



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2494 OF 2017

(Before Hon. Justice Dr. Jacob Gakeri)

ZEDDY CHERONOH SAMBU.....CLAIMANT

VERSUS

NATIONAL OIL CORPORATION OF KENYA.....RESPONDENT

JUDGMENT

1. The Claimant commenced this action by a statement of claim dated 8th December 2017 and filed on 21st December 2017.
2. The Claimant avers that she was employed by the National Oil Corporation of Kenya (NOCK) on 15th May 2017 as the Corporate Affairs Manager at a monthly salary of Kshs.405,000/-.
3. That during her employment by the Respondent she was hardworking, dedicated and exceeded targets of the Corporate Affairs Department and intended to continue doing so but for the abrupt summary dismissal from employment on 26th September 2017 on allegations that the Claimant had provided false information regarding her remuneration by the former employer. That the Claimant provided a payslip for the month of April 2017 showing the correct figure.
4. The Claimant avers that her employment was terminated without notice or justifiable cause. That the allegations related to matter that arose during the interview which the Respondent could have verified before engaging her.
5. That the Claimant appealed the decision on or about 29th September 2017 but the appeal was unsuccessful. It is also averred that the letter of termination made reference to the appointment letter on probationary employment.
6. It is averred that the termination was irregular, unlawful, unfair, malicious and unprocedural as the Claimant was not given notice, fair hearing, nor valid reason which exposed the Claimant to ridicule and suffering.
7. The Claimant prays for –
 - (a). Declaration that the Claimant suffered unfair and unlawful dismissal by the Respondent.
 - (b). An order of unconditional reinstatement without loss of benefits.
 - (c).. In the alternative payment of the benefits totalling Kshs.5,265,000/- comprising of –
 - i. One month's salary in lieu of notice pay.....Kshs.405,000
 - ii. Salary for 12 months at Kshs.405,000/- as compensation.....Kshs.4,800,000

Total..... Kshs.5,265,000
 - (d).. An order for the Claimant's certificate of service.
 - (e).. Maximum 12 months' compensation for wrongful termination.
 - (f)... Costs of this suit.

Respondent's Case

8. The Respondent filed its memorandum of response on 1st March 2017. It avers that the Claimant was employed by the Respondent on 15th May 2017 as Corporate Affairs Manager and was terminated on 26th September 2017.
9. The Respondent further avers that while the Claimant was on probation, the Respondent conducted background checks from the former employer, the Kenya Electricity Generating Company (KENGEN), confirmed that the Claimant had provided false information to the Respondent regarding her remuneration and/or salary.
10. That the Respondent terminated the Claimant's employment for having provided incorrect information on her monthly salary. That the Board heard the Claimant's appeal and affirmed the decision of the management to terminate the Claimant's employment.
11. The Respondent denies that its decision was actuated by malice or bad faith. That it had sufficient grounds for termination and acted fairly. The Claimant was on probation at the time.
12. Finally, it is contended that the Respondent acted in conformity with the provisions of the Employment Act, Human Resource Policy and the employment contract.
13. The Respondent prays for dismissal of the suit with costs.

Evidence

14. The Claimant adopted the written statement and was cross examined. She testified that she received the termination letter on 26th September 2017. That during the interviews she was asked about her last pay and she had given an estimate since she did not have the payslips. That she had quoted Kshs.385,000/- and her pay in April was 378,748.08 inclusive of leave allowance.
15. On cross examination, the Claimant confirmed that she applied for a job at NOCK and was interviewed on 17th March 2017 and had given an estimate of her salary and was never invited for salary negotiations. The witness testified that she had given an estimate of Kshs.385,000/-.
16. The Claimant further confirmed that at the time of termination she was on probation and staff rules applied to those on probation as well.
17. That under the Human Resource Policy making a false statement was a major offence. The Claimant also confirmed that the payslip for April 2017 was given at the end of the month and has been a consultant since termination on 26th September 2017.
18. The Claimant told the Court that she had worked for the Respondent for about four months.
19. On re-examination the Claimant stated that she had given the figure of Kshs.385,000/- because she had no payslip with her. It was her testimony that she appeared before Board Committee after termination.
20. RW1 adopted the written statement and testified that she had worked for the Respondent for 10 years and was the Assistant Manager, Human Resource and Administration. The witness testified that the Claimant was interviewed on 15th March 2017 and was asked about her salary expectation and current salary to determine affordability. That she gave the figure of Kshs.385,000/- as her current salary and gave the same figure when she negotiated for the salary with the Human Resource Manager and was given the offer letter on 10th April 2017.
21. The witness told the Court that the Claimant was in probation for the first six months of her employment with NOCK effective 15th May 2017 and was terminated on 26th September 2017.
22. That KENGEN provided confidential information about the Claimant's salary which showed that the Claimant had given false information which led to her termination. According to the reference check form sent to KENGEN for its completion, the Claimant's gross pay was Kshs.328,748/- per month. The payslip for April 2017 had a leave allowance component which is a one-off payment per year. The payslip was neither produced at the interview nor salary negotiation.
23. RW1 testified although the Claimant sought reinstatement, the Respondent had lost confidence and could not trust her and had filled the position.
24. On cross examination, RW1 confirmed that the Claimant was interviewed on 15th March 2017 but had no documentation on the interview and was invited for salary negotiations but the documentation was not filed.
25. The witness also confirmed that the Human Resources Manual of the Respondent applied to all employees and the matter in question was a disciplinary issue. That the Claimant was not taken through a disciplinary process because she was on probation and no notice of termination was required.
26. On re-examination, RW1 testified that on appeal, the Claimant admitted having provided the wrong estimate of her salary and her former employer confirmed her monthly salary through the employee reference check received on 20th September 2017. That summary dismissal is

one of the penalties provided by the Human Resource Manual.

Claimant's Submissions

27. The Claimant identifies two issues for determination:

- i) Whether the Claimant's dismissal was procedurally fair;
- ii) Whether the Claimant's dismissal was substantively fair.

28. As regards procedural fairness, reliance is made on Sections 43, 44 and 45 of the Employment Act to urge that the Claimant's termination was unfair. That since the Claimant was interviewed in March 2017 and did not require the payslip for the review, coupled with the rigorous nature of the oral interview, the Claimant may have inadvertently given the incorrect salary as Kshs.385,000/- as opposed to Kshs.328,748/- which was her last salary at KENGEN. That the difference in the figures is attributable to human error.

29. It is contended that since the minutes of the interview were not produced in Court, the authenticity of the figure quoted by the Respondent was doubtful and the Claimant's dismissal was substantively unfair.

30. That failure to notify the Claimant of the alleged charges violated the rules of natural justice.

31. It is submitted that since the Claimant's salary was Kshs.405,000/- per month and she had given a figure of Kshs.385,000/- and her salary expectation was Kshs.400,000/-, the charge that the Claimant gave a false figure was unsubstantiated.

32. It is further submitted that the employee reference check completed by KENGEN had no official stamp of the company or accompanying letter and therefore its authenticity was doubtful.

33. It is argued that since none of the interviewers was called to give evidence on the response given by the Claimant in relation to her salary at KENGEN, it is unclear on whether the question was on gross salary or the Claimant's last pay at KENGEN.

34. That in the circumstances, the dismissal was substantively unfair for want of particulars.

35. As to whether the Claimant's dismissal was procedurally unfair, the Claimant submits that the dismissal was procedurally unfair since the Claimant was not given a notice to show cause or subjected to any disciplinary hearing. Section 45(2)(c) of the Employment Act is relied upon to urge that the termination of employment must be fair. Relatedly, the Respondent had no policy of termination of employees on probation.

36. It is submitted that clause 12(d) of the Respondent's Employee Handbook makes provision for summary dismissal which the Respondent did not comply with. That the noncompliance with the Human Resource Policy Manual offended Section 4 of the Fair Administrative Actions Act.

37. The Court is invited to notice that the Claimant was not accorded the opportunity to cross examine witnesses and was not informed of the right to appeal.

38. The decisions in **Charles Muema Munuve & Another V Safaricom PLC [2021] eKLR**, **Abubakar Ali v Central Electricals International Ltd [2019] eKLR** and **Stephen Munyao Kini v Gulf Stream Investments Limited [2019] eKLR** are relied upon to urge that the Claimant's termination was unfair and is therefore entitled to the reliefs sought.

Respondent's Submissions

39. The Respondent premises its submissions on the following, that the Claimant confirmed on cross examination that she was on a probationary contract, at the time of termination, had worked for four months and 11 days and was duty bound to provide correct information. That the Respondent's Human Resources Manual provided for background checks and confidential references as well as summary dismissal. That the Claimant confirmed that she gave false information about her previous salary at KENGEN and had board hearing on 5th October 2017.

40. According to the Respondent, the issues for determination are whether:

- i) Termination of the Claimant's contract of employment was fair.
- ii) The Claimant is entitled to the reliefs sought.

41. On termination, it is contended that the Claimant conceded that she had given a false information about her salary at KENGEN and a confidential refence check confirmed that her salary was Kshs.328,748 per month as opposed to a figure of Kshs.385,000/-.

42. It is submitted that since the Claimant was employed on 15th May 2017 and was terminated on 26th September 2017 having worked for only four months and 11 days, and was on a probationary contract of employment prior to termination.

43. That by giving false information about her salary, the Claimant contravened the Respondent's values and compromised its assets and image as provided by clause 12(4), (3)(viii) of the Respondent's handbook. That the Claimant had sufficient opportunity to correct the false information she had given but failed to do so, a demonstration of dishonesty and lack of integrity values required of public officers by the Public Officer Ethics Act. That the false information may have influenced her salary at the Respondent.

44. It is submitted that the Respondent had a valid reason to terminate the Claimant's employment.

45. Pushing the case further, the Respondent submits that the Claimant was heard by the board, her being on probation notwithstanding. That she attended the hearing and tendered a response to the allegation of having provided false information.

46. Finally, it is submitted that Section 42 of the Employment Act, 2007 is clear that *"the provisions of Section 41 shall not apply where a termination of employment terminates a probationary contract"*.

47. The Respondent relies on the decision in **Carole Nyambura Thiga v Oxfam [2013] eKLR** to urge that termination of probationary contract is not subject to the procedural guarantees created under Section 41 of the Employment Act where the Court observed that *"employment during probation is at will"*.

48. That the Respondent was not obligated to accord the Claimant a hearing.

49. The decision in **John Muthomi Mathiu v Mastermind Tobacco (K) Limited [2018] eKLR** and **Danish Jalang'o & another v Amicabre Travel Services Limited [2014] eKLR** are relied upon to buttress the submission that termination during probation is not subject to the provisions of Section 41 of Employment Act. The sentiments of Nzioki Wa Makau J. and Rika J. respectively are cited.

50. As regards reliefs, it submitted that since the Claimant was not unfairly terminated, the claim for compensation and benefits lacks a foundation and is therefore not entitled to the reliefs sought. It is submitted that reinstatement cannot issue as it has been more than four (4) years since the contract was terminated. The decision in **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** is used to urge that reinstatement is not an automatic right.

Analysis and Determination

51. The issues for determination are whether:

- a) The Claimant was on a probationary period at the time of dismissal on 26th September 2017;
- b) The termination of the Claimant's employment contract was unfair;
- c) The Claimant is entitled to the reliefs sought.

52. As to whether the Claimant was on a probationary contract the first point of call is Section 2 of the Employment Act which provides that;

"probationary contract" means a contract of employment, which is of not more than twelve months duration or part thereof, is in writing and expressly states that it is for a probationary period;

53. Clause 7 of the Claimant's appointment letter dated 10th April 2017 provide that:

"You will be on probation during the first 6 months from the effective date above. During this period your performance will be assessed. Should your performance be unsatisfactory as determined by the management, the management may terminate the employment notwithstanding any conditions stated herein. During probation period either party may terminate this employment by one (1) month's notice in writing or pay to the other one month's salary in lieu of notice. Outstanding leave days will not serve in lieu of notice."

54. Regrettably, the Claimant did not submit on this issue.

55. As submitted by the Respondent, the Claimant confirmed on cross examination that she was on probationary contract for six (6) months from 15th May 2017. The Claimant also confirmed that she was terminated on 26th September 2017 having worked for about four months and 11 days as submitted by the Respondent.

56. RW1 testified that the Claimant was on probation for the first six months of employment from 15th May 2017 and was still on probation on the date of termination on 26th September 2017.

57. The witness testified that the Claimant's contract of employment was subject to the Employment Act, 2007 as well as Staff Rules and Regulations.

58. It is common ground that the Claimant was employed by the Respondent on 15th May 2017 and served until 26th September 2017 when she was terminated having worked for slightly over 4 months less than their six months' probationary contract she had with the Respondent.

59. Section 42(2) of the Employment Act, 2007 provides 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.

60. For the foregoing reasons, it is the finding of the Court that the Claimant was on a probationary period at the date of termination.

61. As to whether the Claimant's termination was unfair, the Claimant submits the termination was unfair for want of substantive justification and procedural fairness as required by Sections, 41, 43, 44 and 45 of the Employment Act, 2007.

62. As regards substantive justification, it is submitted that payslip was not one of the documents the Respondent demanded at the interview and the salary estimate given by Claimant of Kshs.385,000/- was not far off from Kshs.378,748/-. It is submitted that the estimate was inadvertent, marginal human error not premeditated and no minutes of the interview were provided for perusal. It is argued that it was unclear whether the question by the interviewer related to the gross pay or last pay at KENGEN, her previous employer.

63. The foregoing submissions overshadow the fact that the Claimant did not deny having given the wrong estimate during the interview. She admitted having given the figure on cross examination. It is unclear how the witness was aware of her salary for April 2017 during the interview in March 2017 before the payslip for April on record. She had not even received her salary for March 2017 and was aware of her gross salary at the time which was far below the estimate. Reliance on the payslip for April 2017 appears misleading as it includes leave allowance, typically payable to employees once in a year.

64. In the appeal to the Board, the Claimant uses the estimated salary of Kshs.385,000/- and the April salary of Kshs.378,748/- which was obviously not her gross monthly salary and rounding of the figure cannot by any stretch of imagination amount to Kshs.385,000/-.

65. It is puzzling why a prospective employee or interviewee would give a false figure as salary, a figure or amount an employed person typically interact with at least once every month.

66. Even in the absence of the minutes recorded during the interview or list of the questions asked, there is sufficient evidence on record that the Claimant gave a false information to the unreviewing panel in March 2017 which was the ground for termination.

67. The Court is satisfied that the Respondent had a justifiable reason to penalise the Claimant.

68. As regards procedure, Section 45(5) of the Employment Act, Section 4 of the Fair Administrative Actions Act and Clause 12 of the Respondent's Human Resource Policy are relied upon to impugn the termination. The Sections of the law and Clause 12 address procedural aspects in decision making. The net effect of the submissions is that the Claimant was not accorded a hearing to explain herself. The elaborate provisions relied upon notwithstanding the Employment Act, 2007 has express provisions on employees serving on probation including termination. Section 42 of the Act provides that:

(1) The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.

(2) ...;

(3) ...;

(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 the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice.

69. As this Court has previously observed, there are two schools of thought in the construction of Section 42(1) of the Employment Act, 2007.

70. In **Danish Jalang'o & another v Amicabre Travel Services Limited (supra)** Rika J. stated as follows: -

“There is no obligation under Section 43 and 45 for Employers to give valid and fair reasons for termination of probationary contracts, or to hear such Employees at all, little less in accordance with the rules of fairness, natural justice or equity. The termination of the probationary contract is strictly regulated by the terms of the contract. The only question the Court should ask, is whether the appropriate notice was given, or if not given, whether the Employee received pay in lieu of notice; and, whether the Employee was, during the probation period, treated in accordance with the terms and conditions of the probationary contract. The Employee has no expectation of substantive justification, or fairness of procedure, outside what the probation clause and Section 42 of the Employment Act 2007 grants. If the Employee has received notice of 7 days before termination, or is paid 7 days' wages before termination, there can be no further demands made on the Employer. If the Employee is advised termination is because the Employer feels there should be no confirmation, there can be no additional demands for substantive justification made on the Employer. The Employer retains the discretion whether to confirm, or not confirm an Employee serving under probation. The law relating to unfair termination does not apply in probationary contracts. ... the correct interpretation is that Section 43 and 45 of the Employment Act, both in terms of procedural and substantive justification, have no application to termination of probationary employment contracts. Section 42 would have no meaning, and probation, which is a period granted to the Employer and the Employee to get to know each other before making any firm commitments, would itself be meaningless ... What more substantive justification would be needed, beyond the explanation that the contract has a probationary provision, based on a substantive law under Section 42?”

71. The Learned Judge was unequivocal that:

“This is the one contract of employment, where the burden of persuasion, within the confines of the probationary contract, rests with the Employee. And should such an Employee succeed in establishing breach, the remedy is in contractual damages, weighed against the contractual notice period, or in the assessment of the Court, the gravity of the contractual breach.”

72. Finally, the Court stated that –

“Employees are not normally recruited at face value; there is a period of uncovering if they are fit for the job. Labour is flexible, and to have a strong, long term, and productive employer-employee relationship, the Parties must be allowed a period of learning each other. The probation law should be retained. Employers should retain a freehand in evaluating Employees’ suitability, and in terminating the relationship during probation, where the Employee is found wanting.”

73. The Learned Judge used similar words in **Christopher Kisia Kivango v Amicabre Travel Services Ltd [2014] eKLR**. Nzioki Wa Makau J. expressed similar sentiments in **John Muthomi Mathiu v Mastermind Tobacco (K) Limited (supra)**.

74. The other school holds that the provision is inconsistent with Article 41 of the Constitution which guarantees employment and labour rights for all. The decision in **Evans Kiage Onchwari v Hotel Ambassadeur Nairobi [2016] eKLR** is a case in point where Ndolo J. stated that –

“I venture to add that Section 42(1) would also be unconstitutional. I say so because even assuming that an employee is found unsuitable within the probation period, the rights secured under Article 41 must still be respected.”

75. More importantly, the Court is also alive to the fact that in **Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party) [2021] eKLR** a three Judge Bench declared Section 42(1) of the Employment Act null and void to the extent that it excluded an employee holding a probationary contract from the provisions of Section 41 of the Employment Act.

76. The Learned Judges expressed themselves as follows:

“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.”

77. Having established that Section 42(1) of the Employment Act is now null and void, the next question is whether Respondent acted contrary to the provisions of law at the time, and as the three Judge Bench held retention of the law on probationary contract as –

“The Respondent honestly believed and applied the law as it was prior to the pronouncements contained in this judgment. It would therefore be unjust to condemn the Respondent for applying the Law as enacted by Parliament even if that Law is, as we have found it be, inconsistent with the Constitution. Further, it naturally flows from the finding that the respondent could not be faulted for applying the impugned law enacted, that no order for compensation as sought in the Petition can be made.”

78. In light of the foregoing decision, it is the finding of the Court that the Respondent was legally obligated to take the Claimant through the procedural requirements contemplated by Section 41 of the Employment Act and comply with the terms of the probationary contract.

79. It is the finding of the Court that the Claimant has on a balance of probabilities shown that termination of the contract of employment was procedurally flawed.

80. Relatedly, paragraph 1.8 of the Employee Handbook and Clause 7 of the letter of appointment provided for termination of the probationary contract by one (1) month’s notice in writing or pay of one (1) month’s salary in lieu of notice.

81. The Respondent did not comply with these provisions. The Claimant was not accorded the requisite notice before dismissal. There is no gainsaying that the Respondent breached the contract and is liable for the breach.

82. On the quantum of damages, the Court is guided by the sentiments of Rika J. in **Danish Jalang’o & another v Amicabre Travel Services Limited (supra)** where the Judge expressed himself as follows:

“Where there is breach, such as unilateral extension of the probationary period by the Employer, or where notice of termination is not given, such breaches can be redressed through contractual damages as done in the case of Catherine E. Nyawira Nyaga, not through statutory compensation for unfair termination.”

Reliefs

83. As regards reliefs, the Court proceeds as follows: –

(a) A declaration that the Claimant suffered unfair and unlawful dismissal by the Respondent

84. Having found that the Claimant's termination of employment by the Respondent was unfair and unlawful, a declaration to that effect is **hereby issued.**

(b) An order of unconditional reinstatement without loss of benefits

85. As stated by Maraga JA (as he then was) in **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others (supra)**

“Reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its own merits”

86. More significantly, light of passage of time since the Claimant was dismissed on 26th September 2017, the remedy of reinstatement is unavailable by reason of Section 12(3)(vii) of the Employment and Labour Relations Court Act. The claim is **declined.**

(c) Benefits totalling Kshs.5,265,000/-

87. Benefits set out at paragraph 15 of the statement of claim totalling Kshs.5,265,000/- comprising: -

i)... One month's salary in lieu of notice pay.....Kshs.405,000

ii).. Salary for 12 months at Kshs.405,000/- as compensation.....Kshs.4,800,000

88. The Claimant is nevertheless entitled to the equivalent of one month's salary as payment in lieu of notice. The Court awards **Kshs.405,000/-.**

89. Having found that the Claimant's termination was unlawful, the Claimant is eligible for the discretionary remedy under Section 49(1)(c) of the Employment Act. In determining the quantum of compensation, the Court has taken into account the following factors:-

i) The Claimant was an employee of the Respondent for only four (4) months and wished to continue as exemplified by the prayer for reinstatement and appeal to the Board.

ii) The Claimant substantially contributed to the termination by giving false information to the interviewing panel.

90. In the circumstances, the Court is satisfied that the equivalent of one (1) month's salary is fair, **Kshs.405,000/-.**

91. **In the upshot, judgment is entered for the Claimant against the Respondent for the sum of Kshs.810,000/- with costs.**

92. Interest at Court rates from the date of judgment till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23RD DAY OF FEBRUARY 2022

DR. JACOB GAKERI

JUDGE

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 has 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.

DR. JACOB GAKERI

JUDGE