



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 2248 OF 2016

SILAS OTIENO OKUMU.....CLAIMANT

VERSUS

KENYA MEDICAL RESEARCH INSTITUTE.....RESPONDENT

JUDGEMENT

1. Through the statement of claim dated **26th October 2016**, the claimant avers that he was unlawfully and unfairly terminated from employment. It is his claim that the decision to terminate his employment was non-collegial, ill advised, improper, misconceived and was premeditated. Accordingly, he seeks compensation for unlawful termination, unpaid leave days, gratuity, service pay, unpaid per diem and certificate of service.

2. The respondent denied the allegations by the claimant vide its Response dated **18th December 2016** and through which it avers that the claimant underwent an end of probation appraisal upon completing his probation period, and was found to have failed on his duties, hence was terminated. The respondent avers that it gave the claimant a fair hearing during his probation appraisal and all his dues fully paid upon termination. The respondent asked the court to dismiss the claim with costs.

3. The matter proceeded for trial on 19th October, 2021 and both parties called oral evidence.

Claimant's case

4. It was the claimant's testimony that he was employed by the respondent with effect from 8th November 2013 as an Assistant County Nutrition Co-Ordinator in its ICCM project on a monthly salary of Kshs 95,000/=. That he was to be based in Homabay but the duty station was changed to Kisumu without notification and/or salary adjustment. He further stated that his performance was exemplary and that he whole heartedly devoted his mind, as well as time to the success of the corporation.

5. The claimant further averred that his relationship with his supervisor became frosty upon his resumption from leave, which he had taken to sit for his Master's Degree final examinations. That nonetheless, he continued to perform his duties diligently and submitted weekly reports as and when required.

6. That he was unprocedurally terminated on 30th April, 2014 without being accorded a fair hearing. It was his further testimony that after appraisal, he was expecting a letter of confirmation or a letter extending his probation if his performance was wanting. The claimant further told court that he followed all the regulations and instructions and generally discharged his responsibilities well and always updated his supervisors of the challenges he was facing. He further stated that he expressed his dissatisfaction as to how he had been appraised but he was not given a hearing. That the respondent also withheld his salary for the month of March and April, 2016 without notice. He asked the court to allow his claim as prayed.

Respondent's case

7. The respondent called oral evidence through Mr. Dennis Ochola, who identified himself as its Human Resource Manager working under the project KEMRI-CMR-RCTP. He asked the Court to adopt his witness statement as part of his evidence in chief. He also produced the documents filed on behalf of the respondent as exhibits before court. It was his testimony that he was aware of the claimant's case through the official records held by the respondent. He told court that upon employment, the claimant was placed on probation for three (3) months whereafter his performance was evaluated and found not to be satisfactory.

8. Mr Ochola further testified that the claimant had two supervisors who gave him an overall rating of 2 out of 5 which was below par. That as such, his appointment was terminated. He further stated that the claimant was given one month notice prior to his termination and his dues fully paid upon complying with the procedures relating to clearance. It was also his testimony that the claimant was given a fair hearing during the probation process and that the appraisal was fair. He concluded his testimony by stating that the respondent was not liable under

the claim.

Submissions

9. Both parties filed written submissions upon close of the hearing. On his part, the claimant submitted that since he continued performing his duties and in absence of any notification to the contrary, it was expected that his terms of employment had been translated to permanent employment. He buttressed his submissions on the cases of **Jane Wairimu Machira vs Mugo Waweru and Associates Cause No. 621 of 2012** and **Daniel Namu Kariuki vs Commission for Implementation of the Constitution (2015) eKLR**. It was his further submission that the respondent had not substantiated the allegations of poor performance on his part. He placed reliance on several authorities including **Jane Samba Mukala vs Oltukai Lodge Limited [2010] LLR**, **National Bank of Kenya vs Samuel Nguru Mutonya [2019] eKLR** and **Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) vs Stanley Kinvanjui and Magnate Ventures Ltd (Industrial Court Cause No. 273 of 2010)**.

10. The claimant further submitted that his transfer from Kisumu to Homabay was arbitrary hence amounted to violation of his constitutional rights. He relied on the case of **A. M. Msagha vs Chief Justice of Kenya & 7 Others [2006] eKLR**.

11. On the other hand, the respondent submitted that the claimant's letter of appointment expressly stipulated that that an evaluation was a precondition for confirmation after the completion of the three (3) months probationary period. The respondent further submitted that the claimant was by law restricted from bringing a complaint of unfair termination pursuant to Section 45(3) of the Employment Act which provides that an employee can only have the right to complain that he has been unfairly terminated if they have been continuously employed by the employer for a minimum of thirteen (13) months. It was the respondent's further submission that it had satisfied both the substantive and procedural requirements before terminating the claimant's employment. That further, by virtue of the fact that the claimant was on probation, it was not bound to grant the claimant a fair hearing by virtue of the provisions of section 42(1) of the Employment Act. It invited the court to consider the findings in the case of **Mercy Njoki Karingithi vs Emerald Hotels Resorts & Lodges Ltd [2014] eKLR**.

Analysis and determination

12. From the pleadings, testimonies before court and submissions on record, this court is being called upon to resolve the following questions;

a) Was the claimant's appointment confirmed by effluxion of time?

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

c) Is the claimant entitled to the reliefs sought?

Was the claimant's appointment confirmed by effluxion of time?

13. The claimant has averred that upon conclusion of the three (3) months probationary period and in absence of any word from the respondent, it was his belief that his employment had been confirmed on permanent terms. The respondent holds a contrary view and maintains that the claimant was well aware that his confirmation was conditional and was subject to evaluation of his performance. That as such he was still on probation at the time of his termination.

14. **Section 42 of the Employment Act (Act)** which provides for probationary contracts is relevant herein. Specifically, Section 42 (2) 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."**

15. It is notable that the Act merely prescribes the minimum requirements applicable in any employment contract but the parties can exercise their free will and enhance the terms and conditions provided thereunder, for the benefit of the employee. In this case, the probationary period had been lowered from the statutory six (6) months to three (3) months.

16. The claimant's letter of appointment which stipulates for the probationary period provides in part: -

"Following your application and subsequent interviews with us on Monday, 4th November 2013 for the above position, we wish to offer you employment as an Assistant County Nutrition Coordinator in the ICCM Project with effect from 10th November 2013...You will be placed on probation for a period of (3) three months and thereafter your performance will be evaluated for confirmation in the above position."

17. It is therefore apparent from the said letter that the claimant's probation was to run with effect from 10th November 2013 to 11th February 2014. As such, the claimant's last date of probation was 11th February, 2014.

18. It is also apparent that the claimant was terminated vide a letter dated 26th March, 2014 pursuant to a performance appraisal which was undertaken on 21st March, 2014. Evidently, this period was past 11th February, 2014, and was roughly one and a half months after the last date of the claimant's probation.

19. From the claimant's perspective, this extra period confirmed his appointment. In this regard, it is therefore essential to revisit the relevant terms of the claimant's appointment thus;

“...You will be placed on probation for a period of (3) three months and thereafter your performance will be evaluated for confirmation in the above position.” Underlined for emphasis.

20. From the wording of the above letter, it can be deduced that the claimant’s confirmation to his position was subject to the following conditions;

a) completion of the 3 months probationary period; and

b) evaluation of his performance.

21. Flowing from the claimant’s letter of appointment it is clear that evaluation of his performance could only be undertaken after the end of the probation period hence the use of word **“thereafter”**.

22. Therefore, it was not practicable to undertake the performance appraisal before the end of the three (3) months’ probation period. Indeed, the said appraisal was undertaken within one and a half months following the last date of his probation.

23. In light of the above, it is my view that in as much as the claimant served beyond the 3 months probationary, that fact could not confer upon him permanent status in employment, as he was aware that the employer was to undertake an evaluation of his performance, a process that was within his knowledge and which he participated in. The claimant cannot therefore claim that there was no communication or action from the respondent upon the lapse of the probationary period.

24. It would be mechanical and robotic to assume that permanence and/or confirmation of employment kicks in immediately the probation period ends. This is moreso where an employer is in the process of undertaking an employee’s performance appraisal. The test should be whether the time taken by the employer to complete the evaluation exercise and communicate to the employee, is reasonable in the circumstances. I find the period taken in the case herein to be reasonable.

25. On the converse, were the respondent to undertake the performance appraisal before the end of the probation period, the claimant would have complained and rightly so, that the period was not adequate to judge his performance as he had not been afforded sufficient opportunity to show case his capability.

26. In the premises, it is the court’s finding that the claimant was not confirmed following the end of the three (3) months probationary period.

Was the claimant’s termination s unfair and unlawful?

27. At the outset, it is imperative to address an issue which has been raised by the respondent as regards the provisions of section 45(3) of the Employment Act. Relying on the said provision, the respondent has submitted that in view of the fact that the claimant had served for a period of less than 13 months, he lacked the basis to bring a claim on the basis of unlawful termination. The said Section 45(3) provides as follows;

“(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated” Underlined for emphasis

28. The proposition by the respondent is not viable for the reason that the constitutionality of the aforesaid Section 45(3) was successfully challenged in the case of **Samuel Momanyi vs SDV Transami & Another (2012) eKLR** where Lenaola J (as he then was), declared it unconstitutional for being inconsistent with Articles 28, 41(1), 47, 48 and 50(1) of the Constitution. Therefore, as at 18th May 2012, when Judgement was delivered and the provision declared unconstitutional, it ceased to have any legal effect.

29. In light of the foregoing, the claimant has a right to claim unfair termination under the provisions of section 45 of the Act, notwithstanding the fact that he had served the respondent for a period of less than 13 months.

30. Having established as such, I now move to consider whether the respondent has proved that the claimant’s termination was fair.

31. In order to prove a case of fair termination under the Employment Act, an employer must prove that there was substantive justification to warrant termination of an employee and that it observed the requirements of procedural fairness in so doing.

32. *The element of substantive justification can be traced to Sections 43(1) and 45 (2) of the Employment Act, which require an employer to establish that it had valid and fair reason to terminate an employee’s employment. The burden of proof lies with the employer. Section 43 (1) provides as follows-*

“In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”

33. The reason advanced by the respondent for terminating the claimant’s employment was poor performance following an appraisal which was undertaken at the end of his probation period. The letter of termination reads as follows;

“Reference is made to your end of probation appraisal held on 21st March, 2014. It was observed that your performance during the probation has been poor. In particular it was noted that:

- 1. You failed to follow the study instructions and procedures as laid down by your superiors.*
- 2. You were unable to submit a master list of children under five at the required time.*
- 3. You failed to distribute Vitamin A drugs within the given timeframe despite several reminders.*
- 4. You were unable to submit weekly reports despite repeated reminders.*

The above issues reflect clearly that you were unable to achieve the key deliverable of your role. From the foregoing, it has been decided that your employment be terminated...”

34. In support of its case, the respondent produced before Court the claimant’s performance appraisal report, titled “End of Probation Appraisal”.

35. From the performance appraisal report, it is discernible that the evaluation exercise covered various broad areas, which were considered key to the claimant’s performance. These included; **Education and Knowledge, Technical and Professional Skills, Communication, Working Characteristics and Leadership.**

36. These broad areas contained subsets, all of which were subject to evaluation. The rating was on a scale of 1 to 5, with the highest being 5 and the lowest being 1.

37. From the scores, the claimant’s supervisor rated him considerably well on the areas of Education and Knowledge; and Technical and Professional Skills. However, when it came to **Communication, Working Characteristics and Leadership**, the claimant was given a score of 2 and in some instances 1. The subsets under these two areas included; *listening skills; email etiquette; sense of responsibility and judgement; ability to follow procedures and instructions; flexibility; work quality; work quantity; enthusiasm; reliability; cooperation; problem solving and decision; supervisory and decision making skills; and ability to coordinate a team.*

38. Against these scores, the claimant’s supervisor remarked as follows; *“shown less cooperation with line management”* and; *“made no substantial effort unless assigned.”*

39. Overallly, while the claimant rated himself at 4 out of 5, his supervisor gave him a rating of 2 out of a possible 5. Clearly, they were on different pages. This appraisal rating is what formed the basis of his termination.

40. It is notable that the issues regarding the claimant’s performance had cropped up during his probation period, and which seemingly reflected in his performance appraisal rating. To illustrate this, I will sample a few emails.

41. In an email of 8th December, 2013, the claimant’s supervisor wrote;

“Dear Silas

I do not like the tone of your email.

Please read my emails again on the training logs. It was not just about the training logs in the surrenders in Nairobi. The one I handled. You were required to ensure all CHWs currently trained should have signed and filed training logs – that was the assignment. That you joined after the trainings begun does not mean you cannot develop a human interest story and worse still not give feedback. I even texted you on how to do it. This is gross irresponsibility Silas and not a sign of good leadership. Your apology is not good enough. I will want this done whether or not you are doing exams and by Tuesday.

Onono Maricianah M.B.Ch.B. MSc...”

42. In yet another email of 29th January, 2014, his supervisor remarked;

“Dear Silas

Thank you for the report. I have a few comments – find them attached. Please note that I expect a full electronic listing by 31st January whatever the challenges may be even in Homabay as highlighted. My strong opinion is even before you jump into support supervision and attending meetings - this MUST be permission.

I still find that your reports provide no insight into challenges and no solutions whatsoever and I find that you are constantly pointing fingers and not taking responsibility. Your previous report indicated that Mbita and Homabay were a problem. However, you did not send an action plan, you did not rally to have the work completed. Your report merely states – it will not be possible to finish by 31st January.

As a rule of thumb, you cannot lead where you have not been. The coordinators must see you engaged in the work and really working with them and not merely a master. I want to state categorically and leave no room for a rebuttal response from you – that list must be complete by 31st even if it means you entering the data yourself which is what I expected you to do in the first place.

Best wishes

Onono Maricianah M.B.Ch.B. MSc...

43. Judging by the above email communication, it is clear that the claimant's supervisor was not satisfied with his performance. This also confirms that the issue of the claimant's performance had been raised by his supervisor previously. As it came to be, the issue of performance is what informed his termination.

44. The claimant's immediate supervisor Mr. Mohammed Abdi is the one who recommended that he be terminated following the performance evaluation exercise. He noted as follows *"New staff not able to achieve his major objectives in this appraisal period. The staff is difficult to mentor and he does not follow Line Management instructions."* This was an indictment on the claimant's performance.

45. From the rating of the claimant in his performance appraisal and going by the previous email communication exchanged between him and his supervisor, it is obvious that his performance was not satisfactory enough to warrant confirmation.

46. In the circumstances and noting the fact that the probation period is a stage of discovery and test of compatibility between the employer and the employee, the respondent had a valid reason to terminate the claimant's probationary appointment being unsatisfied with his performance.

47. I now turn to consider whether the claimant was accorded procedural fairness prior to being terminated. The respondent has relied on the provisions of section 42(1) of the Employment Act and argued that since the claimant was still on probation, it was not bound by the provisions of section 41 of the said Act.

48. This argument cannot stand in view of the finding in the case of **Monica Munira Kibuchi & 6 others vs Mount Kenya University; Attorney General (Interested Party) [2021] eKLR** which declared the said Section 42(1) of the Employment Act, unconstitutional. The three (3) Judge bench determined as follows;

"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."

49. Accordingly, it is worth to note that an employee is entitled to a fair hearing despite being on probation.

50. From the record, it is evident that the process of performance appraisal was undertaken at three levels; the claimant appraised himself, then his supervisor appraised him and finally the same was taken for review before two reviewers.

51. Following the recommendation by the claimant's supervisor that his appointment be terminated, he challenged the same and requested for a review as follows;

"In my considered view, the decision to terminate me is harsh and has been made without looking at some of the successes that I have achieved in the face of my challenges. It is my prayer that the decision be reviewed for a second chance."

52. Subsequently, and as can be discerned from the appraisal review instrument, it is apparent that the claimant's supervisor's comments were subjected to further review by two reviewers, Ms. Ruth Omondi and Dr. Onono who endorsed the supervisor's recommendation as follows;

"The staff has not been able to meet the study objectives. He has not been able to follow study procedures and instructions. He does not take instructions from the supervisors by not supplying vitamin A as required not able to produce a list of clients as required. He is not flexible and. Not confirming him."

53. In a nutshell, the claimant participated in the performance evaluation exercise through which he was given an opportunity to justify his performance in writing through the appraisal report. Thereafter, his supervisor appraised him in writing through the same instrument. It is through the same appraisal instrument that he asked for a review and which was considered by two independent persons who upheld the supervisor's recommendation.

54. In my view, the above constituted procedural fairness. The Court of Appeal has previously determined that fair hearing need not be oral and that the same can be achieved through correspondence. Case in point, is **Kenya Revenue Authority vs Menginya Salim Murgani [2010] eKLR**, where the learned Judges determined thus;

"However, in our view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the matter before us and we are satisfied that it was a fair hearing."

55. The same finding was arrived at in the case of **Kenya Ports Authority vs Fadhil Juma Kisuwa [2017] eKLR**, with the court noting

that;

“It must however be stressed that the necessity of oral hearing will depend on the subject and nature of the dispute, the whole circumstances of the particular case.”

56. The nature of the case herein being evaluation of the claimant’s performance and confirmation following his probationary appointment, could in my view, be dispensed without holding of an oral hearing. The requirements of fair hearing as stipulated under section 41 of the Employment Act were satisfied through the performance appraisal report, which was taken through 3 different stages of consideration.

57. The upshot of the foregoing is that the claimant’s termination was not unfair and unlawful as the respondent had valid reasons to terminate his appointment on the basis of unsatisfactory performance and in so doing, accorded him a fair hearing.

Reliefs

58. Having found that the claimant’s termination was not unfair and unlawful, the claim for compensatory damages and service pay is declined.

59. The claim for leave days and gratuity is similarly denied as the same have not been proved. It is notable that as part of his terminal dues, he was paid the sum of **Kshs 47,500/=** being 15 days leave which were commuted to cash. The claimant has not adduced evidence to prove further entitlement.

60. The claimant has also prayed for the sum of **Kshs 462,000/=** being unpaid per diem. It is worth noting that this claim is time barred as it is in the nature of a continuing injury. Pursuant to the provisions of section 90 of the Employment Act, such a claim ought to have been brought before Court within 12 months following the cessation of the continuing injury. In this case, the cessation occurred when the employment relationship terminated on **30th April, 2014**, hence that is the effective date when the cause action arose and time started running. The suit herein was brought on **3rd November, 2016**, which was well past two years since the cause of action arose. To this end, this court lacks jurisdiction to entertain the same as the issue of limitation of time is jurisdictional.

Orders

61. In the final analysis, I find that the claimant’s termination was neither unfair nor unlawful hence the claim is dismissed in its entirety.

62. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Wachira

For the Respondent Ms. Ng’etich

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