



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

ELRC APPEAL NO.E001 OF 2021

(Before D.K.N.Marete)

MERU MULTI-PURPOSE CO-OPERATIVE SOCIETY LIMITED.....APPELLANT

VERSUS

JEREMY KIRIMI.....RESPONDENT

J U D G M E N T

This matter came to court by way of an Appeal dated 28th January, 2021. It comes out thus;

1. *THAT the learned Trial Magistrate erred in law and in fact in failing to make a finding that the Respondent's suit did not disclose a cause of action after finding that the Respondent was employed on probational terms.*
2. *THAT the learned Trial Magistrate erred in law and in fact in failing to fully analyse the evidence tendered by the Appellant herein and giving undue weight to the Claimant's case and least weight to the Respondent's case.*
3. *That the learned resident magistrate failed in interpreting the law regarding employment on probational terms and arrived at a naked decision.*
4. *That the learned trial magistrate erred in law and in fact in that he totally failed to take into account the Appellant's case.*
5. *That the learned trial Magistrate erred in law and fact in disregarding the evidence of the Appellant on record hence resulting to a wrong decision.*
6. *That the learned trial Magistrate erred in law and fact in failing to consider the Appellant's submissions and legal authorities relied upon in support thereof.*
7. *That the learned Magistrate so misdirected herself on matters of both law and fact as to occasion a miscarriage of justice against the appellant.*
8. *That the learned Magistrates award was otherwise, undeserved, excessive and not backed by any jurisprudence.*
9. *That the learned trial magistrate's decision albeit, a discretionary one was plainly wrong.*

He prays that this appeal be allowed and the judgment dated 24th December, 2020 in Meru CMELRC NO.4/2018 be set aside and the same be substituted with an order dismissing the case with costs both in the lower court and this court.

A cross Appeal dated 16th June, 2021 comes out as follows;

1. *That the learned trial Magistrate erred in law and fact in failing to find that the appellant was employed on permanent terms.*
2. *That the learned trial Magistrate erred in law and fact in completely misapprehending the law relating to employment and labour.*
3. *That the learned trial Magistrate erred in law and fact in failing to award the appellant the payment for unpaid leave days.*

4. That the learned trial Magistrate erred in law and fact by awarding the appellant a very small amount being Kshs.26,880/- in terms of general damages for unlawful dismissal.

5. That the learned trial Magistrate erred in law and fact in failing to consider that the letter of employment indicated that the employment was on a permanent basis.

The Appellant in her written submissions dated 26th October, 2021 submits that the Respondent was under a contract of service and regulated by the terms of such service. The Respondent as employer had a right to review performance and access his capability before confirmation.

It is her further case that the disciplinary committee meeting held on 19th July, 2017 was justified and lawful. It was here that the claimant's conduct and performance was evaluated leading to a termination of contract within the probation period. He was invited to make a presentation and this not being satisfactory the committee recommended his termination of employment.

The Appellant sought to rely on the authority of **John Muthomi Mathiu v Mastermind Tobacco (K) Limited (2018) eKLR**, where the issue of termination during probation was adequately ventilated and settled.

The Appellant further submits to the sanctity of the employment contract. It is her case that parties to such contracts are bound by their terms and conditions and so is the case in the circumstances.

She further employs Section 42 of the Employment Act, 2007 to buttress her case. This comes out as follows;

42. Termination of probationary contracts

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

(2) 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.

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

(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.

The Appellant further sought to buttress her case by relying on the authority of **Peris Nyambura Kimani v Dalbit Petroleum Ltd, petition No.63 of 2013**, where the court held as follows;

“Section 42 therefore becomes one of the most outstanding provisions of the law and part of the new thinking in employment and labour relations in Kenya. That an employee under probation has to ensure good performance at all times as such an employee's employment can be terminated legally within this period without hearing, can be terminated within 7 days or less or be terminated immediately upon payment of 7 days wages. This is exceptional for the law to be couched in this manner.

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 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 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.”

The Appellant further also dismisses the cross-appeal on grounds that the Respondent termination was fair in the circumstances of his misconduct while under probation. His contract of service was duly unlawfully terminated in accordance with the terms of such contract. Here she relies on the authority of **Kenya Airways Corporation Limited vs Auma & 5 others (2007) 2 KLR 24**, where the Court of Appeal held as follows;

“We would also think that it was unreasonable for the respondents to believe that it was their entitlement and right to be employed by the Appellant during their whole working life. The expectation has no basis in law as employment relationship is contractual and thus terminable under the terms of the contract.”

The cross-appellant in her written submissions dated 2nd December, 2021 submits on a case of employment of the Respondent by the Appellant. This employment was permanent and compassed all the latitudes of an employment contract.

It is his case that his termination of employment was contrary to the provisions of Sections 41 and 43 of the Employment Act, 2007 on substantive and procedural fairness and award of reason for termination. These were absent in the case of the termination of this employment.

The Respondent further submits that the reasons for termination of his employment were unsound and in contravention of section 43 and 45 (2) of the Employment Act, 2007.

The reasons for termination of employment per the letter dated 20th July, 2017 are;

- i) The claimant was employed with good qualifications,
- ii) The claimant was on probation period,
- iii) The claimant found the system of his immediate supervisor with irregularities and fitted in the same system,
- iv) No evidence to show that the claimant reported the said irregularities to the accountant.
- v) The claimant never informed the manager or board about the said irregularities.

He submits that the termination was not justifiable in that the office of the Respondent had problems even before the onset of his employment.

The Respondent submits that the appeal should be dismissed and his cross-appeal upheld.

I have had occasion to scrutinize the case and the evidence presented at the lower court. It is not disputed that the respondent's employment was terminated during his probation period. This was on grounds of incompetency and failure to report anomalies at his desk to the Respondent's management.

The Respondent counters this and insists on a case of unlawful termination of employment. He even enters a cross-appeal for awards in enhancement that of the learned magistrate at trial and determination.

The Respondent case must fail and the appeal allowed. This is because all evidence leads to a case of the claimant's disability to perform his duties as expected of his employment contract. He sat on performance anomalies in his domain and never reported the same to his supervisors. He knew or ought to have known that this was irregular practice and unacceptably to his employer.

Further, all this happened during the period of probation of the Respondent. The law is succinct on the terms of employment at probation level. One can be discontinued if found unsuitable. This is the case here and I therefore find for the Appellant.

The learned magistrate erred in law and fact in finding a case for the Respondent. This due to a legitimate justification of termination of employment in the circumstances. I therefore find for the appeal and dismiss the cross appeal.

I am therefore inclined to allow the appeal and dismiss the cross appeal with orders that each party bears their costs of the same.

DATED AND DELIVERED AT NYERI THIS 23RD DAY OF MARCH, 2022.

D.K.NJAGI MARETE

JUDGE

APPEARANCES

1. MR.KARANJA INSTRUCTED BY MWIRIGI KABURU & COMPANY ADVOCATES FOR THE APPELLANT.

2. MISS MAORE INSTRUCTED BY G.M WANJOHI, MUTUMA & COMPANY ADVOCATES FOR THE RESPONDENT.