



Kemboi v Multimedia University of Kenya & another (Employment and Labour Relations Cause 236 of 2019) [2023] KEELRC 3288 (KLR) (14 December 2023) (Judgment)

Neutral citation: [2023] KEELRC 3288 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 236 OF 2019
BOM MANANI, J
DECEMBER 14, 2023**

BETWEEN

WILLIAM KEMBOI CLAIMANT

AND

MULTIMEDIA UNIVERSITY OF KENYA 1ST RESPONDENT

**VICE CHANCELLOR MULTIMEDIA UNIVERSITY OF KENYA 2ND
RESPONDENT**

JUDGMENT

Introduction

1. This action was prompted by the decision by the Respondents to terminate the Claimant's contract of service. The Claimant has challenged the decision as unlawful. And hence the suit seeking to redress his grievance.
2. On the other hand, the Respondents maintain that the impugned decision was legitimate. They accuse the Claimant of failing to meet the performance expectations of the 1st Respondent thereby prompting the impugned action against him.

Claimant's Case

3. The Claimant avers that he was employed by the 1st Respondent in the position of Hotel Manager as from 29th November 2016. It is his evidence that the contract of service had a one year probationary clause.
4. The Claimant contends that despite serving the one year probationary period, he did not receive a letter of confirmation from the 1st Respondent. As a consequence, he continued to serve in the position of Hotel Manager on probationary terms for a further three months.



5. The Claimant contends that instead of the Respondents confirming his contract, they issued him with a letter dated 13th February 2018 deploying him to a new position of Manager, Catering Services. According to the Claimant, the Respondents then purported to extend his probationary period to 21st March 2019.
6. The Claimant contends that in total, the Respondents placed him on probation for a period that exceeded two years in contravention of the law. It is the Claimant's case that having served the initial probation period, he was entitled to automatic confirmation of his contract of service.
7. The Claimant avers that he sought an explanation from the Respondents as to why his probationary period had been stretched beyond what the law stipulates. However, the Respondents gave him no response.
8. It is the Claimant's case that after he completed the initial probationary period, the Respondents had no right to extend it without his express consent. Therefore, the purported extension was illegal.
9. The Claimant states that when the Respondents deployed him to the new position of Manager, Catering Services, they unilaterally reduced his pay package. The Claimant contends that the Respondents' action in this respect was unlawful.
10. The Claimant contends that the Respondents eventually issued him with a letter dated 3rd April 2019 terminating his services. According to him, this development came despite his diligent service to the 1st Respondent.
11. The Claimant contends that the manner in which the Respondents treated him was unfair. He avers that the Respondents' conduct exposed him to great anxiety and depression. As a result, he prays for the several reliefs in the Statement of Claim.

Respondents' Case

12. The Respondents admit that the Claimant was first engaged by the 1st Respondent as a Hotel Manager. However, they contend that he was unable to deliver in this position prompting their decision to deploy him to the position of Manager, Catering Services.
13. The Respondents further contend that despite moving the Claimant to the position of Manager, Catering Services, his performance did not improve. Thus, a decision was taken to terminate his contract.
14. The Respondents contend that the process of evaluating an employee's performance is confidential. According to them, the employee's departmental head prepares a confidential report on the employee which is then considered by the 1st Respondent's management. The management then decides whether to confirm or terminate the employee's services.
15. The Respondents admit that the Claimant's probationary term was extended as he claims. They aver that the extension was done after the lapse of one year because the decision required the approval of the 1st Respondent's highest decision making organ. According to the Respondents, this organ did not convene until about three months after the Claimant's initial probationary term had expired. And hence the delay in extending it.
16. According to the Respondents, whether or not to extend the Claimant's probationary contract was entirely at the discretion of the 2nd Respondent. Therefore, the consent of the Claimant was not required.



17. In the Respondents' view, the manner in which they terminated the Claimant's contract of service was lawful. Therefore, they urge the court to dismiss the instant case.

Issues of Determination

18. The parties did not present a joint list of issues for determination. Nevertheless, after evaluating the pleadings and evidence on record, I consider the following to be the issues that require determination.
- a. Whether the decision to terminate the Claimant's contract was lawful.
 - b. Whether the Claimant is entitled to the reliefs that he seeks through the Statement of Claim.

19. Section 42 (2) & (3) of the [Employment Act](#) provides as follows regarding the duration of a probationary contract:-

“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.

No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2).”

20. According to the above provision, an employee can only serve on probation for a maximum of one year. Therefore, stretching the period beyond one year would be against the law.

21. The Respondents have contended that they extended the Claimant's probationary period beyond one year because their terms and conditions of service permit the Vice Chancellor to extend the period. The Respondents rely on clause 5.2.1 of the 1st Respondent's terms and conditions of service to advance this argument. The clause provides as follows:-

“There shall be a minimum probationary period of one (1) year for all appointments made on permanent and pensionable terms. The Vice Chancellor may, at his discretion extend the period of probation for a further year after the expiry of the one year.”

22. This clause is contrary to the express edict by section 42 of the [Employment Act](#) on the maximum period that an employee can serve on probation. The clause is patently illegal. No employer has the right to impose on an employee terms of service that are in contravention of the law.

23. Closely related to the foregoing is the fact that an employee's probationary period is restricted to a maximum of six months in the first instance. Although the employer may extend this period by a further six months, this must be with the consent of the employee. Therefore, any purported extension of a probationary contract beyond six months without the employee's input is irregular.

24. The evidence on record shows that the Respondents violated section 42 of the [Employment Act](#) by first subjecting the Claimant to a probationary term that exceeded six months without his consent. Second, the Respondents acted illegally by purporting to extend the already illegally extended probationary contract by a further one year (*Benjamin Nyambati Ondiba v Egerton University* [2014] eKLR).

25. The other issue that the Claimant challenges relates to the Respondents' decision to deploy him from the position of Hotel Manager to Manager, Catering Services. The Claimant contends that with this change came the unilateral changes to his remuneration with some of his packs being lowered.

26. I have scrutinized the Claimant's letter of appointment dated 28th September 2016 alongside the 1st Respondent's standard terms and conditions of service. Neither of the two instruments gave the



- Respondents the power to unilaterally deploy the Claimant from the position of Hotel Manager to a new position without consultations with him.
27. Section 10 (5) of the *Employment Act* prohibits an employer from altering an employee's contract of service without consulting the employee. There is no evidence that in making the decision to deploy the Claimant to the new position of Manager, Catering Services, the Respondents consulted the Claimant. Therefore, the Respondents' decision in this respect was in contravention of the law.
 28. It is also evident that the contract between the parties had fixed the Claimant's probationary term to one year from the date of his appointment. Thus, even assuming that the Respondents were entitled to extend this period, they could only have done so before the lapse of the one year. The record shows that the purported extension came long after the one year probationary period had lapsed.
 29. The Respondents argue that the belated extension was due to the fact that the 1st Respondent's decision making organ took long to convene and deliberate on the matter. This argument does not make legal sense. It is important for the Respondents to appreciate that they must act within the law. They cannot make decisions whimsically to suit their circumstances as is apparent in this case. The Respondents had no powers, for whatever reason, to extend a probationary period that had long lapsed.
 30. Under the law, if the employer does not to communicate to the employee the decision to extend his probationary term within the timelines that are provided in the statute, the employee's contract is deemed as constructively confirmed. Thus, the employer cannot continue to treat the employee as if he was still serving on probation (*Benjamin Nyambati Ondiba v Egerton University [2014] eKLR*).
 31. The circumstances of the instant case confirm that the Respondents violated every piece of legislation regarding the processing of the Claimant's probationary contract. First, they purported to subject the Claimant to a probationary term that exceeded six months without his consent. Second, they purported to extend the probationary term beyond the statutory one year. Finally, they purported to extend the probationary term after it had lapsed.
 32. The other matter in dispute relates to whether the Respondents were right to terminate the Claimant's contract on grounds of poor performance. The Claimant disputes the Respondents' assertion that he performed his duties poorly. He believes that he had performed fairly well.
 33. The law entitles an employer to terminate an employee's services on account of poor performance. However, this cannot be done whimsically.
 34. The decision must be based on evidence that meets the objectivity test. And hence the need for the employer to put in place a performance evaluation process that is transparent and measurable.
 35. Poor performance presupposes that the employee has failed to meet the set performance goals within a specified period of time. Therefore, there must be evidence that the goals were communicated to the employee. At the same time, the goals must have been realistic and achievable.
 36. Usually, the employer and the employee will jointly set and document the expected deliverables for a fixed period of time. Thereafter, the employer will undertake periodic reviews of the employee's performance to determine whether he is meeting the agreed goals.
 37. Where the employee is performing below the expected targets, he must be notified of this and assisted to improve. And hence the need for performance improvement plans.
 38. The foregoing cannot be achieved if the employer purports to evaluate an employee in secrecy against targets that were not communicated to the employee. Such action constitutes an unfair labour practice.



39. In the instant case, the Respondents aver that the Claimant was deployed from the position of Hotel Manager to that of Manager, Catering Services because of poor performance. Yet, they provide no proof of the performance goals that they had communicated to the Claimant and evidence that he had failed to meet them.
40. Further, there is no evidence that is produced by the Respondents to demonstrate that the Claimant was given an opportunity to improve in the position of Hotel Manager before the unilateral decision to deploy him to another department was made. This was irregular.
41. The Respondents aver that despite being deployed to another department, the Claimant still failed to meet the 1st Respondent's performance expectations. Yet, they provide no evidence of the performance goals that were set for the Claimant in the new position and whether they were communicated to him.
42. Although the Respondents have produced a form purporting to contain performance evaluation results, there is no evidence to demonstrate how these results were arrived at. There is no evidence to demonstrate the previously agreed performance targets, if any. There is no evidence to demonstrate that the results were measured against agreed deliverables. There is no evidence to show that the Claimant was involved in the evaluation process. The internal memos that the Respondents rely on to advance their case were not addressed to the Claimant.
43. The Respondents aver that the performance evaluation process is usually confidential in line with the 1st Respondent's Human Resource instrument. This suggestion is untenable in an open and democratic society.
44. To purport to exclude an employee from a process that is meant to gauge his performance is highly irregular. Since the process impacts on the employee's labour rights, it cannot be undertaken in secrecy. It must be open and consultative. The employee must be allowed the opportunity to make his comments on it.
45. Section 4 of the Fair Administrative Act obligates every decision maker, including employers, to give a person who is likely to be affected by the decision (including an employee): prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations in that regard; and notice of the right to review or appeal against the decision.
46. In the instant case, there is no evidence that the Respondents followed the above procedure in processing their decision to terminate the Claimant's contract of service on grounds of poor performance. Consequently, the impugned decision was rendered irregular.
47. The Respondents have sought to justify their actions on the ground that the Claimant was serving on a probationary contract. According to them, the Claimant was not entitled to a hearing on the allegations of poor performance against him. This argument is flawed for a number of reasons.
48. First and as has been indicated earlier, the purported extension of the Claimant's probationary term beyond the statutory one year was illegal. Second, the purported extension of the term after it had lapsed was irregular.
49. In effect, the Claimant's contract was confirmed by operation of law after the lapse of the first probationary term. Thus, at the time of the impugned decision, the Claimant was a protected employee in terms of section 41 of the *Employment Act* and was entitled to be heard on the allegations of poor performance against him before the decision to terminate his contract was made (*National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR).



50. Importantly, in the decision of *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party)* [2021] eKLR, the court declared section 42(1) of the *Employment Act* which purport to treat employees serving on probationary terms differentially contrary to *the Constitution*. Therefore, this provision is of no legal effect. Having regard to the foregoing, I reach the conclusion that the Respondents' decision to terminate the Claimant's contract of service was unlawful.
51. As I pen off on this issue, it is necessary for me to comment on an issue which the defense has addressed at length in their submissions. The Respondents' advocates suggest that the Claimant was hired under two distinct contracts of service.
52. It is suggested that the Claimant was first hired as a Hotel Manager under the contract dated 28th September 2016. However, the contract was allegedly not confirmed when he failed to perform his duties to the satisfaction of 1st Respondent. The defense suggest that the contract lapsed at the expiry of the probationary period.
53. It is suggested that the Claimant was then engaged under a new contract as Manager, Catering Services. As such, his second engagement with the 1st Respondent commenced on a fresh slate with the consequence his probationary term was automatically renewed for a further one year.
54. This argument does not find support in the evidence on record. The 1st Respondent's letter dated 13th February 2018 by which the Claimant was moved from the position of Hotel Manager to Manager, Catering Services described the process as a deployment and not a fresh appointment.
55. Further, apart from the limited changes to the Claimant's position that were highlighted in the letter, the Respondents affirmed that his (the Claimant's) terms and conditions of service remained as per his letter of appointment dated 28th September 2016. In effect, the parties were still engaging under the single contract of employment that was contained in the letter dated 28th September 2016.
56. Thus, the Respondents' the letter of 13th February 2018 did not result in a new contract of service with the Claimant. The letter merely moved him (the Claimant) from one position to another but under the same contract. Therefore, the suggestion by the defense counsel that the Claimant was engaged under two distinct contracts of service is flawed.
57. The next issue for determination is whether the Claimant is entitled to the reliefs that he has sought through the Statement of Claim. According to his pleadings, the Claimant sought the following reliefs:-
 - a. A declaration that the official probation period ended after the lapse of the first 13 months of the Claimant's employment and that he was automatically serving as a permanent and pensionable employee.
 - b. That the extension of probation for a further one year after serving for 15 months was illegal null and void and contrary to the law.
 - c. A declaration that subjecting the Claimant to further probation period without having accorded him a performance appraisal was wrongful, unlawful, unfair and un-procedural.
 - d. Orders that the Respondents confirm the Claimant as a permanent and pensionable employee of the 1st Respondent with immediate effect.
 - e. That the Claimant be paid his dues which were deducted unlawfully.
 - f. Costs of the suit.



58. Analysis of this second issue will be undertaken in the section below. In the analysis I will endeavour to demonstrate why the Claimant is not entitled to some of the reliefs that he seeks notwithstanding that he is the successful party.

Determination

59. Having regard to the earlier findings, the court has no hesitation to make the following declarations:-
- a. That the Claimant's contract of service was constructively confirmed after the initial probationary terms of 12 months lapsed.
 - b. That the purported extension of the Claimant's probationary term beyond the initial 12 months was illegal.
 - c. That the decision to terminate the Claimant's contract of service purportedly on grounds of poor performance was unlawful for want of just cause and for failure to adhere to procedural requirements of the law.
60. The Claimant has prayed for orders directing the Respondents to confirm him as a permanent and pensionable employee of the 1st Respondent with immediate effect. At the time of filing this case on 9th April 2019, the Claimant was aware that the Respondents had already terminated his contract of service. Indeed, he (the Claimant) confirms this position at paragraph 20 of his Statement of Claim when he pleads that the contract was terminated on 3rd April 2019.
61. Despite confirming that his contract was terminated on 3rd April 2019, the Claimant asks that I confirm him as the 1st Respondent's permanent and pensionable employee. This request appears absurd. One cannot ask to be confirmed into a position that he no longer holds. Such relief can only issue if the contract of service was still subsisting. Consequently, the prayer for confirmation into a position that no longer exists is declined.
62. The Claimant has also prayed for payment of dues that were allegedly unlawfully deducted from him. This prayer presupposes that at the time of institution of the case, the Respondents were unlawfully holding onto some money that was due to the Claimant.
63. In the Statement of Claim, the Claimant did not specify the dues in contention. And neither did he provide evidence to substantiate this aspect of the claim.
64. During cross examination, the Claimant asserted that the 1st Respondent did not remit his National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) dues. However, he did not provide evidence to support this claim.
65. The NSSF and NHIF maintain records of contributors' remittances. If required, the agencies normally generate statements to demonstrate this fact.
66. The Claimant did not procure such statements to back his claims. Importantly, assuming that the 1st Respondent had failed to make remittances to the two agencies in respect of the Claimant, it is only these agencies that can sue to recover the withheld amounts. In the result, this aspect of the claim is dismissed.
67. In his oral testimony in court, the Claimant prayed for reinstatement to the position of Hotel Manager. However, he had not pleaded this relief in his Statement of Claim. As such, the relief cannot issue.
68. Further, the prayer is expressly barred by section 12 (3) (Vii) of the *Employment and Labour Relations Court Act*. A period of more than three years has lapsed between 3rd April 2019 when the Claimant's



contract was terminated and the date of this decision. Therefore and in terms of the aforesaid provision, reinstatement is no longer available to the Claimant.

69. In their final submissions, the Claimant's Advocates have prayed for pension pay, service pay, compensatory damages, house allowance, salary arrears, transport allowance and leave allowance. However, the Claimant neither pleaded these claims nor tendered evidence on them. As a consequence, they cannot be granted.
70. However, as the court has declared the decision to terminate the Claimant's contract illegal, he shall have costs of the case.

DATED, SIGNED AND DELIVERED ON THE 14TH DAY OF DECEMBER, 2023.

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

