



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

CAUSE NO.8 OF 2020

(Before D.K.N.Marete)

KELVIN GITONGA KINYUA.....CLAIMANT

VERSUS

KENYA METHODIST UNIVERSITY.....RESPONDENT

JUDGMENT

This matter was originated by way of Memorandum of Claim dated 22nd July, 2020. The issues in dispute are therein cited as;

1. *Whether the termination amounts to wrongful termination of employment.*
2. *Whether the Respondent is in breach of the contract of employment.*
3. *Whether the Claimant is entitled to the prayers sought and amounts claimed*
4. *Whether the Claimant is entitled to any other relief.*

The Respondents in a Memorandum of Defence dated 11th September, 2020 denies the claim and prays that the same be dismissed with costs.

The Claimant's case is that he was employed by the Respondent as a Human Resource Officer on 1st April, 2020 and on 9th June, 2020 his services were terminated unprocedurally.

The Claimant's further case that his dismissal was malicious, illegal, unlawful and without due process and procedure. It was unilateral as he was not given an opportunity to be heard.

His further case is that;

- He was employed at a salary and conditions not less favourable than the Employment Act and Regulation of Wages Act.
- That he did his work well.
- He was not offered a right to be heard contrary to rule of natural justice.
- That this is a grave violation of his contract of employment as he was led to resign from his previous employment and terminated on reporting to work.
- That it was expensive and risky to change employment during the Covid 19 pandemic and he went into great challenge to report to work only to be terminated.

The Claimant's further case is a prayer for reinstatement or in the alternative be paid as follows;

- a) *Compensation for costs incurred in relocation as follows;*

i. Hire of motor vehicles – Ksh. 250,000/=

ii. Accommodation expenses - Kshs. 107,000/=

b) Breach of contract

c) Pain and suffering as a result of the unlawful action of the Respondent

d) Any other costs deemed by the court.

He prays as follows;

a) Compensation on costs incurred in relocation – Kshs. 357,000/=

b) Damages for unlawful termination of employment.

c) Costs of this suit

d) Interest on the above and

e) Any other relief.

The Respondent's case is an agreement on the employment and employment particulars of the Claimant.

Her further case is that upon employment the Respondent conducted due diligence on the Claimant's work history by seeking a report from his previous employer – the Technical University of Mombasa.

The Respondent's other case is that she received the report which was adverse. She therefore deemed him untrustworthy and proceeded to terminate his employment.

He was employed on 1st April, 2020 and terminated on 9th June, 2020. The letter of appointment provided for a six month probation period which was applied in the termination.

The Respondent's further case is a reliance on Section 42 of the Employment Act, 2007 which provides thus;

(1) The provisions of section 41 shall not apply where a termination of employment terminates a probation 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'

In conclusion the Respondent submits that the provisions of section 41 of Employment Act, 2007 are not applicable in a situation of probation as is the case here.

The matter came to court variously until 10th December, 2020 when the parties agreed on a determination and disposal by way of written submissions.

The issues for determination therefore are;

1. Whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawful.

2. Whether the claimant is entitled to the relief sought?

3. Who bears the costs of the claim?

The Claimant in his written submission dated 17th December, 2020 narrates and submits his case of unfair termination and relies on the authority of **Mercy Njoki Karingithi versus Emerald Hotels Resorts and Lodges Limited 2001** where the court held that "it cannot be disputed that although serving under probation, an employment relationship between parties have commenced. Immediately on the commencement of the relationship, legal obligations on the side of each of the parties arise....."

The fundamental rights of the employees not to be unfairly terminated and the Claimant in this case, has provided for in Section 45(1) and (2) of the Employment cannot be abrogated during the probation period.

The Respondent in her written submissions dated 3rd February, 2021 reiterates her case and seeks on the authority of **Patrick Korir Rotich versus Unilever Tea Kenya Limited** where this court adopted her position when it held thus;

“the confines of probation are guided and guarded by the law and no one would escape from this. This is because probation period is in law a transition period whereby the employer is allowed time and opportunity to test the suitability of new recruit in employment. Strict adherence to procedure and timelines of probation must be heard to avoid hurting the interest of the parties”

She further seeks to rely on the authority of **Joan Muthomi Mathiu versus Mastermind Tobacco (K) Ltd. 2018 Eklr** the court held thus;

The law is clear cut on the subject of probation. In as much as the legal ingredients of termination of employment would apply, the level of application makes the difference. This is because as provided by section 42 of the Employment Act, 2007 the standard applied on a case of termination during probation are lesser and do not incorporate the provisions of section 41 thereto.

A case of lawful termination of employment of the Claimant therefore arises in the circumstances. The reasons for his termination of employment fitted the circumstances the respondent found herself in. He was found unsuitable for continued employment due to findings on his character. This was communicated to him and termination ensued. I therefore find the matter as such. This answers the 1st issue for determination.

The 2nd issue for determination is whether the Claimant is entitled to the reliefs sought. He is not. Having lost on a case of unlawful termination employment, he becomes disentitled to the reliefs sought.

I am therefore inclined to dismiss the claim with costs to the Respondent

DATED AND DELIVERED AT NYERI THIS 26TH DAY OF JULY, 2021.

D.K.NJAGI MARETE

JUDGE

Appearances

1. Ms Awino instructed by Ombati Otieno Opondo and Awino Advocates for the Claimant.
2. Mr. Kilonzo instructed by the Federation of Kenya Employers for the Respondent.