



THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 2110 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

AYSHA HAFSA MUSA.....CLAIMANT

VERSUS

COMPUTER REVOLUTION LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent as an Enterprise Account Manager effective 1st February, 2015. She remained in the employment of the Respondent until 15th October, 2015 when her employment was terminated by the Respondent vide a letter dated 8th October, 2015.

2. Aggrieved by the termination, the Claimant filed the present suit on 1st December, 2015, by way of a Statement of Claim dated 24th November, 2015. Therein, she alleges that the termination of her employment was unfair and unlawful. She prays for Judgment against the Respondent as follows:

i. A declaration that the Claimant's dismissal from her employment was unfair and unlawful;

ii. The Claimant be paid her terminal benefits as set out in paragraph 7 being:

a. One month's salary in lieu of notice – Kshs.162,800/-;

b. Day worked in the month of October, 2015 – Kshs.81,400/-;

c. 12 months' compensation for unfair termination-Kshs.1,953,600/-;

d. Certificate of Service.

iii. The Respondent pays the costs of the claim.

iv. The Respondent be ordered to compensate the Claimant for wrongful dismissal at the equivalent of twelve (12) months' gross salary.

v. This Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.

vi. Interest on (ii) and (iii) above at Court rates.

vii. The Respondent be ordered to issue the Claimant with a Certificate of Service as required by the provisions of Section 51 of the Employment Act.

3. On 11th March, 2016, the Respondent filed a Memorandum of Response dated 26th February, 2016. The Respondent avers that the Claimant was still under probation at the time of her termination. The Respondent avers that the Claimant's employment was terminated on account of poor performance and absconding duty and the termination was in accordance with her probationary contract. The Respondent thus sought the dismissal of the suit with costs.

4. The Claimant filed a Reply to the Respondents' Statement of Response dated 25th November, 2016 together with a Further List of Documents of the same date. On 16th April, 2019, the Respondent filed a Supplementary List of Documents dated 15th April, 2019.

5. The Claimant's case was heard on 20th November, 2019 where the Claimant testified in support of her case. The Respondent's case was heard on 16th February, 2021 when the Respondent's witness, Fresiah Wambui Githua (RW1) testified.

6. Pursuant to the Court's directions issued on 16th February, 2021, the parties filed and exchanged written submissions. The Plaintiff's written submissions are dated 7th April, 2021 and the Respondents are dated 19th May 2021.

Analysis and Determination

7. I have considered the respective pleadings filed by the parties, the testimonies and evidence produced by their witnesses as well as the submissions and identified the following as the issues for this Court's determination: -

(1) *Whether the Claimant was under probation at the time of her dismissal?*

(2) *Whether the dismissal of the Claimant was unfair and unlawful?*

(3) *Whether the Claimant is entitled to grant of the Orders sought?*

8. On the issue whether the Claimant was under probation at the time of her dismissal, the Claimant testified that she was to serve a three-month probationary period with an option for extension to six months. She testified that at the end of the three-month probationary period, she never received communication that her probation was extended.

9. Further, the Claimant testified that she performed her duties with the honest belief and the legitimate expectation that her employment had been confirmed after the first three months of probation. She was therefore surprised when she received the Notice of Termination dated 8th October, 2015 that terminated her contract with effect from 15th October, 2015.

10. It was the Claimant's submission that there was no evidence

submitted by the Respondent to show that her probationary engagement was extended. The Claimant in support of her submissions, invoked the provisions of Section 74 of the Employment Act in submitting that it was the duty and responsibility of an employer such as the Respondent to keep accurate records.

11. The Claimant relied on the case of **Jane Samba Mukala v OI Tukai Lodge Limited [2013] eKLR** and **Martin Ileri Njenga v Olerai Management Company Limited [2017] eKLR** where the Courts held that it is the responsibility of the employer to keep records.

12. The Respondent on the other hand pleaded and submitted that the Claimant's probationary period was extended to six months. It was RW1's testimony that she held a meeting with the Claimant and the Respondent's CEO at the end of three months following the Claimant's employment where it was mutually agreed that the Claimant's probation would be extended to enable her meet her targets.

13. It was the Respondent's submission that at paragraph 3 of the Claimant's Reply to the Response to the Statement of Claim, the Claimant admitted that she was on 6 months' probation when she pleaded that "*she successfully completed her probation period for six (6) months*". The Respondent submitted that the same is reiterated in the Claimant's Witness Statement at paragraph 7. It is thus the Respondent's contention that both parties agree that the probation period was for 6 months.

14. The Respondent further made reference to on the minutes of a meeting dated 26th August, 2015 which is indicated to be minutes for a performance review meeting attended by the Claimant on that date. The Respondent also produced an email dated 19th August, 2015 which attached an end of probation questionnaire which the Claimant confirmed in her testimony she sent.

15. Further, the Respondent submitted that the six-month period had not lapsed because the Claimant was away sick for two months in the month of July and August 2015. It was the Respondent's submission that in its view, the probationary period stopped running when the Claimant was away and resumed when the Claimant returned to work.

16. It is not in dispute that the Claimant was under a probationary contract for a period of three months from her effective date of employment on 1st February, 2015. The Respondent was at liberty to extend the probation for a further three months which would be an aggregate of six months. The Respondent has however not brought before this Court any written communication of the extension of the Claimant's probation.

17. The provisions of Section 10 and 13 of the Employment Act are abundantly clear in that the terms of an employee's contract and any changes thereto must be in writing and must be with the consent of the employee. The Respondent has not provided any written communication of the extension of the Claimant's probation before this Court.

18. As such, in the absence of any written communication in this regard, the Claimant's probation contract is deemed to have ended as at 30th April, 2015. It was not enough for the Respondent to claim the Claimant verbally agreed to an extension of her probation during a meeting whose date is undisclosed either in the pleadings or in the evidence adduced in Court.

19. In the case of **Lucy Wangui Wanyika v Nam Consult Limited [2016] eKLR, Abuodha J. held as follows:**

“It is a conventional practice in contractual relationships that where parties conduct their dealings in writing, the same mode of interaction should so far as possible be retained for avoidance of confusion. The Claimant herein was appointed in writing hence it was only reasonable that any issue concerning her contract which had the possible effect of modifying or bringing to close the contractual relationship be done in the same manner. It is curious that whereas the respondent claimed that the extension of the probation period and communication over non- performance of the Claimant was verbal ... in the circumstances, the Court finds that it was unreasonable to let the Claimant continue working beyond her initial probation period without clear and documented communication over the reasons for extension of the probation period and for how long the extension would be.”

20. I agree with the finding above by Abuodha J. and that of **Mbaru J.** in the case of **Lear Shighadi Sinoya v Autech Systems Limited** as cited by the Claimant in her submissions. In that case Mbaru J. held that the probation period can only be extended by mutual agreement and that without extension, the employee’s services are deemed confirmed by operation of the law. Indeed, the duty is upon the employer to advise the employee when the probation period has lapsed. Where an employer allows the same to pass without any action, the employee stands confirmed. Section 42(2) is clear that the extension of a probationary contract is to be made *“with the agreement of the employee”*. In this case there is no agreement of the employee or a letter notifying the employee of the extension of the probationary period. I find that the Claimant was not on probation at the time of termination of her employment.

21. Having found that the Claimant was not under probation at the time of her termination, I will now proceed to consider whether the termination was unlawful and unfair.

22. The Respondent issued the Claimant with a Notice of Termination dated 8th October, 2015. The said Notice cites

the grounds of termination as: -

(1) Consistent non-performance on targets set.

(2) No clear pipeline or proof of delivery on pipeline; and

(3) Non-committal working.

23. The letter alludes to several warnings that had been issued to the Claimant with respect to the said grounds. RW1 testified that they held a meeting with the Claimant three months after her employment when they extended her probation. As stated previously, the date of the meeting was not disclosed. Further, RW1 testified that meetings with respect to her performance were held on 26th August, 2015 and 14th September, 2015, the minutes of which were produced in the Respondent’s bundle.

24. RW1 testified that in a meeting held on 6th August, 2015, the Claimant’s performance was reviewed and the Respondent found that the Claimant had still underperformed and that she was also culpable for presenting erroneous figures on her sales pipeline report for deals she was working on. It was RW1’s testimony that following the said review meeting, the Claimant made a request for her salary to be reduced and that she be granted an opportunity to redeem herself.

25. It was RW1’s further testimony that the Claimant severally failed to report to work without permission and/or justification and that the Respondent consequently issued the Claimant with a Notice to Show Cause in the form of an email issued to the Claimant on 9th September, 2015.

26. The Claimant denied in her testimony and submissions that she was ever cited for non-performance or agreed to the reduction of her salary. She testified that the decision to reduce her salary was unilaterally made by the Respondent. She denied receiving the Notice to Show Cause or attending a meeting on 14th September, 2015. Further, the Claimant denied having ever been absent from work without permission.

27. **Section 41** of the Employment Act provides for the procedure for termination of employment as follows: -

41. Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity 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.

28. Further **Section 43** provides for proof of reasons as follows: -

43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

29. Further, **Section 45(2)** provides that termination of employment is unfair if the employer fails to prove that the termination of employment was for valid reasons and that the employer complied with the requirements for fair procedure.

30. The Notice of Termination cites grounds based on poor performance. The Notice to Show cause sent in the email dated 9th September, 2015, clearly states that the same is related to allegations of the Claimant absconding duty. The Notice of Termination issued to the Claimant did not cite absconding of duty or absenteeism as part of the grounds of the termination.

31. There was no evidence placed before me that the Claimant was afforded an opportunity to respond to the allegations of poor performance as alleged by the Respondent. There is no evidence that the Claimant was informed in advance of a disciplinary hearing or supplied with the charges laid against her. There was in fact no disciplinary hearing at all.

32. The Claimant was thus not afforded a fair hearing or opportunity to be heard as envisioned in **Section 41** of the Employment Act. I therefore find that the Claimant's termination was unfair.

Reliefs Sought

33. Having found that the termination of the Claimant's employment was unfair, I now proceed to consider the reliefs sought in the statement of claim under the respective heads of claims;

(i) Payment in lieu of notice

34. Having found that the Claimant was not under probation at the time of her dismissal, the Claimant was entitled to not less than one month's notice or payment in lieu of notice. Empowered by Section 49(1) of the Employment Act, I accordingly award the Claimant the sum of **KES 162,800.00** being one month's salary in lieu of notice.

(ii) Days Worked in the Month of October 2015

35. The Claimant prays for payment of the sum of KES 81,400 worked in the month of October 2015. The last day of working based on the Notice of Termination was 15th October, 2015 which amounts to 15 days.

36. The appropriate formula for the calculation of days worked is the salary divided by days worked in a month. A working month is 26 days, taking into account 4 rest days a month thus $162,800 \div 26 \times 15$. The payable salary would thus have been KES 93,923. However, parties are bound by their pleadings and it is not for this Court to award that which the Claimant has not prayed for. I thus award the sum of **KES 81,400.00** for days worked as pleaded by the Claimant.

(iii) Compensation

37. Having found that the Claimant was unfairly terminated, she is entitled to compensation. I have taken into account the circumstances under which the Claimant's employment was terminated and the factors set out in **Section 49(4)** of the Act. I have considered that the Claimant worked for a period of about 8 months and the unfair manner in which her summary dismissal was undertaken. In my opinion, compensation equivalent to 2 months' salary amounting to **KES 325,600.00** would be reasonable in the circumstance. I accordingly award the Claimant the same.

(iv) Certificate of Service

38. The Claimant has prayed for issuance of a Certificate of Service. It is apparent that the Certificate of Service prepared by the Respondent as produced in the Respondent's documents makes reference to a "*Reuben*" in the last paragraph of the Certificate which appears to be a typographical error.

39. I thus order that the Respondent issue the Claimant with a Certificate of Service with correct particulars pursuant to Section 51 of the Employment Act.

Conclusion

40. In conclusion judgment is entered in favour of the Claimant against the Respondent as follows: -

i) Payment in lieu of notice KES 162,800.00

ii) Payment of accrued salary KES 81,400.00

iii) 2 months' salary as compensation KES 325,600.00

Less amount paid (KES 57,588.00)

Total Award KES 512,212.00

iv) The Respondent shall issue the Claimant with a Certificate of Service forthwith.

v) The Respondent shall pay the Claimant's costs of this suit.

vi) The decretal sum shall attract interest at court rates from date of judgment until payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH 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