



**Rantu v Muslims for Human Rights (MUHURI) (Cause E086 of 2022)
[2023] KEELRC 2277 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2277 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E086 OF 2022
M MBARŪ, J
SEPTEMBER 21, 2023**

BETWEEN

MARIE RAMTU CLAIMANT

AND

MUSLIMS FOR HUMAN RIGHTS (MUHURI) RESPONDENT

JUDGMENT

1. The respondent employed the claimant as the Executive Director (ED) on 2 June 2022 at a gross salary of Kshs. 510,000 per month.
2. The claim is that, the claimant was placed on probation for 6 months which was successfully completed and continued to work as the substantive ED of the respondent. however, on 13 March 2022 the respondent terminated the claimant's employment on the grounds of non-extension of the probation period and again on 1st April 2022 a second notice was issued purporting to appraise the claimant on 14 April 2022 in the performance of the role of ED, a period of over 6 months after the probation period ended.
3. On 20 April 2022 the respondent issued the claimant with notice terminating employment with effect from 22 April 2022 which was without notice or hearing and leading to unfair termination of employment. The circumstances leading to termination of employment were discriminatory, unconstitutional and in contravention of the respondent's human resource policy or the due process. The claim is also that the termination of employment was actuated by malice following allegations that the claimant was a proponent of the lesbian, gay, bisexual, transgender and questioning (LGBTQ) contrary to Article 22 of *the Constitution* and which amounted to discrimination and breach of the right to employment and right to freedom of association protected under Section 5 of the *Employment Act*.
4. The claimant is seeking for orders and payment of the following;



- a. 3 months' notice pay at Ksh. 1,530,000;
 - b. 12 months' compensation for unlawful termination of employment Kshs. 9,180,000;
 - c. General damages;
 - d. Costs of the suit.
5. The claimant testified in support of the claim that employment commenced on 2 June 2021 as the ED and placed on probation for 6 months and the contract was to run for 30 months there was no appraisal at the end of the 6 months and the board chair proceeded to hold a meeting in the absence of the claimant and a decision taken to terminate employment from 1st April 2022. Later, the board purported to summon the claimant for an appraisal through notice dated 20 April 2022 and then told the claimant the contract would not be extended but the probation period had already ended, 2 months since. Any termination of employment ought to have been in accordance with the terms and conditions of employment and the policy of the respondent. Such required a 90 days' notice or payment in lieu thereof.
 6. The claimant testified that holding the position of ED for the respondent made her the first black woman in this position and this was celebrated as a best practice but the respondent went ahead to discriminate against her by stating that she was a proponent of the LGBTQ but she had held various positions in different organizations and the respondent hired her because of this expansive and inclusive approach to such matters but were now using this background for discriminatory treatment. The respondent hired the claimant as ED upon extensive interrogation of the background. This led to a violation of the claimant's constitutional rights and employment rights and damages should be awarded as pleaded.
 7. The claimant testified that an anonymous letter was sent to the chair of the board alleging that she was treating Muslim women with disrespect and that she had made derogatory comments but this evidence was never produced for the claimant to give her representations.
 8. In response, the respondent's case is that the claimant was employed as the ED on probationary terms for 6 months' from 2 June 2021. The claimant failed to successfully discharge the function as a substantive ED leading to non-extension of the probation period.
 9. On 13 March 2022 the respondent issued the claimant with notice terminating employment because she was on probation. Under the contract, the respondent had a right to terminate employment at an earlier period and at its discretion and through letter dated 22 April 2022 the respondent assured the claimant on the payment of her dues. The assumption of the office of the ED was not procedural and the claimant remained on probation which was extended by the board and hence within this extension, the respondent had the discretion to terminate employment and the claims made should be dismissed with costs.
 10. In evidence, the respondent called Khelef Khalifa who was the chairperson of the board when the board unanimously decided to employ the claimant as the ED. The board gave the claimant time to familiarize with the function of ED but upon assessing her performance, it was noted that she did not have the capability of addressing donors and dealing with them at a personal level and she insisted that the respondent should hire a grant manager to deal with sourcing for funds which role was part of her duties as ED. The claimant also engaged the board seeking to terminate the employment of several employees over alleged misappropriation of funds and an audit as conducted and no indications were given that funds had been misappropriated. This raised concerns to the board on the capacity of the claimant as a leader and to forestall deterioration of the organisation, the board decided to act and



terminate the claimant's employment during the probation period. Several meetings were held with donors in Nairobi and the board noted that the claimant had no tangible way forward on how she wanted to lead the organisation or increase the funding base. Her attempts at proposal writing borne no fruits unlike other employees who understood the process well and submitted good proposals to donors.

11. Mr Khalifa testified that the claimant's probation period ended in March/April 2022 and was at the time in Nairobi holding meetings with donors and the board felt that there was no need to rush the probation period and should wait for the return to the office in Mombasa for an appraisal which was done at least 2 weeks after the end of the 6 months' probation period. The board passed a resolution to terminate employment for lack of funds as the ED salary was almost half of the entire wage of the organisation and notice issued. At the time, several employees had lodged complaints that the claimant had made derogatory remarks about Muslim women wearing bui and that her words were that the organisation had so many of such women which was not taken well by the employees and this contributed to the decision to terminate employment within the probation period.

Determination

12. The issues which emerge for determination from the pleadings, evidence and written submissions are whether there was discrimination against the claimant; whether there was unfair termination of employment and whether the remedies sought should issue.
13. Discrimination at work is one of the outlawed practices entrenched under Section 5 of the *Employment Act, 2007* (the Act). this is further affirmed under Article 27 of *the Constitution*. Discrimination, whether direct or indirect is both unlawful and unconstitutional.
14. Under the Act, once an employee has pleaded the fact of discriminatory treatment, the employer bears the burden to disprove that that practice did not take place in terms of Section 5(7) of the Act;
 - (7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.
15. Once the employee has established a prima facie case that there was discriminatory treatment, the burden shifts to the employer to disprove the same as held in *AKO v Abson Motors Limited [2021] eKLR* that;

... the law is therefore designed in a manner, that encourages Claimants to pursue remedy without fear of reprisal, with dignity, modesty, and unhindered by a choking evidentiary regime. The burden therefore shifts on the Employer, once there is a prima facie case, to show that discrimination did not take place, or that the acts or omissions complained of, are not based on any grounds specified under Section 5 of the *Employment Act*.
16. The claimant's case is that she was the first black women to hold the position of ED for the respondent organisation. However, she was treated unfairly and the respondent alleged that she was a proponent of the LGBTIQ, a matter that had been addressed during her interview and recruitment process but was later being used to terminate her employment. That the claimant was targeted following anonymous letters and complaints that she had used derogatory language against Muslim women in the organisation which was not true and that she was never called to respond to any such matters.
17. As outlined above, the moment an employee pleads discriminatory treatment at work, sets out a prima facie case, the employer has the burden to disprove such matters. In the case of *Keith Wright v Kentegra Biotechnology (Epz) Ltd [2021] eKLR* the protection of employees against any form of discrimination



at the work place is a significant matter and the burden placed upon an employer to disprove the allegations of discrimination is enormous. The employer must prove that discrimination did not take place as alleged and that where there is discrimination, it was not with regard to any of the specified grounds under the Act or *the Constitution*.

18. Without any effort by the respondent to address the claim of discriminatory treatment of the claimant at work, such conduct is without justification, it violated the clear provisions of Section 5 of the Act and Article 27 of *the Constitution*. The claimant is entitled to damages.
19. The claimant had worked from 2 June 2021 to 22 April 2022 when she was required to attend an exit interview. This was a period of under 9 months. Damages equivalent to one (1) month pay is hereby found appropriate all at Ksh. 510,000.
20. With regard to unfair termination of employment during the probation period, the provisions of Section 42 of the Act are well addressed in the case of *Monica Munira Kibuchi & 6 others v Mount Kenya University and Attorney General (Interested Party)* [2021] eKLR, which cemented the position that an employee on probation is entitled to a hearing before employment is terminated and that the denial of the right to a hearing is unconstitutional. The Bench held that;

Any legislation therefore which intends to limit or qualify a labour right, ought to be to the extent that the limitation or qualification is reasonable and justifiable in an open and democratic society.

Further, in addition to the inconsistencies among Sections 42(1), 42(2) and 41 considered earlier in this judgement, we find no reasonable and justifiable cause in the exclusion of an employee holding a probationary contract from the procedural safeguards contained in Section 41 of the *Employment Act*.

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.

21. Therefore, even with the ordinary interpretation of the probationary terms of a contract, the term starts and ends as agreed upon by the parties. In this case, the claimant was on probation from 2 June 2021 for 6 months hence ending on 1st December 2021. Any extension of the probation period thereof was bound by the provisions of Section 42(2) of the Act that;
 - (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.
22. Therefore, to apply any extensions to the probationary period, the respondent as the employer ought to have addressed such matters with the claimant for concurrence and her written agreement. The rationale is that the employer retains the discretion to appraise the employee before the end of the probation period. Such role cannot be left to the employee to organise. The employer must retain control over the employee and where the respondent felt that the claimant needed more time to conclude certain duties before such appraisal, recourse was to call the claimant and enter into agreement over the terms of the probation period.
23. To act suo motto and assume that the probation period was the discretion of the employer was a misapplication of the very law the respondent is seeking to rely upon, Section 42 of the Act.



24. Effectively, the claimant's probation period lapsed on 1st December 2021 and she became the substantive ED for the respondent. The full benefits of the employment contract applied to her with regard to any matter of performance, capabilities or misconduct. Before termination of employment, the provisions of Section 41 of the Act applied to the claimant as correctly held by the Bench in the cited case of *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party)* [2021] eKLR that;

Section 41 of the Act provide that an employer shall before dismissing an employee on grounds of misconduct, poor performance and so on, explain to the employee the reason for which the employee is considering termination and that the employer shall before terminating the employment of such employee consider any representation such employee and or his representative may make.

25. Accordingly, the termination of the claimant's employment by the respondent was devoid of due process and was unlawful and unfair.

26. Upon the lapse of the probation period, the claimant became the substantive ED with rights and benefits under her contract and the policy regulations for employees. Under clause 4 of the respondents Human Resource Policies and Procedures Manual, termination of employment during the probation period was upon one months notice or payment in lieu thereof and upon taking up the substantive role, upon 3 months' notice or payment in lieu thereof.

27. In this regard, the claimant is entitled to 3 months' notice pay at the last salary of Ksh. 510,000 x 3 total due Ksh. 1,530,000.

28. For the unlawful and unfair termination of employment, the claimant worked for the respondent for under a year. One-month compensation is hereby found appropriate all at Ksh. 510,000.

On these findings, each party shall bear own costs.

29. Accordingly, judgment is hereby entered for the claimant against the respondent with the following orders;

- a. A declaration that the claimant was discriminated against by the respondent;
- b. A declaration that the claimant's employment was unfairly terminated by the respondent;
- c. Damages awarded at Ksh. 510,000;
- d. Compensation awarded at Ksh. 510,000;
- e. Notice pay awarded at Ksh. 1,530,000;
- f. Each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 21ST DAY OF SEPTEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

