



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO.909 OF 2017

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

TITUS GITHINJI NDERITU.....CLAIMANT

VERSUS

CONSOLIDATED BANK OF KENYA LIMITED.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Claimant filed a claim dated 12th May, 2017. Respondent filed a response on 28th June, 2017.

FACTS

CLAIMANT'S EVIDENCE

2. The Claimant was employed by the Respondent effective 4th January, 2016 as a business Development Officer. He was to grow the business of the Respondent by getting customers to take up credit.

3. Initially he was put on probation for six months but upon completion the Respondent extended the probation period until 30/9/2016 and still further to 30/12/2016.

Even after 30/12/2016 it was extended again for another 3 months.

4. The Claimant avers his appointment was converted to a term contract on 5/1/2017 by operation of law and therefore probationary clause did not apply. He further states by being subjected to unending probationary contracts that amounted to unfair labour practices.

5. He asserts the unending probation was discriminatory as other employee were placed on six months' probation but his was pushed to over one year.

6. He says the allegation of poor performance was unfounded and due to his good performance he was appointed internal quality auditor on 17/2/2017.

7. He says he introduced clients to take credit but were turned away on the excuse there were no funds to issue credit.

He was also sent communication not to process new loan applications and so he is not to blame in view of such directives.

8. Respondent also stated it could not process loans introduced by the Claimant because it had reached maximum limit of exposure.

9. Claimant says his termination was unmerited and was without reason. He says he was not given notice that his employment was being terminated but only received the termination notice.

10. The Claimant says the claim for his termination for poor performance together with the prevailing unemployment rate will pose a serious danger to his career.

11. The Claimant therefore prays for judgement against the Respondent for the following:-

- (a) Declaration that the Claimant termination of employment is unlawful.
- (b) Twelve months compensation totalling Kshs.1,620,000/=.
- (c) Damages for unfair labour practices.
- (d) Costs of the suit.
- (e) Interest on 2- 4 above.
- (f) Any other relief the court may deem fit to grant.

RESPONDENT'S EVIDENCE

12. The Respondent states that the Claimant was employed by the Respondent and was put on probation for six months to monitor his performance.

13. He says the termination letter was issued procedurally and the reason was poor performance of the job by the Claimant.

14. He says that allegation of conversion of Claimant's employment to a term employment is erroneous since conversion stipulated in Section 37 of Employment Act Kenya only applied to casual employment which is not the case here.

15. The Claimant was employed on permanent terms but was subjected to confirmation but he says Claimant's performance was unsatisfactory and so the Respondent had no choice but to terminate it.

He says the same was done in accordance to his letter of appointment.

16. The Respondent says the Claimant's position was target based position and his performance was unsatisfactory and below par.

He says the termination was not unlawful or malicious as claimed.

17. He further says he paid the Claimant all his dues including his salary upto 5th April, 2017, 2 pending leave days and one month salary in lieu of notice.

18. Respondent therefore avers that the Claimant's suit is unfounded and frivolous and an abuse of the process of the court and is merely seeking unjust enrichment. He says Claimant is not entitled to the remedies claimed in the memorandum of claim and prays the claim be dismissed with costs.

ISSUES FOR DETERMINATION

19 (a) was Claimant under probation when his employment was terminated?

(b) Was his termination lawful.

(c) is he entitled to the reliefs prayed?

DETERMINATION

20. Section 2 of the Employment Act 2007 define probationary contract as a contract of employment which is not more than twelve months duration or part thereof, is in writing and expressly states is a probationary period.

21. Claimant was employed by the Respondent and got a letter of offer dated 16th November, 2015 as a Business Development Officer. He was placed on probation for six months and it was stipulated the employment could be terminated by giving one month notice or payment of one month in lieu of notice during the probationary period. The effective date was 4th January, 2016.

On 8th August, 2016 his employment term was extended for 3 months and again on 13th December, 2016 his contract was extended (backdated) from 1st October, 2016 to 31st December, 2016.

22. On 17th February he was appointed as an internal auditor alongside his other responsibilities.

Finally on 5th April, 2017 he got a termination letter and was informed his performance for the 6 months and further six months was unsatisfactory.

He was terminated effective 6th April, 2017.

23. So the issue of whether the Claimant was still on probation at the time of termination of his employment is the first and foremost issue to tackle.

24. The Section that defines probationary contract already referred here above states probationary period is for a period of not more than 12 months. The Claimant here was on probation from 1st January, 2016 upto 5th April, 2017 when his term was terminated for poor performance. That clearly was longer than the 12 months provided in the law.

25. Section 42(2) of the same act further 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. No employer shall employ under a probationary contract for more than the aggregate period provided under Sub-section.

26. The case of **FRANK ZAWADI WANJALA MUDIBO AND 5 OTHERS VS ZIRCON GROUP LIMITED (2016) eKLR** the court held that the probation period is to be respected by the parties unless changed by consent. It was also held in the case of **PERIS NYAMBURA KIMANI VS DALBIT GROUP LIMITED PETITION NO.63 OF 2014** that where an employee completes the probation period and the same is not extended by consent it is automatically confirmed into permanent employment by operation of the law.

The extension of probation period must therefore be with the full knowledge and consent of the employee. Otherwise without such consent, the employer cannot change the same suo motto and where the employee refused to have such extension upon notice, the employee may terminate the employment.

27. In this present case the Respondent kept extending the probationary period of the Claimant pleading poor performance. There is no evidence that he obtained consent or consultant of the Claimant as provided in law. In that score the Respondent practiced unfair labour practices against the Claimant.

28. Furthermore he extended the probationary period to over 12 months which again is against the law. The court finds that the Claimant was no longer on probation by 4th January, 2017 and is declared a permanent employee by operation of law after 12 months.

29. The next issue to consider is whether the Claimant's employment was unfairly terminated.

The tenets of the law of employment is that before an employer terminates the employment of an employee he must prove the reason for termination is valid.

Section 45 of the Employment Act states in mandatory terms that the employer must prove the validity of termination.

Secondly he must prove the reason for termination is fair reason related to employees conduct, capacity and compatibility or based on the operational requirement of the employer.

Thirdly the employer must prove that the employment was terminated in accordance with fair procedure.

30. Section 41 of the Employment Act provides that an employer shall before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity explain to the employee in a language he understands the reason for which the employee is considering terminating and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

31. In the case of **ASCRAAT GIAMI VS CHAEL WORLD GABRIEL (2015) eKLR** stated that the Respondent was under an obligation to subject the Claimant to a disciplinary process by giving him notice to show cause containing charges levelled against him and afford the Claimant an opportunity to explain why his employment should not be brought to an end.

32. Also in the case of **KENFREIGHT EA LIMITED VS BENSON NGUTI 2016) eKLR** the same was held that an employer was duty bound to explain to an employee in the presence of another employee or a union official in a language the employee understood the reason or reasons for which the employer was considering termination of the contract.

The employee was entitled to be heard and his representations if any considered by an employer before the decision to terminate his contract was taken.

33. In this case the employee was not accorded an opportunity to be heard even though during his evidence in chief in court he claimed he had good reasons to explain about his performance.

The Respondent gave him a termination letter dated 5th April, 2017 and his last date was the following date 6th April, 2017.

34. The Respondent therefore did not follow the mandatory procedure as clearly set out in the Employment Act and he never he gave the Claimant an opportunity to give his presentation in the presence of a witness of his choice.

The Respondent failed the fairness test provided in the often cited case of **WALTER ANURO VS TEACHERS SERVICE COMMISSION (2013) eKLR** which provide “However for a termination to pass the fairness test it must be shown that there was not only substantive justification for the termination but also procedural unfairness.”

35. The above put into account, I find the Respondent failed the mandatory provision of the law addressing the procedural requirements of terminating the employment of the Claimant. The same amounted to unfair termination. I therefore proceed to enter judgment in favour of the Claimant.

REMEDIES

36. The Claimant is awarded 4 months equivalent salary taking into consideration he worked for the Respondent for one year and 3 months and the same is regarded sufficient to cover as well damages for unfair practice.

The total award is Kshs.540,000/= and interest at court rates from the date of judgment until final payment.

Costs follow the event and so Claimant is awarded costs of this suit.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 15TH DAY OF FEBRUARY 2022.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE