



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Omondi v Diakonie Katastrophenhilfe (Cause 477 of 2019)
[2023] KEELRC 3099 (KLR) (27 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3099 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 477 OF 2019
B ONGAYA, J
NOVEMBER 27, 2023**

BETWEEN

JULIUS OYOKO OMONDI CLAIMANT

AND

DIAKONIE KATASTROPHENHILFE RESPONDENT

JUDGMENT

1. The claimant filed the Statement of claim on 22.07.2019 through Ng'ani & Oluoch Advocates. The claimant prayed for judgment against the respondent for:
 - a. A declaration that the respondent's termination of the claimant's contract was unlawful.
 - b. Breach of contract.
 - c. Loss of income.
 - d. Damages.
 - e. Cost and interest.
2. The Response to Statement of Claim was filed on 04.11.2019 through Adera & Co Advocates. The respondent prayed that the suit be dismissed with costs.
3. The claimant's case was that prior to his employment with the respondent he had an unblemished and sterling career spanning 27 years, having worked for, the Government of Kenya, Plan International, Kenya Red Cross and World Vision International (Kenya).
4. That he was employed by the respondent by a letter dated 28.03.2017 as a Program Co-ordinator for emergency responsible for the countries of Southern Africa and Ethiopia.



5. The claimant states that on 02.05.2017 she reported to his duty station in Nairobi only to learn that the respondent had unilaterally altered his designation from Program Coordinator in charge of Southern Africa and Ethiopia to Program Co-ordinator responsible for Kenya and Ethiopia.
6. The claimant's pleaded that his immediate supervisor and line manager in the organization was the Regional Director, Mr. Clemens von Heimmendahl who constantly undermined his work.
7. It's the claimant's case that his said supervisor refused to assign him duties and responsibilities that he was hired to perform, but instead, assigned him menial administrative duties.
8. That the supervisor undermined staff and set them against each other thereby breeding mistrust amongst them.
9. The claimant states that the supervisor would organize meetings with local partners without his knowledge, only to ambush him and compel him to attend the meetings to 'champion' agenda he was not aware of, thereby, setting him up to fail.
10. That the supervisor never shared vital information, and that when information was actually shared, it was done grudgingly.
11. The claimant states that on many occasions both in formal and informal settings, his supervisor, Mr. Von Heimmendahl used offensive and derogatory language to him and other staff and that ideas and suggestions were arrogantly dismissed with his choice phrases being "typical African idiot", "stupid African", "bogus African", "typical African reasoning/excuses".
12. That on one occasion he openly and loudly accused his staff in the presence of visitors of stealing toilet paper. As a result of constant bullying and insidious harassment, the claimant states he suffered endless anxiety, humiliation and felt degraded and unworthy.
13. The claimant states that his contract of employment had a 3 months probationary period, and in July of 2017, his line manager informally announced to the claimant that the organization was extending his probation for a further 3 months, for reasons that the line manager felt he had not fitted well in the organization and that his work was lagging behind, despite no formal structured appraisal based on prior jointly agreed upon performance agreement being done.
14. The claimant states that on joining the respondent, he requested for a 3-year strategy and annual program plan of action and for the year 2017, which he had been made to believe were formulated during his interviews, however, no such documents had been formulated.
15. He states that he agreed with his supervisor, that the claimant develops a performance agreement against which he would be appraised at the end of the extended 3-month period, which document he prepared with the support of the personnel officer.
16. The claimant states that the line manager forced him to share with him the password to the laptop issued to him by the respondent, to enable him access documents therein. That the line manager accessed the documents during the electioneering period of August 2017 and doctored certain documents that the claimant states he had meticulously produced and ensured they contained errors before sending them to the DKH Headquarters in Germany in a bid to paint him in a bad light as a non-performing staff.
17. On the part of the respondents, it is stated that the claimant was an employee of the respondent on probation for a four-month period 01.05.2017 up to and including 31.08.2017 when the respondent lawfully determined his probation.



18. That under clause 3 of the agreement, the contract was mutually expressed to be subject to a successful and satisfactory completion of a probationary period of 3 months with effect from 01.05.2017 up to 31.07.2017.
19. The respondent states that as potential long-term employer, it retained the discretion and liberty to extend the said 3-month probation period pending a final decision regarding confirmation or otherwise into permanent employment.
20. On 21.07.2017 prior to the initial 3-month probation period, the claimant willfully executed a mutual addendum to the initial contract, agreeing to an extension of probation by a further 3 months from 01.08.2017 to 31.10.2017 to enable the respondent adequately assess his competence and suitability for permanent engagement.
21. On 17.08.2017 the respondent issued the claimant a prior 14-day notice of intended termination of probation, and the contract was accordingly terminated on 31.08.2017. The respondent states that the probation was determinable at the discretion of the employer and premised on the respondent's confidential assessment of the claimant and without obligation to disclose the results of the guarded investigation which the respondent had undertaken on the claimant's suitability and compatibility generally.
22. Upon clearance, the claimant was paid all his dues which he accepted and was issued with a certificate of service.
23. The respondent maintains that it did not victimize and frustrate the claimant or subject him to unfair treatment as alleged.
24. The respondent pleads that the termination of the claimant's employment was not wrongful, un-procedural, unfair or in breach of contractual terms. That it followed due process, fair labour practices, the terms of the agreement and the provisions of the *Employment Act*.
25. The parties filed their respective submissions. The court has considered the parties' respective cases and makes finding as follows.
26. To answer the 1st issue, the Court returns that the parties were in a voluntary contract of service. The claimant was one of the candidates who answered the respondent's advertisement of 17.02.2017 for the position of DRR Coordinator. The claimant was the successful candidate and accepted the offer dated 28.03.2017. Parties signed the contract of employment on 02.05.2017. He was designated Program Coordinator & Emergency. The appraisal form reads Projector Coordinator Kenya, Ethiopia and Emergency. The claimant testified that he underwent induction.
27. To answer the 2nd issue, the claimant testified that he voluntarily signed for extension of the probationary period. The Court finds that the probationary period was voluntarily extended. The reason for extension was that the claimant's line manager felt that the claimant had not fitted well in the organisation and his work was lagging behind.
28. To answer the 3rd issue, the Court returns that the claimant testified and confirmed that clause 14.2 of the contract provided that probationary service could be terminated upon 14-days' notice being served. In the circumstances he received the 14-days' notice dated 17.08.2017 giving his last day at work as 31.08.2017. The claimant testified that his last day at work was on 17.08.2017 but the notice was express that it covered 18.08.2017 to 31.07.2017 when the contract would terminate. The Court finds that the respondent complied with the contractual clause on notice to be given to terminate the contract during the probationary service.



29. Did the respondent breach its National Staff Human Resources Manual in implementing clause 14.2 on termination of the probationary period? Was it a voluntary termination or separation as was embedded in clause 14.2. The clause does not state that the respondent had to evaluate the claimant and give him reasons for terminating the probationary period. While RW testified that he was not aware of targets or review of claimant’s performance during the probationary period, the claimant testified that his supervisor had told him the probationary period was being extended because the supervisor felt that the claimant had not fitted well in the organisation and his work was lagging behind. It is submitted for the claimant that the Manual provided for target setting and assessment prior to making a decision on the extension of probation period or termination of the contract during the probation period. RW confirmed no targets were set for the claimant and no review was held. While the claimant was trained in an induction or orientation process per the Manual prescription, it appears that no targets were set to be achieved by the claimant during the probation period and no demonstrated monitoring of progress to provide feedback and review of the claimant’s performance was undertaken during the period of probation. To that extent, the Court finds that the respondent breached the provisions of the Manual on target setting, monitoring of progress with feedback and review of the claimant’s performance during the probationary period. The Manual provided, “... The employee has a responsibility to meet the set targets and request as necessary the appropriate support. A performance appraisal shall be carried out prior to the expiry of the probation period.” The Court finds that while the respondent gave due contractual termination notice, it failed to comply with the identified Manual provisions that when observed, would make the termination or lack of it objective and as was agreed in the contract. In view of the findings, it cannot be said that the respondent adopted a fair procedure or had a fair reason to terminate the contract of service as envisaged in section 45 of the *Employment Act*. The Court further finds that the respondent while invoking clause 14.2 of the contract to terminate the contract, the clause was imperfectly invoked for want of the objective safeguards in the Manual. It cannot therefore be found that arbitrary invoking of clause 14.2 in a manner that was in breach of the contract of service could amount to a valid or genuine reason of termination as per section 43 of the Act.
30. It has been submitted for the respondent section 2 of the *Employment Act* provides that probationary contract means a contract of employment which is of not more than 12-months’ duration or part thereof which must be in writing and states that it is a probationary period. Section 42(2) of the Act states that 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. The section further provides that the provisions of section 41 of the Act (on notice and hearing) shall not apply to termination of a probationary period. Further, it states that 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. The Court considers that while section 41 of the Act does not apply, the parties by themselves through the Manual incorporated the fair objective process and safeguards for terminating the probationary service – thereby making it not discretionary and the instance of the respondent’s free or unfettered prerogative. The parties were bound by the manual provisions.
31. It was also submitted for the respondent that section 45(3) of the Act precluded the claimant from alleging and claiming unfair termination because he had not served for a minimum of 13-months. The Court follows its opinion in *Ali Abdullahi Idow –Versus- Sifa Investments Limited ELRCC No. 366 of 2018 at Mombasa [2022]eKLR* thus, “While making a finding of unfair termination on account of redundancy, the Court has considered the opening submissions by counsel for the respondent at the hearing that the claimant had served for only 10-months and he was not entitled to allege unfair termination. Counsel appears to have been alluding to section 45(3) of the *Employment Act*, 2007



which states, “(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.” The Court finds that the section is in plain English and it is permissive and not prescriptive or prohibitory in its terms. It plainly says that those who have been in continuous employment for not less than 13 months have a right to complain of unfair termination and, it does not prohibit those who have not been in such continuous employment not to complain. The Court considers that the section being permissive rather than prescriptive and prohibitory, it does not take away the right of an employee who has worked for any tenure or holding a concluded prospective contract of service which is terminated from complaining of unfair termination as may be appropriately urged on the basis of such relevant constitutional, statutory, contractual and lawful practices applicable on case to case basis. The Court further considers that to the extent that the section is permissive and not prescriptive and prohibitory, the same is not concise on the mischief it sets out to curb. The Court further considers that the section asserts a right for employees to complain about unfair termination while mentioning the instances of a tenure of not less than 13 months of continuous service but, without excluding other tenures of service – particularly, not excluding actually served tenures of less than 13 months or even futuristic tenures where a concluded contract of service is terminated prior to the employee reporting to embark on its performance. The section appears to amount to a content incoherency or incompleteness in legislative drafting and whose consequence appears to render the section dispensable for all practical purposes in its application to cases of alleged unfair termination. It is a vestigial statutory provision.” In any event the Court recalls that that section has previously been declared unconstitutional by the Courts.

32. The 3rd issue is on remedies. The Court returns as follows:

- a. The claimant is entitled to a declaration that the termination of the contract of service was unfair.
- b. The Court has considered the short period that the claimant had served. Against the factors in section 49 of the Act, while alleging discrimination on account of race, the Court upholds the submission for the respondent that during the probationary service the claimant did not report a grievance and it is that the claim for discrimination is a mere afterthought after the termination. It was submitted that once the claimant alleged discrimination, the burden of disproving shifted to the respondent. But the Court returns that by that submission the claimant merely alleged but failed to establish discrimination which will collapse as an aggravating factor in award of compensation, or, as a separate heading for award of compensation as a violation of rights. The claimant is awarded 2 months’ gross salaries making Kshs.292,310.00 x 2 = Kshs.584,620.00. The respondent will pay costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

1. The declaration that the termination of the contract of service was unfair.
2. The respondent to pay the claimant Kshs.584,620.00 less PAYE by 01.02.2024 failing interest to be payable thereon at Court rates till full payment.
3. The respondent to pay costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 27TH NOVEMBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

