



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 931 OF 2014

MATHIAS AMATA MWALO.....CLAIMANT

VERSUS

KENYA WILDLIFE SERVICE.....RESPONDENT

JUDGMENT

1. Mathias Amata Mwalo instituted this suit in vide a Memorandum of Claim dated 29th May 2014 suing the Kenya Wildlife Service for unlawful, unfair and wrongful termination of employment. He avers that he was employed by the Respondent on 20th December 2011 as Lecturer II at the Respondent's Training Institute, Naivasha (the Institute) with effect from 10th January 2012 at a monthly gross salary of Kshs. 84,400/-. The Claimant averred that he had previously worked for Wildlife Clubs of Kenya for seven years before he resigned on 27th July 2011. He averred that he diligently worked for the Respondent and accomplished his tasks with minimum supervision as can be demonstrated by the letter of recommendation given to him. The Claimant averred that the Respondent however purported to terminate his employment on the ground that it had received an unsatisfactory enquiry report from his previous employer. The Claimant averred that he appealed against the said abrupt termination and the Respondent indicated to him that it was in the process of convening the Disciplinary Appeals Committee which would accord him an opportunity to 'defend' his appeal. The Claimant averred that the Respondent has however failed, refused and/or neglected to invite him for the hearing of his appeal and that the delay in concluding the appeal is inordinate and thus unfair. He further averred that the termination of his employment by the Respondent was unfair and wrongful because:

- i. It was in breach of clause B5 (i) and (ii) of the Respondent's Human Capital Policy and Procedures Manual;
- ii. The Respondent did not disclose to the Claimant the contents of 'the unsatisfactory enquiry report' allegedly made by his previous employer;
- iii. The Claimant was not given an opportunity to respond to the contents of the said 'unsatisfactory enquiry report';
- iv. The Claimant was not afforded an opportunity to make representations before his contract was terminated contrary to clause B5 (ii) of the Manual and the Employment Act;
- v. The alleged 'unsatisfactory enquiry report' was made after the appointment of the Claimant by the Respondent contrary to clause B2 (v) of the Manual;
- vi. The alleged 'unsatisfactory enquiry report' was made by the Claimant's previous employer, an entity that the Claimant had sued over non-payment of service pay and was thus malicious and devoid of objectivity;
- vii. The Respondent ignored the Claimant's exemplary performance in the execution of his duties from the date of his employment as given by his immediate supervisors.

The Claimant thus prays for judgment against the Respondent for:

- a) A declaration that the Respondent's decision to terminate the Claimant's employment was unfair and wrongful.
- b) Reinstatement or 12 months' salary in lieu.
- c) Any other relief that this Honourable Court deems fit to grant in the interest of justice.

d) Costs of the suit

2. The Respondent filed a Memorandum of Reply dated 16th September 2014 averring that the Claimant's contract was lawfully terminated in accordance with the terms and conditions of the offer of employment and the Respondent's Manual. The Respondent averred that the Claimant was still on probation and his contract had not been confirmed and that it is during his probation that the Respondent conducted a background check on him and received copies of correspondence in the Claimant's file with Wildlife Clubs of Kenya. The Respondent averred that it rightfully terminated the Claimant's employment as the same had been secured through deliberate misrepresentation of material facts and/or concealment of material facts by the Claimant in his acceptance of the offer of employment, contrary to express and/or implied term of the Claimant's contract. To be specific, that the Claimant had failed to disclose that during his employment at Wildlife Clubs of Kenya he had on two occasions been warned of his failure to adhere to examination regulations and had further been questioned about his transparency and accountability. The Respondent averred that considering the Claimant's employment as a Lecturer with the Respondent was a position of trust which as per tasks assigned to him would call for accountability of monies entrusted to him, the Claimant's non-disclosure of the same made him unsuitable for the said position. It further averred that it was not obligated to disclose to the Claimant the contents of the enquiry report it received from his previous employer as the same was written in confidence as part of its due diligence on an employee on probation. The Respondent averred that since the Claimant's contract was terminated during the probationary period the provisions of Section 41 of the Employment Act set in and further supersede agreements and/or manuals prepared by parties in disputes. The Respondent contends that the Claimant's letter of resignation to his previous employer was calculated to forestall the said previous employer's Governing Council's deliberations into his continued employment thereat. It prays that the Claimant's Claim against be dismissed with costs. The Respondent also filed a witness statement from its Human Resource Officer, Vincent Makan Samoo who states that the Claimant had only worked for the Respondent for 5 months 16 days and was thus still serving under probationary terms. He states that after the termination of the Claimant's employment, the Respondent paid him 2 months' notice without assigning any reasons. He further questions the purported letter of recommendation produced by the Claimant in his annexure **MAM 6** stating that the same does not emanate from the Respondent and could have been written by the recommender as his friend. The Respondent further submitted that the Respondent only issues a Certificate of Service to its employees.

3. The Claimant and the Respondent's witness testified. The Claimant stated in his examination in chief that the recommendation letter in Court was done by his supervisor and the same was positive and that he cleared with KWS on 6th August 2012. He further stated that an appointment on probation is usually terminated based on unsatisfactory performance and conduct and that the Respondent should have notified him and given him the opportunity to make presentation prior to termination. He testified that the claim by his previous employer was submitted after he had been appointed and that the same was not a material factor to be given at the point of his acceptance. He stated that he seeks to be reinstated as his performance and conduct was satisfactory and he still has a lot to offer the society. The cross-examination and re-examination of the Claimant was conducted before Radido J. on 11th March 2020 where he stated that he also seeks compensation.

4. The Respondent's witness was Vincent Samoo who testified that if they adopt 10th January 2012 as the date the Claimant reported for duty then 6 months would have ended on 9th July 2012 and it therefore lies that the Claimant had not completed the 6 months probation period. He stated in cross-examination that he was giving his evidence based on records and as the Senior Human Capital Officer at the Respondent. He further stated that Section 42 of the Employment Act allows for termination of an employee on probation and that there is also a procedure under the KWS Manual at page 19, Clause (ii) and that Clause (6) (5) (iii) which refers to the people whose performance has been questionable and are on probation. He confirmed that the Respondent followed the procedure in the termination of the Claimant and that the Claimant had not yet gone to the Respondent to be issued with a Certificate of Service.

5. The parties thereafter filed written submissions. The Claimant submitted that none of the documents produced by the Respondent give a negative report on him from his previous employer and that they are simply correspondence between an employee and his employer culminating in his resignation letter which was unconditionally accepted by the said previous employer. That the Respondent terminating his contract on the possible outcome of a disciplinary process that never materialized between his previous employer and the Claimant is unfair and invalid and that his previous employment relationship cannot be used to impute wrongdoing on his part. He submitted that Clause B2 (v) of the Respondent's HR Manual enjoins the Respondent to seek references once a successful candidate has been selected for appointment. That this therefore means that reference could only be obtained before his appointment and as such, there would have been no need for the Respondent to seek his response on the 'negative reference'. He further submitted that the Respondent had no valid reasons to terminate his employment as required of it under Sections 43(1) and 45(2) (a) of the Employment Act. He urges the Court to find that the ground of negative reference from Wildlife Clubs of Kenya is not a valid reason for termination and cited the case of **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR** where the Court held that termination of employment has to pass the fairness test in terms of substantive justification and procedural fairness. The Claimant submitted that the Respondent failed to follow the right procedure before arriving at the decision to terminate his employment as required under Section 41 of the Employment Act and that the decision by the Respondent not to accord him an opportunity to respond to the 'negative report' is contrary to Article 47(1) & (2) of the Constitution on his right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and the right to be given written reasons for the action. As regards the Respondent's assertion that it was not required to hear the Claimant before his termination because he was on probation, as under section 42 of the Act, the Claimant submitted that Sections 3(6) and 26 of the Employment Act provide that the minimum terms and conditions of employment as under the Act to be met by an employer and only apply if the contract terms are not better. The Claimant submitted that the Respondent therefore seeking to apply the terms under the Act as opposed to the employment terms is unheard of. He cited the case of **Kenya University Staff Union & Another v Masinde Muliro University of Science and Technology [2018] eKLR** where the Court held that Section 26 of the Employment Act elevates any contractual term and condition of employment above the statutory conditions. He also relied on the case of **Wells Fargo Limited v Julius Ihomba Gatete [2018] eKLR** where the Court of Appeal affirmed that with regards to Section 26 of the Employment Act, the more favourable terms between an employer's regulations and the Employment Act apply. The Claimant submitted that he should have therefore been served with the negative report and given an opportunity to respond to the same before the Respondent reached a decision to terminate his employment. The Claimant submitted that Clause B5 (ii) of the HR Manual sets out the procedure to be followed by the Respondent before terminating an employee who is still on probation as follows:

“where it is recommended that an employee's probationary period should be extended to accord him the opportunity of improvement in any respect in which his work or conduct has been adversely reported on, or if it is recommended that the employee's appointment should be terminated, the recommendation must not be made until the employee has been notified in writing of such intention and of the right of the employee to make representation thereon.”

6. The Claimant submitted that pursuant to the provisions of clause B5 (ii) of the HR Manual, the Respondent is not entitled to rely on the provisions of Section 42 of the Act because its own HR Manual provides that an employee on probation ought to know the reasons for the intended termination and be afforded an opportunity to make representation on the same. The Claimant submitted that it is further noteworthy that the Respondent amended its HR Manual in December 2014 and did away with the requirement of notifying an employee on probation of the intention to terminate the contract of employment and of the right of such an employee to make representations on the same. The Claimant submits that because the Respondent failed to afford him fair procedure as spelt out under Section 41 of the Act and clause B5 (ii) of the HR Manual, termination of his contract of employment was wrongful, unlawful and unfair. The Claimant submitted that whereas reinstatement may no longer be tenable in view of the duration in which he has remained disengaged from the Respondent, Section 49(1)(c) of the Employment Act as read together with Section 50 grants this Court the discretion to award him compensation for wrongful termination up to twelve (12) months' salary. He relies on the case of **Shankar Saklani v DHL Global Forwarding (K) Limited [2012] eKLR** and the Court of Appeal case of **Kima International School of Theology v Ben Julius Achila [2014] eKLR** where the Court declined to interfere with the trial court's award of 12 months' salary. He further submits that the successful party is entitled to costs.

7. The Respondent's submissions were to the effect that the Claimant ought to have questioned the wording in the Certificate of Service issued to him by his previous employer to establish what further information his former employers would provide. The Respondent submitted that the Claimant provided the said certificate of service during his interview with the Respondent and the Respondent deemed the contents of the same as being correct. It submitted that Section 42(1) of the Employment Act is couched in mandatory terms providing that Section 41 shall not apply where a termination of employment terminates a probationary contract. The Respondent submitted that it is for this reason that all the provisions of the Employment Act requiring notification and hearing before termination are dispensed with in the instant case. It relied on the case of **John Muthomi Mathiu v Mastermind Tobacco (K) Limited [2018] eKLR** where the Court affirmed that Section 42 of the Employment Act makes provision that permits the dismissal of an employee without ascribing reasons. The Respondent submitted that this Honourable Court further observed that an employee on probation cannot anticipate the same safeguards to be available to them like for an employee already confirmed to position. The Respondent further cited the case of **Danish Jalang'o & Christopher Kisia Kivango v Amicabre Travel Services Ltd [2014] eKLR** where the Court held at para 22 that:

“In the case of the 2nd Claimant, he was serving probation. The only obligation imposed on the Employer on termination during probation is stipulated under the contract of employment and Section 42 of the Employment Act 2007. There was no obligation imposed on the Employer under any other law. If Sections 43, 45 of the Employment Act 2007 or Article 41 of the Constitution, required the Respondent to demonstrate substantive justification, this obligation was discharged by the proof of the existence of a valid probationary Clause. It was not even necessary for the Respondent to reveal to the Court, or to the 2nd Claimant that his contract was terminated because he tampered with the Respondent's Vehicles. It was sufficient that the Respondent observed, and weighed the 2nd Claimant's suitability for the job, while on probation, and in exercise of the managerial prerogative, was satisfied his employment should not be confirmed. It was not necessary to issue the 2nd Claimant with the letter to show cause, or hear him at all. He was paid 7 days' wages as notice pay, which was in accordance with the contract and Section 42 of the Employment Act 2007. This was sufficient remedy for his economic injury. The Court cannot ask more of the Respondent. Sections 42 and 45 [3] are laws which reasonably define the contours of the rights and obligations of Employers and Employees. They are not the kinds of laws, which should be removed from our Industrial Justice System, and cast to the swine, or liberally thrown into the mists of antiquity, through Judicial Edicts. The 2nd Claimant is not entitled to 12 months' salary in compensation and 1 month salary in lieu of notice as prayed. Why should the 2nd Claimant be paid compensation the equivalent of 12 months' salary, which is the total salary he would have earned in his 12 month-contract, while he did not even complete his probation of 6 months successfully? Why seek a full month's notice pay, while the contract gave him 7 days' pay which the Respondent offered to the Claimant in the computation of final dues? He was kindly offered pro rata annual leave pay, on top of the notice pay. He should accept what was given by the Respondent. The 2nd Claimant's Claim is dismissed in its entirety.”

8. The Respondent submitted that an employee's incompatibility was a fair reason for termination under Section 45(2)(b) of the Employment Act. The Respondent submitted that the Court in the case of **Danish Jalang'o & Christopher Kisia Kivango v Amicabre Travel Services Ltd (supra)** cited the case of **Dede Esi Annie Amanor-Wilks v Action Aid International [2014] eKLR** where the Court observed that employers are generally entitled to have harmonious working relationships in their Organizations and can do so by weeding out trouble-makers, eccentrics and disruptive employees from their Organization. The Respondent submitted that none of the case law cited by the Claimant deals with probationary terms of contract and are therefore irrelevant to the issues before this Court. It prays that the Court dismisses the case with costs to the Respondent.

9. The Claimant's claim is one that must fail as the long line of judicial precedent and the law demonstrate. The Claimant was dismissed while on probation and the Respondent rightly surmised the rights the Claimant enjoyed were abridged in mandatory terms in Section 42 of the Employment Act which allows for termination of an employee on probation. In the case of **Danish Jalang'o & Christopher Kisia Kivango v Amicabre Travel Services Ltd [2014] eKLR** it was held as follows:-

“In the case of the 2nd Claimant, he was serving probation. The only obligation imposed on the Employer on termination during probation is stipulated under the contract of employment and Section 42 of the Employment Act 2007. There was no obligation imposed on the Employer under any other law. If Sections 43, 45 of the Employment Act 2007 or Article 41 of the Constitution, required the Respondent to demonstrate substantive justification, this obligation was discharged by the proof of the existence of a valid probationary Clause.

The upshot of the forgoing is that Claimant's claim is unmerited and was not proved on a balance of probability and the same is accordingly dismissed albeit with no order as to costs.

It is so ordered.

Dated and delivered at Nairobi this 21st day of April 2021

Nzioki wa Makau

JUDGE