



**Okumu v Good Man Agencies Limited (Cause 1895 of 2017)
[2022] KEELRC 13514 (KLR) (9 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13514 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1895 OF 2017
SC RUTTO, J
DECEMBER 9, 2022**

BETWEEN

DONALD ASIKU OKUMU CLAIMANT

AND

GOOD MAN AGENCIES LIMITED RESPONDENT

JUDGMENT

1. Through the statement of claim dated September 4, 2017, the claimant avers that he was unlawfully and unfairly terminated from employment on March 31, 2017. He has termed his termination as premature hence the instant suit.
2. The claimant avers that he was employed by the respondent on September 1, 2016 or thereabout as a medical representative. That at the time of his termination, he had worked for the respondent for a period of seven months. That the respondent did not pay his dues and service gratuity following his termination. It is for the foregoing reason that the claimant seeks against the respondent, the sum of Kshs 2,198,000.00 being one month's salary in lieu of notice, payment for 29 months for breach of contract, leave pay, overtime pay and compensatory damages for unfair termination.
3. The respondent opposed the claim through its statement of response dated August 12, 2019. The respondent admitted terminating the claimant's contract but avers that the same was done in respect of a new contract of employment dated February 1, 2017 and not the contract of employment of September 1, 2016. That the claimant worked for three months in the first contract dated September 1, 2016 and for one month in the second contract dated February 1, 2017. The respondent further avers that it paid the claimant's dues in respect of the first contract. Consequently, the respondent has asked the court to dismiss the claim with costs.
4. The matter proceeded for part hearing on March 9, 2022 and later on July 5, 2022 when the defence closed its case. At the trial, both parties called oral evidence.



Claimant's Case

5. The claimant started by adopting his witness statement and documents filed together with his claim to constitute his evidence in chief. The said documents were further produced as his exhibits before court.
6. It was the claimant's testimony that he was employed by the respondent on September 1, 2016 under a three year contract and was earning a monthly salary of Kshs 68,000.00. That prior to his summary dismissal, he was summoned and informed that the mother company could no longer cater for their expenses hence they had to go home. That he was given a week's notice on March 23, 2017 with the actual date of termination being March 31, 2017. That he was further told never to report back to work again. That he was not given a reason for his termination. That further, there was no complaint whatsoever about his general performance. He further told court that the respondent completely declined to pay his benefits. In closing, the claimant asked the court to allow his claim as prayed.

Respondent's Case

7. The respondent called oral evidence through Ms Mercy Muthoni who testified as RW1. She identified himself as the respondent's human resource manager. Similarly, RW1 asked the court to adopt her witness statement to constitute her evidence in chief. She further produced the documents filed on behalf of the respondent as exhibits before court.
8. It was RW1's testimony that the respondent was employed *vide* a contract dated August 22, 2016. That clause 6 of the said contract provided for a probationary period of six months. That due to the claimant's performance, the respondent terminated the said contract through a letter dated December 14, 2016. That the said termination was done during the claimant's probationary period and he was paid all his dues amounting to Kshs 96,336.25.
9. That a few months later, and after much lobbying by the claimant, the respondent issued him with another contract of employment dated February 20, 2017. RW1 stated in further testimony that clause 10 of the said contract provided for a probationary period of six months. That the claimant was terminated on March 23, 2017 and was paid a sum of Kshs 60,291.00 whereafter he confirmed that he had no further claims against the respondent. That therefore, the claimant has not come to court in good faith as he has mischievously failed to disclose the existence of the contract of February 20, 2017 and that all his dues were paid.
10. RW1 summed up her testimony by asking the court to dismiss the claimant's suit with costs.

Submissions

11. Both parties filed written submissions upon close of the hearing. On his part, the claimant submitted that he was not on probation when his contract was terminated by the respondent and that his employment was automatically confirmed by effluxion of time, upon expiry of his probationary period on 29th February, 2017. To support these submissions, the claimant placed reliance on the case of [*Benjamin Nyambati Ondiba vs Egerton University*](#) (2014) eKLR.
12. It was the claimant's further submission that the respondent's reason for summarily dismissing him from employment was not a valid reason as there was no proof that he had performed poorly in his duties. The claimant cited the cases of [*Felix Mbolonzi Kioko vs Director of Public Prosecutions*](#) (2020) eKLR, [*Francis Aboge Oduk vs Hasbah Kenya Limited*](#) (2020) eKLR and [*Jane Samba Mukala vs Oltukai Lodge Limited*](#) (2013) eKLR in support of these arguments.



13. On its part, the respondent submitted that at the time of the claimant's termination, section 42(1) of the *Employment Act*, was the applicable law as the same was yet to be declared unconstitutional through the determination in the case of *Monica Munira Kibuchi & 6 others vs Mount Kenya University* (2021) eKLR. That therefore, the respondent cannot be deemed to have acted outside the applicable law then.

Analysis and Determination

14. From the pleadings, testimonies before court and the rival submissions, this court is being called upon to resolve the following questions:
- a. Was the claimant under probation at the time of his termination?
 - b. Was the claimant's termination unfair and unlawful?
 - c. Is the claimant entitled to the reliefs sought?

Whether the claimant was under probation at the time of his dismissal

15. The claimant avers that he worked for seven months prior to the termination of his employment contract. On the other hand, the respondent maintains that the claimant was issued with two contracts and only worked for one month under the second contract.
16. On record are two contracts of employment executed by the claimant. The first contract which was for a period of three years, was executed on September 1, 2016. It is apparent from the record that the same was terminated on December 14, 2016 on grounds of poor performance.
17. It was not long before the claimant was once again reengaged by the respondent and offered employment through a contract of employment dated February 20, 2017. The said contract which was to commence on February 1, 2017, was also for a fixed term period of three years. As fate would have it, this contract of employment was also terminated on March 23, 2017, with the effective date of termination being March 31, 2017.
18. It is therefore evident that the claimant has deemed his employment as continuing from September 1, 2016 upto March 31, 2017.
19. I have perused the two contracts of employment and note that they are distinct. Indeed, the second contract did not make reference to the first contract. In this sense, it did not expressly or impliedly state that the claimant's employment was continuous from September 1, 2016. Therefore, it is clear that the second contract was separate in all respects from the first one. I must add that the termination of the claimant's first contract broke his service with the respondent.
20. Accordingly, it is not true that the claimant's contract was continuous from September 1, 2016.
21. What this means is that the second contract dated February 20, 2017 and entered into on February 1, 2017, signaled a new employment relationship. Indeed, the claimant has cited the respondent for termination of his employment through the letter of termination dated March 23, 2017. That is the contract he exhibited before court.
22. As a matter of fact, he did not dispute entering into the second contract on February 1, 2017. Indeed, he confirmed as much under cross examination. As it is, that contract dated February 20, 2017 was the subject of termination by the letter of March 23, 2017.



23. In as much as the letter of termination did not did not make reference to the contract of February 1, 2017, it is evident that it was the one that was the subject of termination as the previous contract executed on September 1, 2016 had been terminated hence extinguished and was no longer in force.
24. The total sum of the foregoing is that at the time the claimant was terminated on March 23, 2017, he had served for close to two months under the second contract entered into on February 2, 2017.
25. In terms of clause of 1.10 of the said contract of employment, the claimant's probationary period was six months. What manifests from this is that the claimant's termination was within his probationary period as he was only two months old into the new employment relationship.
26. That said, was the claimant's termination unfair and unlawful?

Was the claimant's termination unfair and unlawful?

27. Having found that the claimant was still under probation at the time of his termination, the next question is whether the said termination was fair and lawful in light of the *Employment Act*.
28. The respondent has contended that since the claimant was terminated during his probation, section 42(1) of the *Employment Act* was still applicable as the same was yet to be declared unconstitutional.
29. To this extent, I am in agreement with the respondent that at the time of the claimant's termination, section 42(1) of the *Employment Act*, was still good law. Therefore, the respondent was not bound by the requirements under section 41 of the *Employment Act*.
30. It is also notable that the claimant was given seven days notice in line with the provisions section 42(4) of the *Employment Act*. To this end, the respondent cannot be faulted for non compliance with procedure, when effecting the claimant's termination.
31. What the respondent failed to address itself to, is the substantive fairness in the claimant's termination, in light of sections 43 and 45 of the *Employment Act*. Section 43 of the *Employment Act* requires that an employer proves the reason for termination, failure to which such termination is rendered unfair. Further, pursuant to section 45 of the *Employment Act*, such reasons ought to be fair, valid and related to the employee's conduct, capacity, compatibility; or the employer's operational requirements.
32. It should be noted that the *Employment Act* has not ousted the requirement for substantive fairness when it comes to termination of an employee serving under probation. Put another way, the provisions of sections 43 and 45 of the *Employment Act* remain applicable to employees who are on probation.
33. On this score, I find useful guidance in the determination by Radido J in the case of *Mercy Njoki Karingithi vs Emerald Hotels Resorts & Lodges Ltd* [2014] eKLR, where the learned judge held that:

“ 19. I say so because the fairness of termination of employment is not evaluated merely on the basis of the employer complying with procedural fairness but also on the basis of substantive fairness.

20. The question in other words, is whether the provisions of section 45 of the Employment Act are ousted or are not applicable in complaints of termination during probationary period.....

21. It cannot be disputed that although still serving under probation, an employment relationship between parties has commenced. Immediately on the commencement of the relationship, legal obligations on the side of each of



the parties arise. These obligations are in terms of duties and rights. Duties of the employer (respondent) and rights of employee (claimant) and vice versa.

22. The fundamental rights of employees not to be unfairly terminated and the claimant in this case, as provided for in section 45(1) and (2) of the Employment Act cannot be abrogated during the probation period unless clearly expressed so. The only right as far as termination is concerned which has been abrogated during the probationary period is the right to procedural fairness in section 41 of the Act. That is the import of section 42 of the Employment Act.
 23. However the security of tenure given to ordinary employees by section 45 of the Employment Act is still applicable. The employees' right not to be unfairly terminated still binds the employer and is applicable during the probationary period. An employer is obliged to prove the reasons and that the reasons are valid and fair reasons."
34. The court (Makau J) arrived at a similar finding in the case of [*Happiness Nyabonyi Maingo vs Shreeji Chemicals Limited*](#) [2020] eKLR expressing himself thus:
- “Whereas, a probationary contract is a sort of “testing waters” engagement, the rights of the employee are not sacrificed. The employees remain entitled to the protection of the law from arbitrary and whimsical terminations by employers. For example, the law has put in place certain safeguards in favour of employees regardless whether they are employed under a probationary contract... In view of the foregoing, I reiterate that the obligation to justify the reason for terminating contract under section 43,45 and 47 (5) of the Employment Act applies equally to termination of probationary contract. Consequently, an employee has every right to challenge termination for probationary contract for want of substantive fairness.” Underlined for emphasis
35. I wholly align myself and apply the determinations in the above authorities to the case herein and hold that the respondent was not only bound to give reasons for the claimant's termination, but to also justify the same as being fair, valid and related to her conduct, capacity or compatibility; or its operational requirements.
36. Turning to the case herein, it is discernible that the claimant's letter of termination did not disclose the reason for his termination. The letter reads in part:
- “In line with the employment contract signed between yourself and Goodman Agencies Ltd, this letter serves to give you a one week's notice of termination of your employment contract with Goodman Agencies. Your last date of employment will therefore be March, 2017. This one weeks' notice being the notice period applicable for employees who are still serving on probation...”
37. As I have found that the respondent was bound to give reasons for the claimant's termination, and justify the same, it is my finding that having not stated any reasons for his termination, the respondent is at fault and the resultant termination was unfair within the meaning of sections 43 and 45 of the [*Employment Act*](#).
38. As I conclude on this issue, I am also alive to the fact section 45 (3) of the [*Employment Act*](#), whose import was to bar an employee who had served for less than thirteen months, from bringing a suit for



unfair termination, was declared unconstitutional through the decision in *Samuel G Momanyi vs The Attorney General and another* [2012] eKLR.

39. Therefore, despite serving for less than thirteen months, the claimant had all right to challenge his termination for want of fairness.
40. Having found as such, what reliefs avail to the claimant?

Reliefs

41. As the court has found that the claimant's termination was unfair for want of proof and justification of reasons, he is awarded compensation equivalent to one month's salary. This award has taken into account the period served by the claimant, which was considerably short.
42. The claimant is further awarded leave pay as there was no evidence that proceeded on leave during the two months he was employed by the respondent.

Orders

43. In total sum, judgment is entered in favour of the claimant against the respondent and he is awarded the sum of Kshs 65,000.00.
44. As the claimant had served for two months under his second contract, he had earned 4 days leave upon being prorated. This is noting that he was entitled to 24 leave days per year. This translates to Kshs 4,333.33 and he is entitled to the same.
45. The total award comes to Kshs 69,333.33. Interest shall apply on the total award at court rates from the date of Judgement until payment in full.
46. The claimant shall also have the costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF DECEMBER, 2022.

.....
STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Mideva

For the Respondent Mr. Kenneth Wilson

Court Assistant Abdimalik Hussein

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

