



**Nyagah v Internet Solutions (Cause 650 of 2018)
[2022] KEELRC 13294 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13294 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 650 OF 2018
L NDOLO, J
NOVEMBER 24, 2022**

BETWEEN

POLLY KETTY WANJA NYAGAH CLAIMANT

AND

INTERNET SOLUTIONS RESPONDENT

JUDGMENT

Introduction

1. The claimant brings her claim against the respondent by way of a memorandum of claim dated and filed in court on May 3, 2018. The respondent defends itself in a statement of response dated June 20, 2018 and filed in court on August 7, 2018.
2. At the trial, the claimant testified on her own behalf and the respondent called its Group Human Resources Manager, Ruth Wanjugu. The parties also filed written submissions.

The Claimant's Case

3. The claimant was employed by the respondent on March 29, 2017 as a personal assistant to the managing director. She earned a monthly salary of Kshs 40,000.
4. The claimant avers that as the respondent was closing its offices for the Christmas holiday in December 2017, she was informed by the managing director that she would not be confirmed in her employment.
5. The claimant claims that she had completed her three (3) months' probation period. She adds that there was no communication regarding extension of the probation period.
6. The claimant further states that on December 18, 2017, the managing director informed her that her employment had come to an end. The respondent thereafter discontinued the claimant's biometric, email and physical access.



7. The claimant was issued with a termination letter dated January 22, 2018. She claims that she was not subjected to any disciplinary hearing prior to the termination. She adds that the reason for termination was not explained to her.
8. The claimant terms the termination as unlawful and unfair. She therefore claims the following:
 - a. One month's salary in lieu of notice.....Kshs 40,000
 - b. 12 months' salary in compensation.....480,000
 - c. House allowance for 9 months.....54,000
 - d. Leave allowance for 8.75 days.....13,462
 - e. General damages
 - f. Costs plus interest

The respondent's Case

9. In its statement of response dated June 20, 2018 and filed in court on August 7, 2018, the respondent admits having employed the claimant effective March 29, 2017.
10. The respondent states that by an email dated December 15, 2017, the claimant's supervisor, Pete Frielinghaus affirmed that the claimant's employment would not be confirmed after the probation period.
11. The respondent denies that the claimant was a permanent employee, stating that at no time was there communication to the claimant that she had been confirmed to the position of personal assistant.
12. The respondent admits that it issued a termination letter dated January 22, 2018, which the respondent claims was in resonance with its previous communication of December 15, 2017.
13. The respondent States that it has been ready and willing to make payment to the claimant, including her December 2017 salary and one month's salary in lieu of notice subject to the claimant clearing with the relevant departments.
14. The respondent submits that the provisions for hearing before termination under section 41 of the *Employment Act* do not apply to probationary contracts as provided under section 42(1) of the *Employment Act*.
15. The respondent further submits that under section 45(3) of the *Employment Act*, the claimant was not entitled to bring a claim for unfair termination, since she had not served for a continuous period of thirteen (13) months.

Findings and Determination

16. There are two (2) issues for determination in this case:
 - a. Whether the termination of the claimant's employment was lawful and fair;
 - b. Whether the claimant is entitled to the remedies sought.

The Termination

17. The respondent opposes the claimant's claim on three fronts; first, that by the time of leaving employment, the claimant was still on probation and the provisions of procedural fairness were not



applicable to her; second, that she had not served for a continuous period of thirteen months and could not therefore lay a claim for unfair termination of employment and third, that due process was applied in the circumstances of the claimant's case.

18. On the issue of the claimant being on probation, the respondent relies on clause 15 of the employment contract which provides as follows:

15. Probation

You will be on probation in the first instance for a period of three (3) months.

On completion of the period above, your performance will be assessed and subject to good performance you will be confirmed in appointment. Confirmation of service shall not be automatic unless it is approved in writing.

Should your performance be unsatisfactory, an extension may be given. The extension would be for a period of three months at the end of which, your performance will be assessed and subject to good performance you will be confirmed in appointment.

19. The respondent pursues the argument that because the claimant had not been issued with a confirmation letter, then she was still on probation when her employment was terminated. The only thing I will say on this issue is that the respondent's argument flies in the face of section 42(2) and (3) of the *Employment Act*, which imposes the following restrictions on probation periods:

- (1) ...
- (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).

20. If indeed it is true the claimant was on probation for her entire service period of nine (9) months, it follows that she ought to have been consulted on the extension of the probation period. In fact, the respondent's Human Resource Department appears to have been aware of this requirement as is evident from the email dated September 18, 2017 at 12:59 from Nellie Kindiga (IS) to Pete Frielinghaus stating:

“ Good Afternoon Pete,

Thanks for getting back to us.

In view of the probation out-come-we support an extension possibly for another three months from now.

Kindly detail all the areas of weakness and expectations on the same as well as objective to [be] met within the next three months.

Kindly share the same with Ketty who will sign to agree on the same and be re-visited just before the end of the next three months.”

21. The respondent did not adduce any evidence to demonstrate that the claimant had consented to extension of her probation beyond the statutory period set in law. This is adequate force to demolish the wall erected by the respondent to bar the claimant from pursuing her claim on the ground that she was a probationary employee. I will however add that a three judge bench of this Court (Mbaru, Abuodha & Ndolo JJ) in *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney*



General (Interested Party) [2021] eKLR held that section 42(1) of the Employment Act, in as far as it sought to restrict the right to fair hearing for a category of employees, was unconstitutional.

22. In the circumstances of the present case, the only conclusion to make is that the claimant's probation lapsed by effluxion of time with the consequence that at the time she left employment, she was a confirmed employee of the respondent.
23. The respondent also seeks to lock out the claimant from the safeguards of procedural fairness on account of the fact that she had not served for a period of thirteen (13) months. In this regard, the respondent relies on section 45(3) of the Employment Act. This provision was however also declared unconstitutional by Lenaola J (as he then was) in Samuel G Momanyi v Attorney General [2012] eKLR, a decision of persuasive force with which I fully agree.
24. With the preliminary issues off the tray, I will now consider the substantive merits of the termination of the claimant's employment.
25. On January 22, 2018, the respondent wrote to the claimant as follows:

“Dear Ketty

RE: Termination of Employment

Further to the discussions between you and your line manager on the December 15, 2017 pertaining your probation where it was established that despite your probation having been extended and your line manager having undertaken the necessary measures to improve your skill set, attentiveness to detail and timekeeping as had been enumerated during your prior probation review, there was still no positive change on the same.

A core requirement of your job as a personal assistant is having the requisite skill set in Microsoft office applications, however, you have proven unwilling and unable to master this. Further, your turn around time in the course of your work is very wanting and there have been numerous occasions of unjustifiable tardiness and absences from work.

Despite HRs attempt to engage with you on this subject matter through inviting you for meetings at its offices, you neglected, refused and or failed to attend to the same. This seems to be a tactic being used by you to extend your tenure with the company by being on its payroll. Be advised that as your probation had already lapsed, your employment is deemed terminated as at your last day at work.

As per the Company's HR Policy, your final dues will be paid out by cheque and shall only be remitted upon clearance. It will consist of the following:

Salary up to December 31, 2017; 8.75 Leave days earned not yet taken; 1 months' notice pay
Less any monies you may owe the company;

The above payment shall be subject to applicable taxes and statutory deductions

To enable us process your final dues, enclosed herewith is the clearance form that you will be required to fill and have completed by the relevant departments before returning it to Human Resource, together with the exit interview form also attached herewith.

Should you wish to appeal this decision, you may do so in writing to the appeals committee via hr within 7 calendar days of receipt of this letter.

Please confirm you have read, and understood the content of this letter by appending your signature below. You may retain the second copy for your records.



Yours sincerely,
For and on behalf of Access Kenya Group Ltd
(signed for)
Ruth Wanjugu
Group Human Resources Manager”

26. According to this letter and as confirmed by the respondent’s witness, Ruth Wanjugu, the claimant’s employment was terminated on account of poor performance and misconduct. There is however no evidence of the respondent engaging the claimant on any of the issues that may have led to the termination of her employment.

27. Indeed, a reading of the documents availed by the respondent reveal a classic case of an employer talking to itself about an employee, without the involvement of that employee.

28. On September 18, 2017 at 09:54, the claimant’s supervisor, Pete Frielinghaus pete@continuityea.co.ke sent the following email to Nellie Kindiga (IS); Ruth Wanjugu (IS); Angeline Gitau (IS):

“Morning Ladies

I’ve completed the evaluation form for Ketty (I’ll get the original signed version to you when I return, I’m on leave this week)-my suggestion is that we just extend the probation period into the new financial year as we’ve had some reliability and absentee issues to date.”

29. On December 15, 2017 at 12:05, Pete Frielinghaus sent a further email to Ruth Wanjugu (IS); Nellie Kindiga (IS):

“Hi Ruth

As discussed, I’ve told Ketty that we won’t be renewing her probation which expires at the end of the month (or offering her full-time employment), other than this conversation I’ve had with her, are there other actions you need me to implement?

I will revoke access and complete other administrative matters from this side myself, will you finalize the HR/payroll side of things? With Kennedy, Vince and I we will manage for the short term so there is no urgency in finding her replacement, so I’ll start looking in Jan.

Thanks again for the help

Cheers

Pete Frielinghaus (MBCI)

Managing Director”

30. This correspondence demonstrates a unilateral drift by the respondent which cannot pass the test of a credible performance management process. What is more, there is evidence that by the time the respondent was issuing the letter of termination, the claimant had been disengaged by being denied access to the work place.

31. In light of the foregoing, I find and hold that the respondent mismanaged the claimant’s exit thus rendering the resultant termination substantively and procedurally unfair.



Remedies

32. I therefore award the claimant four (4) months' salary in compensation. In making this award I have considered the claimant's length of service plus the respondent's unlawful conduct in the termination process.
33. The claimant also claims house allowance. However, clause 4.2 of her employment contract provided for a gross salary, which would ordinarily be inclusive of house allowance. This claim therefore fails and is disallowed.
34. No evidence was led to support the claim for general damages which also fails and is dismissed.
35. The claims for notice pay and leave pay were settled before trial and therefore dissipate.
36. In the end, I enter judgment in favour of the claimant in the sum of Kshs 160,000 being four (4) months' salary in compensation for unlawful and unfair termination of employment.
37. This amount will attract interest at court rates from the date of judgment until payment in full.
38. The claimant will have the costs of the case.
39. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2022.

LINNET NDOLO

JUDGE

Appearance:

Mr Okoth for the claimant

Mr Kimani for the respondent

