43 and 45 of the Act.
34. The Court finds that the respondent failed to prove that it had a valid reason to terminate the employment of the claimant. The respondent also did not follow a fair procedure in terminating the employment. The termination was therefore unlawful and unfair and in violation of Section 36, 41, 43 and 45 of the Act.
35. The claimant is entitled to compensation in terms of Section 49(1) (c) and (4) of the Act.
36. The claimant is also entitled to payment of the full salary for May, 2016 and to half salary for June, 2016, since termination took effect on 5th June, 2016. The arrear salary amounts to Kshs 1,093,563.
37. The claimant is also entitled to one month salary in lieu of notice in the sum of Kshs 728,922.

Compensation

43. With regard to compensation, the Court has considered that the claimant was a senior employee who was head-hunted by the respondent and forfeited other employment opportunities to join the respondent. That the hopes of the claimant to progress his career with a better employer were quickly and unlawfully thwarted within a short period of seven and half months (7 ½) months. The claimant suffered loss and damage as a result of the unfair treatment and unlawful termination of employment conducted in a deceptive manner depicted by the conduct of the respondent to cover their unlawful intentions. The claimant was not granted a Certificate of Service to help him look for other opportunities upon termination.
44. The claimant had indeed relocated from United States of America to Kenya to take up the new appointment.
38. The claimant satisfied the Court that he suffered immense financial and psychological setback by fact of having to relocate back to United States of America after a very short stay in Kenya.
39. The Court believed the claimant that he was unlawfully and maliciously threatened and targeted for termination of his employment by his supervisor after he complained that he had not been properly oriented into his position in terms of the probationary contract and was deliberately set for failure. The Court also believes that crucial information was not given to the claimant to settle in his new role for up to five (5) months of the probation period.
40. The conduct by the respondent is an aggravating circumstances in this matter. Failure to pay the claimant his earned salary and in lieu of notice yet he was to relocate to America is a further aggravating circumstance in this matter. The claimant was not compensated for the unlawful loss of his employment.



41. The Court believes the claimant that he had served the respondent well despite deliberate efforts by his supervisor to impede his settling into his position. R.W.1 did not have personal knowledge of the circumstances that befell the claimant and was unable to adequately rebut his credible testimony.
42. The Court has considered the case of Kenya Science Research International Technical and Allied Institutions Worker's Union (KSRITAWU) –vs- Stanley Kinyanjui and Magnate Venture's Limited where the judge noted:-
- “In our view, poor performance cannot be dealt with through just one evaluation..... In our view about 2-3 months would be reasonable. The respondent should have therefore given the grievant a chance to improve after the said evaluation instead of proceeding to dismiss her.”
43. I borrow this reasoning to find bad faith on the part of the respondent as a further aggravating circumstances to be considered in this matter.
44. The Court has also considered the case of *Dorcas Kemunto Wainaina -vs- IPAS [2018]* eKLR in awarding the claimant the equivalent of three (3) months' salary in compensation for the unlawful and unfair termination of employment in the sum of Kshs 2,186,766.
45. In the final analysis, judgment is entered in favour of the claimant against the respondent as follows:-
- (a) One month salary in lieu of notice - Kshs 728,922.
 - (b) Arrear salary for the months of May and June, 2016 in the sum of Kshs 1,093,563.
 - (c) Kshs 2,186,766 in compensation.
Total award Kshs 4,009,251
 - (d) Interest at Court rates from date judgment till payment in full.
 - (e) Certificate of Service to be provided to the claimant within 30 days of this judgment.
 - (f) The respondent to meet the costs of the suit.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 13TH DAY OF APRIL, 2023.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Chenge for claimant

M/sMuma for Respondent

Ekale – Court Assistant

