



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 316 OF 2016

WINNIE CHEMUTAI CHEPKONY.....CLAIMANT

VERSUS

JAMII BORA BANK.....RESPONDENT

JUDGEMENT

1. The genesis of the claim herein is non-confirmation of the claimant following her probationary appointment. The claimant termed this action on the part of the respondent as termination of employment and as such, she moved this court vide a memorandum of claim dated 29th February, 2016, through which she seeks various reliefs including compensatory damages for wrongful termination, one month's salary in lieu of notice, salary for days worked in January, 2016 and unpaid leave days.
2. The respondent entered appearance and filed a response in answer to the memorandum of claim, through which it denied the averments set out therein. It maintained that the claimant was terminated during her probation owing to non-performance.
3. The matter proceeded for hearing on 25th October, 2021 with each side calling one witness.

Claimant's case

4. The claimant testified as CW1 and at the outset, sought to rely on her witness statement which she asked the court to adopt as part of her evidence in chief. She also produced the documents filed together with her claim as exhibits before court.
5. The claimant testified that she was employed by the respondent with effect from 3rd August, 2015 and placed on probationary appointment. That the said probation was to last for a period of 3 months, hence was to effectively terminate on 3rd November, 2015. It was also her testimony before court that she never received any communication from the respondent, extending her probation hence it was her assumption that her appointment had been confirmed. She further told court that in the event the respondent was desirous to extend her probation, it would have advised her as much, in which case, she would have been issued with an "extension" to sign and return. In this regard, she averred that she never received such communication. The claimant further informed court that during her employment, she was unable to meet her targets on account that the respondent bank was facing liquidity challenges at the time and which in turn, affected loan disbursements, which activity was within her core mandate.
6. In cross examination, the claimant admitted receiving a show cause letter which she maintained had nothing to do with her performance. She further admitted that she had not collected her terminal dues as she was awaiting the conclusion of the instant case.

Respondent's case

7. The respondent called Mr. John Wamati who testified on its behalf, as RW1. He identified himself as the Head of Human Resource at the respondent bank. He also sought to rely on his witness statement which he asked the court to adopt as part of his evidence in chief. He also produced the documents filed on behalf the respondent as exhibits before court.
8. Mr. Wamati told court that initially, the claimant's probation was to run from 3rd August, 2015 to 3rd November, 2015, but the same was extended for a further 3 months. It was his testimony that the claimant was issued with a letter dated 2nd November, 2015 through which her probation was extended, but she refused to acknowledge and sign the same. He further stated that at the material time, the respondent bank was not facing liquidity challenges but rather, insufficiency of funds. He maintained that the two did not amount to the same thing. Mr. Wamati further told court that the claimant was terminated during her probation period. He further averred that the claimant had deliberately failed to collect her terminal dues and had not cleared from the respondent bank as required.

9. In cross examination, Mr. Wamati reiterated that the claimant had refused to sign the letter extending her probation but admitted that there was no evidence to prove as much. He also admitted that unavailability of funds would affect loan disbursement albeit on a temporary basis.

Submissions

10. The claimant submitted that her probation was not extended hence upon the lapse of 3 months on 3rd November, 2015, her employment was confirmed by operation of law. On this issue, she sought reliance on the case of **Francis Aboge Oduk vs Hasbah Kenya Limited (2020) eKLR**. The claimant further submitted that the respondent did not have justifiable cause to terminate her employment and, in this regard, she invited the court to consider the court's finding in the case of **Water Ogal Anuro vs Teachers Service Commission (2013) eLKR**. It was also her submission that in the event the respondent was not satisfied with her performance, then it ought to have granted her an opportunity to be heard. She buttressed her submissions with the case of **Jane Samba Mukala vs OI Tukai Lodge Limited (2013) eKLR**.

11. At the time of writing and delivery of this Judgment, the respondent's submissions were not on record, despite its earlier indication that it had done so, pursuant to the Court's directions on 25th October, 2021. As such, the Court did not have the benefit of considering the same.

Analysis and determination

12. Upon consideration of the pleadings on record as well as the evidence placed before court, the issues falling for the court's determination are;

a) **Whether the claimant's termination was within her probationary period?**

b) **Was the claimant's termination unfair and unlawful?**

c) **Is the claimant entitled to the reliefs sought?**

Whether the claimant's termination was within her probationary period

13. The claimant has averred that upon lapse of her 3 months probationary period, she did not receive any communication extending her probation, hence it was her assumption that her appointment had been confirmed. This fact was disputed by the respondent who stated that the claimant was issued with a letter extending her probation but she refused to acknowledge and sign the same.

14. Section 42 (2) of the Employment Act (Act) is relevant in this case and provides as follows;

"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." Emphasis added

15. It is notable that the Act merely provides for the minimum requirements to govern an employment relationship hence parties have the liberty to enhance the rights stipulated thereunder, so as to provide better terms and conditions for the employees. Indeed, the court made this observation in the case of **Peris Nyambura Kimani vs Dalbit Petroleum Ltd, Petition No. 63 of 2013** where it opined as follows;

"Parties to an employment contract are allowed to set their own parameters as to the applicable period for probation. Such a period must however follow the basis of law and cannot go beyond the legal maximum of 12 months. Such a probation period shall not be for more than 6 months but it may be extended for a further period of not more than six months with the agreement of the employee. As much as an employer has long latitude with exercise of their powers within the probation period, the legal requirements therein are set in mandatory terms. Such a probation time can be for up to 6 months and may be extended with the agreement of the employee."

16. In the instant case, the respondent appears to have exercised its discretion in this regard and elected to lower the probationary period from the statutory 6 months to 3 months.

17. As can be discerned from the provisions of section 42(2) of the Act, extension of the probationary period must be mutually agreed upon by both the employer and the employee. In this case, there is no evidence that there was mutuality to extend the claimant's probationary period. This is on account of the fact that the claimant did not sign and accept the respondent's letter that purportedly extended her probation. Further, there is no evidence from the respondent's end either forwarding the said letter to the claimant and advising or reminding her to sign and accept the same.

18. In its defense, the respondent contended that the claimant refused to sign and acknowledge acceptance of the extension letter. Be that as it may, the said letter is dated 2nd November, 2016 and as noted herein, the claimant was still in the respondent's employment upto early January, 2016. Therefore, if indeed the claimant refused to accept the said extension, ordinarily, further communication in that respect would have followed. In this case it is apparent that there was none, as the same would have been produced in court. In absence of such evidence, it can only be inferred that there was no mutuality in the extension of the probationary period as required under the law. In addressing this issue, the court in the case of **James O Oloo vs Tana and Athi River Development Authority [2016] eKLR** expressed itself as follows;

"This Section is couched in mandatory terms in respect to the probationary period. In case of the claimant then this probation period be extended, then it would have been done in agreement with the Claimant."

19. It is also notable that the extension letter does not make any reference to the claimant's performance. The same appears to be purely based on non-availability of documentation relevant to the employment. It would therefore seem that up to that point, the respondent had no issue with the claimant's performance.

20. Further, it is not in doubt that the claimant continued rendering her services to the respondent upto sometimes in early January, 2016, well past the 3 months probationary period. In the case of **Narry Philemons Onaya-Odeck vs Technical University of Kenya [Formerly, the Kenya Polytechnic University College] [2017] eKLR**, the court had this to say when confronted with an almost similar issue;

“In this case, the contemplated 6 months of probation for the claimant came and went. The claimant was not reviewed and was not issued with a letter of confirmation. Such process did not take place as agreed. The respondent sought to review the claimant's employment for purposes of confirmation 8 months into his employment. The inaction of the respondent as the employer cannot be visited upon the claimant. The benefit of this lapse can only apply to protect the claimant's rights in the employment relationship... By operation of the law and in accordance with section 42 of the Employment Act, the claimant successfully completed his probation period and thus his employment confirmed.”

21. Having found that the purported extension of the claimant's probation by the respondent was ineffectual, and in following with the above precedent, I find that the claimant stood confirmed upon lapse of the 3 months probationary period. As such, the claimant was not on probation at the point of her termination.

Was the claimant's termination unfair and unlawful?

22. **Section 43(1)** of the Employment Act, places the burden of proving reasons for termination on an employer and failure to do so, renders such termination as unfair. Additionally, **section 45 (2)** of the Act, provides that a termination of employment as unfair where the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer.

23. The aforesaid legal provisions encapsulate what would constitute substantive justification and constitute the first limb towards establishing whether a termination of employment was fair or not.

24. In the instant case, the claimant was not issued with a termination letter but rather, a “non-confirmation of contract”, which in essence had the effect of terminating her employment with the respondent. As such, by the issuance of that letter, the claimant's employment stood terminated.

25. From the respondent's end, the reason for the termination of the claimant was non-performance and which assertion, she has refuted. The letter dated 5th January, 2016, which effectively terminated the claimant's employment, reads in part as follows;

“Following the discussion with yourself, your supervisor and Chief Manager HR, it was noted that your performance was below expectation even after your supervisor accorded you one more improvement month. One of the key objectives for a relationship manager is assets/loan disbursement and your current achievement is less than 50% which is unacceptable”

26. It is therefore clear that the claimant's termination was in respect of assets/loan disbursement, which the respondent noted as being less than 50%.

27. In her testimony before court, the claimant averred that the respondent was facing liquidity issues at the time hence this had an implication on her performance. To this end, she produced email communication to demonstrate that indeed, there were some issues in regards to loan disbursement at the respondent bank. I will sample a few. In an email of 7th October, 2015 addressed to the claimant amongst other people who I suppose are her colleagues, the respondent's Head of Medium Enterprise by the name Mr. Andrew Githaiga, advises in part as follows;

“...whilst we definitely do not have the liquidity at this time to disburse the said amount, there may be implication in the future due to the delay in disbursement...”

28. In another email of 30th November, 2015, the said Mr. Andrew Githaiga yet again advises the claimant amongst others as follows; *“Please go through the attached numbers carefully. They will help you gauge where we are as a department as at the end of October, 2015. We expect these numbers to be even worse for November especially due to the slowdown in lending. Please take your time to understand them as you will then understand the pressure that is coming down on us.”*

29. Judging from the foregoing email communication, it would seem that the issues of disbursement stemmed for major operational issues at the respondent bank and the same were not entirely attributable to the claimant. It is therefore surprising that the respondent would base the claimant's termination on the said issue of loan disbursement whilst it was well aware of the root cause of the problem.

30. The upshot of the foregoing is that the respondent has failed to prove that the reasons for the termination of the claimant's employment were justifiable in terms of fairness and validity.

31. Beyond proving reasons for termination, **section 45 (2) (c)** of the Act, requires an employer to prove that it complied with the requirements of fair process in terminating the services of an employee. **Section 41(1)** of the Act provides in an elaborate fashion what entails fair procedure. In this regard, it requires an employer to notify an employee of the intended termination. As such, the employee is to be notified of the reasons thereof in a language he or she understands and in the presence of another employee or a shop floor union

representative. This second limb is what constitutes fair process.

32. From the record, there is no evidence that the claimant was granted an opportunity to make her representations to the allegations in regards to nonperformance. The letter terminating the claimant's services did not indicate whether her erstwhile explanation to the show cause was wanting, hence warranting her termination. Indeed, it did not refer to the same at all. It would therefore appear that her termination was not in pursuance to the said show cause. By law, it was incumbent upon the respondent to notify the claimant of the intended termination and accord her an opportunity to defend herself against the allegations of non-performance.

33. In respect to this issue, section 41(1) of the Act provides as follows;

“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.”

34. The respondent did not tender any evidence to prove that this process was undertaken. **In the case of Jane Samba Mukala vs OI Tukai Lodge Limited Industrial Cause Number 823 of 2010** the court observed as follows;

“Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.”

35. I fully adopt and reiterate the finding in the above case. In as much as the respondent had the right to disengage from the claimant, it was bound to comply with the provisions of the law and on this score, there is no evidence that it complied.

36. In view of the foregoing, I find that the termination of the claimant was neither fair nor lawful for want of compliance with sections 43(1), 45(2) and 41 of the Employment Act. I now turn to consider the reliefs available to the claimant.

Available Reliefs

37. Having found that the claimant's termination was unfair and unlawful, I will award her two (2) month's gross salary as compensatory damages. This award is informed by the length of the employment relationship, noting that the same lasted for a period of close to 5 months.

38. I further award the claimant one (1) month's salary in lieu of notice.

39. The respondent has not disputed the claim for accrued 10 leave days hence I will award the same as prayed.

40. I will also award the claimant salary for the 5 days worked in the month of January, 2016 as the same was not contested by the respondent.

Orders

41. Accordingly, I enter Judgment in favour of the claimant against the respondent as follows;

(a) Compensatory damages in the sum of Kshs 280,000/= which sum is equivalent to 2 months gross salary.

(b) One month's salary in lieu of notice being Kshs 140,000/=.

(c) 10 days accrued leave being the sum of Kshs 46,667/=.

(d) Salary for 5 days worked in the month of January, 2016 being the sum of Kshs 23,333/=

(e) The total award is Kshs 490,000/=.

(f) The claimant shall also have the costs of the suit.

(g) Interest on the amount in (e) at court rates from the date of Judgement till payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JANUARY, 2022.

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STELLA RUTTO

JUDGE

Appearance:

FOR THE CLAIMANT MR. NJIRU

FOR THE RESPONDENT MR. GACHOKA

COURT ASSISTANT BARILLE SORA

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE