



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2120 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

GLADYS CHELIMO BII.....CLAIMANT

VERSUS

KENYA POWER AND LIGHTING COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. Vide its Memorandum of Claim dated **4th October 2017**, the Claimant herein avers that the termination of her employment by the Respondent was wrongful, unfair and unlawful.

2. In the claim, the Claimant seeks the following reliefs:

i. A declaration that the termination was wrongful, unfair and unlawful;

ii. As a preference, immediate reinstatement to the position of Deputy Director, without loss of salary, benefits and/or allowances.

iii. That upon reinstatement, the Respondent does issue a letter of confirmation of employment on permanent and pensionable terms which the Respondent has withheld unlawfully from the Claimant since August 2016.

iv. That upon reinstatement the Respondent does grant her a car loan in the sum of Shs. 2,700,000/= to enable her purchase a motor vehicle similar to the one which was repossessed by the Respondent.

v. In the alternative, the Claimant demands a certificate of service as well as compensation from the Respondent for the unlawful termination as set out hereunder;

a. Twelve (12) months' salary being damages for unlawful termination at the rate of Kshs.577,367/= per month.... Kshs.6,928,404

b. Monthly airtime allowance at the rate of Kshs.10,000 per month for 12 months..... Kshs120,000

c. 22 accumulated leave days..... Kshs.274,708

- d. Leave allowance..... Kshs.124,867
- e. Three months in lieu of notice..... Kshs.1,732,101
- f. Pay for the month of December 2016 in respect of mileage..... Kshs.89,264
- g. Salary for 6 days worked in January 2017 Kshs.115,473
- h. Unpaid Electricity allowance for the 11 months
- i. worked for the Respondent (February 2016 – January 2017)..... Kshs.77,000
- j. Reimbursement of all payments made by the Claimant towards the car loan and car insurance as follows:

1. Car loan deductions as from June 2016-December 2016 at the rate of Kshs.57,367 per month Kshs.401,569
2. Car insurance premium paid as from June 2016 – December 2016 at the rate of Kshs.6,771 per month..... Kshs.47,397
3. Car loan payments for the month of January 2017 – April 2017..... Kshs.249,413
4. Car insurance Premium paid from January 2017 to April 2017..... Kshs.27,084

3. The Respondent filed a Statement of Response on 22nd May 2018 where it denies the Claimant's allegations in toto.

Claimant's Case

4. The Claimant avers that by a letter dated **28th January 2016**, she was employed by the Respondent in the position of Deputy Director, Telcom Services in the Respondent's subsidiary company, Kenya Power International Limited. That by the aforesaid letter, the Claimant was notified that she was expected to serve probation for a period of six (6) months and upon completion of the probation period, the Claimant would be confirmed to the position of Deputy Director, Telecom Services, Kenya Power International Limited on permanent and pensionable terms.

5. The Claimant contends that she performed her duties diligently and faithfully throughout the six (6) months' probation period and never received any warning letters or negative appraisals from the Respondent. That upon completion of the probation period, **on 10th August 2016**, she continued performing her duties. That in the absence of any notification to the contrary, it was expected that her terms had been translated to permanent and pensionable. That the expectation was based upon:-

a. Regulation No. 3 of the Respondent's Staff Rules and Regulations which stipulates that the company shall grant a car loan to members of staff who have completed their probation period. That in line with the aforesaid provision, the Respondent granted the Claimant a car loan in the sum of Kshs.2,700,000/= on **6th April 2016** repayable over a period of five years

b. In September 2016, the Respondent started making deductions from the Claimant's salary towards the Retirement Benefit Fund Scheme. That this signified that the Claimant was an employee on permanent and pensionable terms as per the provisions of Clause 10 of the terms and

conditions of employment which were executed by the Claimant on **10th February 2016**. The aforesaid clause stipulates that it is a condition of service that an employee would join the Company's Retirement Benefit Scheme upon completion of the probationary period.

6. The Claimant avers that by a letter dated **4th November 2016**, being a period of three (3) months after the expiry of her probation period, the Claimant's supervisor informed her that her performance had been unsatisfactory since the Claimant joined the Respondent and that it is due to the Claimant's unsatisfactory performance that the Claimant's probation period was extended. The Claimant was notified that she was required to show cause within 72 hours as to why disciplinary action should not be taken against her for the alleged offences stipulated therein.

7. That upon receipt of the aforementioned letter, the Claimant via a letter dated **7th November 2016** responded to the letter dated 4th November 2016 and in her view demonstrated that the grounds set out in that letter were unjustifiable and unlawful. That despite receiving her response, the Respondent did not consider the contents of her letter and on **8th November 2016**, she was issued with an undated letter inviting her for a disciplinary hearing on 11th November 2016. That despite the short notice she attended the disciplinary hearing as scheduled.

8. The Claimant further avers that though the letter inviting her for the disciplinary hearing stipulated that she could have another employee present during the hearing, there was no employee of the Respondent willing to testify before the Respondent's disciplinary committee for fear of victimization and as such her rights to have her witness present during the hearing was made illusory with the result that it was practically a mirage. Further that the disciplinary committee which heard her case was biased since there was no female member who sat in the Committee. That at the disciplinary hearing, the Respondent did not adduce evidence regarding the allegations leveled against her.

9. That upon conclusion of the hearing, the Claimant was provided with the draft minutes of the hearing for her approval but she noted that the minutes as provided did not reflect a true and fair record of what transpired during the hearing. Upon request of the actual minutes, the Respondent availed to the Claimant the minutes which were an improved record of the disciplinary hearing.

10. The Claimant maintains that there was no finding in the disciplinary hearing or at all to the effect that the Claimant's work performance had been assessed by the Respondent and found unsatisfactorily.

11. That as at September 2016, the Claimant was an employee of the Respondent on permanent and pensionable terms and thus the Director of Kenya Power International had no lawful mandate to deal with the Claimant's terms and conditions of employment. That despite the foregoing, the Claimant was issued with a letter dated 11th November 2016, signed by the Director of Kenya Power International purporting to extend her probation period by one month.

12. The Claimant further avers that by a letter dated **7th December 2016**, the Respondent's Acting General Manager, extended her probationary period by a further one (1) month. That by a letter dated **4th January 2017**, the Claimant was notified that her employment had been terminated. That despite being employed on permanent and pensionable terms, the Respondent nonetheless issued the Claimant with a one week termination notice instead of the three months' notice as stipulated at Clause 13 of the Claimant's terms and conditions of employment. The Claimant unsuccessfully appealed against her termination. It's her view that the Respondent did not consider the appeal on its merits since the panel indicated that the Claimant's performance was not satisfactory and yet no assessment had been done on the Claimant's performance. She maintains that the minutes of the appeal hearing do not demonstrate any adverse report regarding her work performance and as such the decision by the Respondent to dismiss her appeal was unjustified, unfair and in total defiance of the law. That despite the foregoing, the Respondent forcefully and without notice repossessed her motor vehicle, and did not make a refund of the money which had been deducted from the Claimant's salary towards repayment of the car loan.

13. In support of its case, the Claimant filed her witness statement dated 4th October 2017, a bundle of

documents as per the Claimant's list of documents that included, inter alia, Respondent's staff regulations, copy of log book, Notice to show cause letter evidence of Mpesa payments of the car loan, appeal and demand letter.

Respondent's Case

14. The Respondent avers that while the Claimant's employment commenced on **10th February, 2016**, the Claimant's confirmation was not automatic or guaranteed but was consequent upon her satisfactory performance during the probation period. Further that the 6 months' probation could be reduced or extended at the sole discretion of the Respondent.

15. The Respondent denies that the Claimant performed her duties diligently or faithfully during the probation period. It puts the Claimant to strict proof of the allegation that she did not receive a negative appraisal from the Respondent regarding her work.

16. The Respondent maintains that the Claimant's performance during the probation period was poor and characterized by –

- a. Failure to bring order and provide a clear direction and leadership on business growth;
- b. Failure to guide her subordinates effectively;
- c. Failure to accomplish tasks within the set timeline;
- d. Failure to demonstrate ownership, take responsibility and create a culture of trust in her department;
- e. Failure to consult her immediate supervisor as required in effective performance of her duties; and
- f. Failure to provide clear guidance and specifications to procurement for the supply, construction and commissioning of Standard Telecoms Stations.

17. The Respondent further avers that its officers including the Claimant's immediate supervisor had numerous discussions with the Claimant regarding poor work performance and stressed the need for improvement but she did not improve. That it evaluated the Claimant's performance during her probation and that due to her poor performance, it extended her probation by 3 months to give her an opportunity to improve.

18. In response to the Claimant's allegation that granting her a car loan implied that she was now under permanent and pensionable terms, the Respondent stats that the car loan it guaranteed to the Claimant on 6th April, 2016 did not amount to a confirmation of her employment because –

- a. The Claimant made a special request for a car loan, in the month of February 2016 barely one month after the commencement of her employment;
- b. By a letter dated 29th February, 2016, the Claimant's immediate supervisor sought special approval for the car loan to enable her effectively carry out her work;
- c. The Claimant's loan application was granted a special approval by the Respondent's Managing Director and the Chief Executive Officer; and
- d. The approval was not granted under the Respondent's staff regulations and procedures as alleged by the Claimant as she was barely 2 months into employment at the time;

19. The Respondent also denies that any of the deductions it made from the Claimant's salary constituted a confirmation of her employment on permanent and Pensionable terms.

20. The Respondent admits that it issued the Claimant with a notice to show cause why she should not be dismissed on account of her poor performance but vehemently denies that the Claimant demonstrated, in her response, that the grounds for disciplinary action against her were unjustified or unlawful. That it considered the response and found it unsatisfactory prompting it to invite the Claimant for a disciplinary hearing on 11th November, 2016. That it consequently handed the Claimant an accurate copy of minutes of disciplinary hearing and being satisfied with the contents, the Claimant signed the minutes. The Respondent maintains that throughout the period in question the Claimant remained on probation and her probation was lawfully extended in accordance with the conditions of her employment. As such the notice period applicable to her under her conditions of employment was 7 days and not 3 months as alleged.

21. On the issue of the car loan, the Respondent avers that the car was obtained through a loan that it guaranteed. By its letter dated 4th January, 2017 and in accordance with its policy on staff loans, the Respondent gave the Claimant 14 days to settle her liabilities. The Claimant's failure to make good her liabilities to the Respondent compelled it to repossess the car.

22. The Respondent denies that the Claimant is entitled to the various reliefs sought and prays that the Claim be dismissed with costs.

Evidence

23. The Claimant testified on 19th December 2019. She adopted her witness statement as evidence in chief. She also produced the documents as per her list of documents.

24. On cross examination the Claimant confirmed that she had worked for the Respondent for around 11 months. That at KPLC, she worked with a team of individuals and that her major role was to offer direction and guidance to her team. She confirmed that Mr Jeremiah Kiplangat was her immediate supervisor.

25. When asked about a certain Mr Wanyala, she confirmed that he worked as a technical engineer. That there were complaints that he had been going to the site without informing her.

26. When put to task on a project which she indicated was to be undertaken by another division, she maintained that as per her email (page 228 of her bundle of documents) the project was to be handled by another division. She could not confirm whether the project was later completed.

27. On the issue of her car loan, she confirmed that on 29th February, while still on probation, she was requested by the director to apply for the loan and use it on her official duties. She also maintained that upon receipt of the Respondent's decision to terminate her employment she immediately appealed it. She agreed that she was taken through all the disciplinary processes but stated. She was never provided with the grounds of the decision to terminate her employment. She stated that she was paying Kshs.57,367 per month for the car. That at the time her contract was terminated, she had not paid even a quarter of the loan as the balance was Kshs.2.3 million out of a loan of Kshs.2.7 million which was paid by the Respondent.

28. The Claimant further stated that she started contributing for pension in June 2016. That she has never received any payment from the pension scheme. She was also not aware whether Mr Kiplangat is still working for the Respondent. She testified that even if he was still there, she can still go back to her position as deputy director. That she did not think that the confusion and harassment she went through should cost her job. That even if she was to lose her job, she was not supposed to be harassed.

29. In re-examination, the Claimant reiterated that she was not the one who initiated the pension deductions. That the grounds in the notice to show cause letter were never supported by any evidence at all. She stated that one of the allegations against her was that she never consulted her supervisor but that

she had proved that she always consulted him. It was her view that even after she appealed, the panel did not reach a conclusion that she was guilty of poor performance. That the only conclusion reached by the panel was that there was a strained relationship between her and her immediate supervisor. That she did not think that there existed anything that would interfere with her performance if she went back to KPLC as there was no evidence that she performed poorly.

30. The Claimant also testified that she did not make allegations of sexual harassment either at the disciplinary stage or in her pleadings before this Court.

31. On its part, the Respondent called Mr Augustine Amboka who adopted his witness statement as his evidence in chief. He testified that the Claimant's performance was assessed and that the outcome was that it was not satisfactory. He stated that the Claimant was terminated in March 2017. Further that the Claimant had worked for the Respondent beyond 6 months but it was his belief that probation had been extended. He also testified that the position previously held by the Claimant no longer existed following a re-organisation of the Respondent in early 2020.

32. On cross examination, Mr. Amboka stated that he has nothing personal against the Claimant. He testified that probation period is 6 months but can be extended or reduced in writing. He was not aware when the Claimant was engaged but agreed that it was at the beginning of 2016 and the 6 months' probation period ended on 10th August 2016. That by then the Respondent had not written to the Claimant to either extend or reduce the probation period.

33. The witness further testified that ordinarily, a car loan is only given to a person on Permanent and pensionable terms except in exceptional circumstances. Further that pension contribution is effected after probation period ends. That as at 10th August 2016, the Claimant had been given a car loan and was also on the pension scheme. He agreed that there was no letter extending the probation period.

34. He confirmed that the letter dated 11th November 2016 was addressed to the Claimant and sought to extend her probation by a month. That it was written by one Jeremiah who is not in charge of Human resources. He confirmed that he attended the first disciplinary hearing and that the Claimant appealed against the decision which appeal was rejected. He stated that he has no problem with the Claimant being reinstated.

Claimant's Submissions

35. The Claimant maintains that the termination of her employment was unjust and illegal. She submits that she was not on probation at the time her employment was terminated by the Respondent. The Claimant reproduced Clause 3 of her terms and conditions of employment which stated;

"Your engagement will be subject to a probationary period of six months but this period may be reduced or extended in writing by not more than three months at the discretion of the company. At any time during the probationary period, your employment may be terminated by one week's notice by either party."

36. The Claimant submits she commenced her employment on 10th February 2016 and performed her duties with the Respondent diligently and faithfully throughout the six (6) months' probation period. That during the probationary period, she did not receive any warning letter or any negative appraisal from the Respondent regarding her work or duties. That upon completion of the probation period on 10th August 2016, the Claimant did not receive communication from the Respondent regarding extension of the probation period. That the Claimant continued performing her duties and in the absence of any notification to the contrary from the Respondent, she deemed it that her contract had been confirmed. The Claimant submitted that by enrolling her into the company retirement benefits' scheme, granting her a car loan and signing an annual performance contract, the Respondent confirmed her status as a permanent and pensionable employee.

37. The Claimant urges this Court to find that upon lapse of the Claimant's probationary period on 10th August 2016 and in the absence of a written communication from the Respondent, the Claimant's terms of employment were translated to permanent and pensionable. The Claimant invites the Court to be guided by the following cases:

i. In the case of *David Namu Kariuki v Commission for the Implementation of the Constitution* [2015] eKLR, where this Court held as follows;

"The law requires an employer to confirm an employee upon satisfactory completion of probation and if for any reason, an employer requires more time to assess the performance of the employee then the right thing to do is to formally extend the probation period for a specific period as provided under Section 42(2) of the Employment Act, 2007. Once the probationary period lapses without any word from the employer, the employee is deemed to be confirmed by effluxion of time."

ii. In the case of *Francis Aboge Oduk v Hasbah Kenya Limited* [2020] eKLR, where this Court held as follows;

"...From the above terms, the Claimant's probationary period was supposed to end in March 2014. However, after the lapse of the period, the Claimant's contract was not terminated and neither was his probation period extended in writing as per contract. Instead, the Claimant continued to work for the Respondent until 1st June 2014 when he was issued with a termination letter, effective immediately. By failing to extend the Claimant's probation or terminate his contract upon expiry of the probation period, he became constructively confirmed as a regular employee after 1st March 2014."

37. On whether the disciplinary process adhered to the tenets of procedural fairness, the Claimant submits that it did not. That the Respondent did not avail to the Claimant either the Adverse Report by the Claimant's Supervisor nor documents which would be relied upon by the Respondent's disciplinary committee in making its decision regarding the allegations raised against the Claimant in the Notice to Show Cause.

38. The Claimant further submits that at the disciplinary hearing, the Claimant's supervisor, Dr. Jeremiah Kiplagat despite being in attendance failed to adduce evidence before the Committee. That as such the Claimant was denied an opportunity to cross examine the aforesaid supervisor in respect to the allegations raised in the Notice to Show Cause. The Claimant submits that the Respondent thus acted in violation of the Claimant's right to fair labour practice and fair administrative action as stipulated under Articles 41(1) and 47(1) of the Constitution.

39. As to whether the Respondent had valid and justifiable grounds to terminate the Claimant's employment, the Claimant submits in the negative. She submits that she had not received communication from the Respondent regarding unsatisfactory work performance as alleged in the Notice to Show Cause or at all. Further that there were no targets against which the Claimant's performance was to be assessed so as to ascertain whether her performance was unsatisfactory or otherwise. The Claimant relies on the case of **Abraham Gumba v Kenya Medical Supplies Authority** [2014] eKLR, where the Court held as follows;

"Poor work performance is an allegation that should be supported by evidence of specific performance targets, appraisal of the performance, with specific results. The Claimant had worked directly for 2 months, for the Respondent. There were no targets set for him in those 2 months which he was shown to have been appraised on, and failed to meet. It was alarming to hear Mutuku say that the e-mails exchanged between the Claimant and Laban constituted performance appraisal. The Court has not found any evidence or material on record to conclude that the Claimant performed his work poorly."

40. The Claimant submits that during trial, she adduced evidence to the effect that during her employment

there was neither an appraisal nor assessment on the Claimant's performance undertaken by the Respondent. That such evidence was not challenged by the Respondent. Further that the Respondent failed to adduce evidence to demonstrate that the Claimant's work performance had been assessed; that the Respondent had identified the areas where the performance was not satisfactory and that reviews had subsequently been conducted to ascertain how the Claimant's work performance had improved or not based on any identified weak areas.

41. On the burden of proof, the Claimant submits that Section 47(5) of the Employment Act provides that "the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer." That at the trial, the Respondent did not tender a Performance Assessment Report. That it failed to prove that the Claimant's work performance was unsatisfactory. Hence, the Respondent had no valid and justifiable grounds to terminate the Claimant's employment. The Claimant's termination was therefore unfair.

42. On whether the Claimant is entitled to the orders sought Counsel submits that having demonstrated that the Respondent had no valid and justifiable reason to terminate the Claimant's employment she is entitled to the said orders. Further that the Claimant has not been able to secure alternative employment since 2017. Counsel thus prays for immediate reinstatement to the position of Deputy Director, Telecom Services or any other capacity of equal grade to the aforesaid position without loss of salary, benefits and/or allowances. The Claimant urges the Court to be guided by the case of **Telkom Kenya Ltd v Paul Ngotwa [2013] eKLR**, where the Court held that in our country, employment opportunities are hard to come by and hence reinstatement is the most efficacious remedy.

43. It is the Claimant's submissions that to the extent that Section 12(3)(vii) of the Employment and Labour Relations Act limits the period within which a Court can issue an order of reinstatement, the same is inconsistent with the Constitution and as a consequence is void pursuant to the provisions of Article 2(4) of the Constitution. That fixing of an inflexible period within which the Court can order reinstatement by the Legislature limits the discretion of the trial Court forcing the Court not to award a deserved remedy. That the provision violates a party's right to fair trial under Article 25(c) of the Constitution.

44. The Claimant further states that she is also entitled to reimbursement of all payments made towards the car loan. That the Respondent declined to allow the Claimant to continue repaying the car loan but instead forcefully repossessed the Claimant's motor vehicle unlawfully in June 2017. The Claimant prays that she be reimbursed for the amount she had paid as prayed.

45. In the alternative the Claimant demands a certificate of service as well as compensation from the Respondent for the unlawful termination in the Shs.10,187,280/= as prayed.

Respondents' Submissions

46. The Respondent through its Counsel submitted that the termination was fair, procedural and above board. Further that the Claimant was at the time of termination of her contract of employment, still on probation. That she requested for the car loan and that the car loan should not be interpreted to mean that her employment had been confirmed as it was granted only two months into her employment. That the fact that she was enrolled into the pension scheme does not equate to a confirmation of employment as the deductions made by the Respondent were regular deductions made from all employee's salaries whether on probation or confirmed employment. That even in the absence of a letter extending her probation after 10th August 2016, the Claimant continued to be on probation for reasons that:

There was no letter informing her of her confirmation;

- a. There are two letters extending her probation on 11th November 2016 and 7th December 2016;
- b. She has through her documents expressly admitted that she was on probation on 4th November

2016 and on 7th November 2016.

c. The Claimant submitted her performance appraisals as a probationary employee on 12th August 2016 (page 117 to 121 of the Claimant's documents).

47. The Respondent submitted that the Claimant was given a fair hearing and that the present claim is an afterthought. That the Claimant waived her right to have a witness during the hearing. Counsel urges the Court to be guided by the case of **Paul Waa Mwaponda v Ola Energy Kenya Limited (Formerly Known as Libya Oil Kenya Limited) [2019]** where the Court found that where in a disciplinary hearing the employee has waived his right to have a fellow employee present and the employer followed the laid down procedure under Section 42, the termination is deemed to be lawful and fair.

48. Counsel submits that in the circumstances, the Respondent did adhere to the requirements of section 41 of the Employment Act. That in any event, the Respondent submits that Section 42 of the Employment Act, 2007 is clear that on a termination of a probationary period, the provisions of section 41 of the Employment Act would not apply. The Respondent only afforded the Claimant a hearing in view of her seniority in the organization and her poor performance.

49. It was Counsel's submission that the Respondent had proved that it had justifiable, valid and reasonable grounds to terminate the Claimant's employment. He relies on the decision in **Danish Jelango & Another v Amicable Travel Services Limited** where the Court held that:

"It is completely illogical to expect the Employer to prove any substantive grounds relating to misconduct, poor performance, physical incapacity, or any of the offences listed under Section 44 [4] of the Employment Act 2007, in terminating contracts of Employees on probation. This is the one contract of employment, where the burden of persuasion, within the confines of the probationary contract, rests with the Employee. And should such an Employee succeed in establishing breach, the remedy is in contractual damages, weighed against the contractual notice period, or in the assessment of the Court, the gravity of the contractual breach."

50. The Respondent submits that the Claimant was terminated while on a probationary contract of employment and is therefore not entitled to the prayers sought. That the general rule as restated by the Court in **Danish Jelango & Another v Amicable Travel Services Limited** is that

"Employment during probation is at will, and protection afforded to regular employees under unfair dismissal laws are not available to employees whose contract are terminated while on probation. "

51. The Respondent submits the Claimant's contract having been terminated during probation and in accordance with the law, she was paid all her dues and there is no more due to her and as such her claim should fail.

52. On the prayer for reinstatement, the Respondent submits that Section 12 of the Employment and Labour Relations Court Act which provides for the jurisdiction of this Court gives this Court jurisdiction to make an order *"for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law."* That the three years statutory period for reinstatement lapsed on 4th January 2020 and the remedy is no longer available to the Claimant pursuant to Section 12(3)(vii) of the Employment and Labour Relations Court Act. That the Court does not have jurisdiction to make the order.

53. In response to the Claimant's submission that Section 12(3)(vii) of the Employment and Labour Relations Court Act is unconstitutional to the extent that it limits her rights under Articles 25 (c), 48 and 50 of the Constitution, the Respondent submits that such a stand is erroneous. That the Court is established under Article 162(2) and (3) of the Constitution. Article 162(3) gives parliament the power to determine the jurisdiction of the Court and Parliament has done so under Section 12 of the Employment and Labour Relations Court Act, a post 2010 statute. The Respondent cites the case of **Martha Wangari**

Karua v IEBC & 3 Others [2019] where the Supreme Court held that:

- a. There is a need to adhere to statutory time frames as any substantive determination by a Court over a matter outside the set time frames would be an exercise in futility.*
- b. Where the timelines have been set, the calendar is not shifted by the conduct of the parties and neither can it be breached by the actions of the Court. The period is cast in stone.*
- c.. Once a timeline has lapsed, the Court no longer has any powers to hear and determine a matter and must down its tools.*

54. Counsel submits that the decision in the case of **DMA v Chase Bank Kenya Limited [2019] eKLR** where the Court ordered a re-engagement of an employee 4 years after termination in bad law and should not be relied on by the Court as the Supreme Court in the Karua case above has dismissed the principles that the Court applied in arriving at that finding, which amounted to a reinstatement contrary to the express provisions of the Act.

55. The Respondent submits that in the event that the Court is persuaded that it should consider the remedy of reinstatement, outside the provisions of statute the Court consider the factors under Section 49(4) of the Employment Act.

56. On the prayer for twelve months salary, the Respondent urges the Court to be guided by the Court of Appeal's decision in **Dalmas B. Ogoye v K.N.T.C. Ltd [1996] eKLR** where the Court held that where an appellant's appointment was lawfully terminated, the only damages they are entitled to in law are the amounts they would have been paid if the employment was brought to an end in the manner stipulated in the contract of service and no more. That since the Claimant was lawfully terminated, other than the claim for terminal benefits she has no more claims against the Respondent. That in the event the Court is convinced that the Claimant's employment had been converted into an open ended contract, the Respondent has still proved that there existed sufficient grounds to terminate her contract and that all her dues were processed and paid out/applied towards her existing liabilities. That the Claimant is not entitled to any compensation. That in the event that the Court is to make an award under this limb, Counsel invites the Court to consider the following decisions where the Court awarded between 1 and 3 months' salary as compensation where the termination was procedurally and substantively unfair unlike this case:

- a. CMC Aviation Limited v Mohammed Noor [2015] eKLR** where the Court of Appeal awarded 1 month's salary as compensation for unfair dismissal.
- b. Dorcas Kemunto Wainaina v IPAS [2018] eKLR** two months salary for unfair redundancy;
- c. Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR**, the Court of Appeal in held: *"that when calculating damages due to an employee in the event of unfair or wrongful termination, it is only the emoluments or gross salary of the employee that should be taken into account not allowances and privileges dependent on actual service and performance of the contract ..."*

57. On the prayer for payment for 22 accumulated leave days and annual leave allowance, the Respondent submits that the accrued leave days were applied towards reducing her loan obligations with the Respondent pursuant to the provisions of section 19 of the Employment Act. That this was in line with the Court's finding in **Anglea Wokabi Muoki v Tribe Hotel Limited [2016] eKLR** where it held that at the end of such employment, the owing liabilities should be offset from the terminal dues at the exit. Further that under her contract, the Claimant was not entitled to leave allowance. That this relief should be declined. As for the prayer for 3 months' salary in lieu of notice, the Respondent submits that the Claimant was on probation and as such she was not entitled to such.

58. On the prayer for reimbursements of all the payments made by the Claimant towards the car loan, the Respondent submits that the Claimant is not entitled to reimbursement of the deductions made on the car

loan having used the car for more than 6 months after her lawful termination. That she could have retained the car if she had cleared the car loan.

59. The Respondent prays that the claim be dismissed with costs.

Determination

60. I have considered the pleadings, evidence, submissions and authorities cited by the parties. The issues for determination are: -

- i. Whether the Claimant was serving on probation at the time of termination.
- ii. Whether the termination of the Claimant was lawful.
- iii. Whether Claimant was entitled to remedies sought.

Whether the Claimant was serving on probation at the time of termination.

61. It is not in dispute that the Claimant commenced her employment with the Respondent on 10th February 2016. Clause 3 of the Claimant's conditions employment *provided that*;

"Your engagement will be subject to a probationary period of six months but this period may be reduced or extended in writing by not more than three months at the discretion of the company. At any time during the probationary period, your employment may be terminated by one week's notice by either party."

62. From above it follows that the Respondent had the discretion of reducing or extending the probation by not more than three months. There was, however, one condition attached to this discretion; the extension or reduction had to be done in writing. It is not in dispute that this condition was never met. The Respondent did not communicate in writing to the Claimant about extension of her probation during the 6 months' probation period.

63. The law governing the probation period is now well established. Under Section 42(2) of Employment Act:-

"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".

64. In **David Namu Kariuki v Commission for the Implementation of the Constitution (2015) eKLR** Ndolo J. observed as follows;

"16. According to the Claimant's letter of appointment dated 30th January 2012, he was to be on probation for a period of three months from the commencement date of his employment being 1st March, 2012. The probationary period would therefore have terminated on 31st May 2012. It follows therefore that by the time the Claimant was dismissed on 6th August 2012, his probationary period had come to an end.

17. The law requires an employer to confirm an employee upon satisfactory completion of probation and if for any reason, an employer requires more time to assess the performance of the employee then the right thing to do is to formally extend the probation period for a specific period as provided under Section 42(2) of the Employment Act, 2007.

*18. Once the probationary period lapses without any word from the employer, the employee is deemed to be confirmed by effluxion of time (see **Jane Wairimu Machira v Mugo Waweru and Associates Cause No. 621 of 2012**). That said, the Court finds that the Claimant was confirmed in*

his appointment upon expiry of the probation period set out in the letter of appointment. This claim is therefore properly before the Court.”

65. In the instant case, the Respondent attempted to extend the Claimant’s probation period on 4th November 2016. That was roughly 9 months since commencement of employment. Unfortunately, this was too late. The horse had already bolted. I therefore agree with the submissions of the Claimant and find that the attempt to extend the Claimant’s probation period on 4th November 2016 fell outside the probation period. I thus find that the Claimant was not on probation at the time of termination of her employment.

Whether the termination of the Claimant was lawful.

66. Section 41 of the Employment Act provides as follows-

1. Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of poor performance ... explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

67. In the case of **Pooroosotum Bheekhoo v Linksoft Group (2015) eKLR**, Mbaru J. held that:-

“...in the event an employee is of poor performance, and this is alleged by the employer, the duty is upon such an employer to prove such poor record of performance. It is not just enough to cite poor performance.”

68. In **Fredrick Odongo Owegi v CFC Life Assurance Limited [2014] eKLR** it was held that:-

“Where the question regard to an employee performance, an employer must demonstrate that the employee was aware of the applicable standards of performance, efforts were in place to support such an employee and time was given to allow such an employee to make improvements with constant reviews. It is not just enough to say that any employee is of poor performance. There must be a demonstration that the employer did more in this regard to bring such a non-performing employee to the statue required by an employer.

69. In the case of **Jane Samba Mukala v Ol Tukai Lodge Limited [2013] eKLR** the Court held that:-

“This is important to note as where poor performance is shown to be a reason for termination, the employer is placed at a high level of proof as outlined under section 8 of the Employment Act to show that in arriving at this decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance. Section 5 (8)(c) further outlines the policy and practice guidelines that include having a performance evaluation system that can be used by an employer in ensuring their employees get a fair chance when they are of poor performance.

Therefore it is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further what measures they have taken to address poor performance once the policy or evaluation system has been applied. It will not suffice to just say that one has been terminated for poor performance. The effort leading to this decision must be demonstrated. Otherwise, it would be an easy option for abuse.”

70. In the instant case, the Respondent has not produced any proof of performance appraisal or poor performance that demonstrates the Claimant never met the set targets. As stated in the cases referred to above the Respondent is expected to demonstrate what it portrays as poor performance and this can only be tested by a demonstration of what was expected of the Claimant and what she actually achieved. The only grounds advanced by the Respondent was that she had bad attitude towards her supervisor and that she did not relate well with her juniors. The scores of her performance was never produced in Court. The onus of proving poor performance lies upon the Respondent. In this case, the Respondent failed to prove the same. In the circumstances, I find the termination of the Claimant was premised on invalid reasons and was therefore unfair.

Whether Claimant was entitled to remedies sought

71. The Claimant's major prayer is reinstatement. It is now trite that Courts should only resort to this remedy in exceptional circumstances. This is so because an order of reinstatement is an order of specific performance which Courts must refrain from granting except in exceptional circumstances. The basis for exercising the discretion to grant this remedy is provided for in section 49 of the Employment Act. In the case of **Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike [2017] eKLR** this Court had this to say:-

"Reinstatement is provided for under Section 49(3)(a) of the Employment Act as one of the remedies that a Court, by virtue of Section 50, shall be guided by. It is couched in Mandatory terms and requires the Court to take into account ANY OF THE FOLLOWING MATTERS set out in Section 49(4)(a) to (m) before it can order reinstatement;

- a. The wishes of the employee;*
- b. The circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and*
- c. The practicability of recommending reinstatement or re-engagement;*
- d. The common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;*
- e. The employee's length of service with the employer;*
- f. The reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;*
- g. The opportunities available to the employee for securing comparable or suitable employment with another employer;*
- h. The value of any severance payable by law;*
- i. The right to press claims or any unpaid wages, expenses or other claims owing to the employee;*
- j. Any expenses reasonably incurred by the employee as a consequence of the termination;*
- k. Any conduct of the employee which to any extent caused or contributed to the termination;*
- n. Any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and*
- m. Any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee."*

72. The circumstances of the instant case confirm that the Claimant's employment was terminated for no valid reasons. The Claimant cannot be faulted for the termination. The other condition that this Court must consider before making a reinstatement order is the practicability of recommending reinstatement or re-engagement. In the instant case, the Respondent has already stated that the position previously held by the Claimant no longer exists following the Respondent's reorganization in the year 2020. It is also evident from the evidence on record that there is bad blood between the Claimant and her immediate Supervisor. Owing to the seniority of the Claimant's position as Deputy Director, it would be expected that if she were to be reinstated she would be forced to work under the same Supervisor. This would not be conducive to a productive working environment for either the Claimant or her Supervisor. The Claimant only worked for the Respondent for 11 months which further militates against granting an order for reinstatement.

73. Having already found that the above factors militate against granting the order for reinstatement, this Court shall not deal with the parties' submissions on whether Section 12(3)(vii) of the Employment and Labour Relations Court Act which limits the period within which the Court can order reinstatement is unconstitutional to the extent that it limits the Claimant's rights under Articles 25(c), 48 and 50 of the Constitution. This is further because a declaration of unconstitutionality of Section 12(3)(vii) was not specifically prayed for.

74. The prayer for a certificate of service succeeds.

75. For unlawful termination, having considered that the Claimant worked for the Respondent for 11 months and having considered the submissions by both parties, this Court awards the Claimant two months' salary as compensation at the rate of Kshs.577,367/= per month, that is **Kshs.1,154,734**.

76. The prayer for monthly airtime allowance fails as it is this Courts view that such airtime was to be used for official purposes only. The same fate befalls the prayer for unpaid Electricity allowance

77. On the prayer for the 22 accumulated leave days, the Respondent maintained that the same was used to offset the Claimant's liabilities. The Respondent however, fails to demonstrate how much the Claimant owed her vis a vis the amount deducted. Such an omission, in my view was fatal and as such the prayer succeeds with the Claimant being awarded **Kshs.274,708**.

78. The prayer for leave allowance also succeeds and is awarded at **Kshs.124,867**.

79. For the prayer for three months in lieu of notice, the Respondent submitted that the Claimant did not qualify since she was still on probation. This Court has already found that the Claimant's probationary contract had already lapsed and the Claimant was confirmed by operation of the law. The Claimant's prayer therefore succeeds and the Claimant is awarded pay in lieu of 3 months' notice at **Kshs.1,732,101**.

80. The prayer for pay for the month of December 2016 in respect of mileage and salary for 6 days worked in January 2017 failed after the Respondent proved that the same was paid to the Claimant.

81. On the prayer for Reimbursement of all payments made by the Claimant towards the car loan and car insurance the Court takes note of the evidence adduced by the parties. It is not in dispute that the Respondent paid 2.3 Million out of 2.7 million. The Claimant has not proved that she made an offer to pay the balance. As such the prayer fails. The money paid towards obtaining insurance for the car cannot be reimbursed as it had already been utilized by the Claimant who stayed with the car for six months post termination. Further, the Claimant did not ask for accounts to be taken to ascertain if any money was due to her on account of payments she made towards the car loan. The prayer thus fails and is accordingly declined.

82. In conclusion, the Court makes the following orders:

i. A declaration be and is hereby made that the termination of the Claimant's employment by

the Respondent was wrongful, unfair and unlawful;

ii. The Claimant is awarded three (3) months' salary in lieu of notice in the sum of Kshs.1,732,101/=.

iii. The Claimant is awarded the 22 accumulated leave days as prayed in the sum of Kshs.274,708/=.

iv. The Claimant is awarded leave allowance as prayed in the sum of Kshs.124,867/=

v. This Court awards the Claimant two (2) months' salary as compensation in the sum of Kshs.1,154,734/=.

The total award is Kshs.3,286,410/=

vi. The Respondent is directed to issue the Claimant with a Certificate of Service forthwith.

vii. Court awards costs to the Claimant together with interest at Court rates from date of judgment till payment in full.

83. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF AUGUST 2021

MAUREEN ONYANGO

JUDGE

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 has 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.

MAUREEN ONYANGO

JUDGE