



**Mwaniki v Judicial Service Commission (Cause 1387 of 2017)
[2021] KEELRC 913 (KLR) (30 September 2021) (Judgment)**

Rose Wanjiru Mwaniki v Judicial Service Commission [2021] eKLR

Neutral citation: [2021] KEELRC 913 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1387 OF 2017
CN BAARI, J
SEPTEMBER 30, 2021**

BETWEEN

ROSE WANJIRU MWANIKI CLAIMANT

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

JUDGMENT

1. The Claimant filed this suit vide a statement of claim dated 18th July, 2017, through Rhoda N. Maina Advocate of Kituo Cha Sheria.
2. Her case is that she applied for the position of clerical officer/interpreter advertised by the Respondent.
3. It was her further case that she was shortlisted, appointed and received a posting to Nyeri Law courts, upon successfully going through an interview process mounted by the Respondent.
4. The Claimant further states that the monthly salary attached to this position was Kshs. 60,000/=.
5. It is her case that she collected her appointment letter and signed the same indicating her acceptance of the offer of employment and further proceeded to resign from the job she held prior to this appointment, which resignation was swiftly accepted by her former employer.
6. It is the Claimant's case that she moved to Nyeri with the intention of commencing her employment.
7. She further states that upon reporting, she was issued with a letter confirming that she had reported to her station with instructions to deliver the same to the Respondent's Human Resource department based at the Supreme Court building to signify her reporting.
8. It is her case that she did deliver the letter as instructed on the 22nd of November, 2017, and that the same was received and no issues were raised at the time concerning her appointment and posting.



9. The Claimant further states that on the 25th of November, 2017, she received a call from the Respondent demanding that she returns both her letter of appointment and that of posting to the Respondent's Human Resources offices.
10. The Claimant states that on the 28th of November, 2017, she went to the Respondent's offices and met her caller, an officer named Iddah, who sent her to see yet another officer by the name Lorna, who was said to be in charge of recruitment.
11. It is the Claimant's case that the said Lorna took both her letter of appointment and that of posting and asked her to apply for another position once the Respondent puts out another advertisement and promised that she will be considered.
12. The Claimant states that she made a complaint to the Respondent on the turn of events and that the Respondent's response, was that she did not qualify for the position of clerical officer to which she had been appointed.
13. It is her case that the conduct of issuing her with an appointment letter and subsequently being asked to return the same amounted to breach of contract that caused her mental anguish, financial embarrassment and emotional trauma.
14. The Claimant's prayers to the court are that she be paid Kshs. 25, 920,000 as salary she would have earned had she worked for the Respondent to retirement age as she was only 30 years old at the time.
15. She also prays that she is awarded costs of the suit, interest and any other relief the court may deem just in the circumstances
16. The Respondent filed a memorandum of response dated 29th September, 2017, and filed in court on the 2nd of October, 2017.
17. The Respondent admitted that indeed the Claimant applied and was appointed to the position of clerical officer advertised by it.
18. The Respondent further states that the reason the Claimant's appointment was revoked was because she did not meet the requirement set for the position under the Judiciary Human Resources Manual of 2014.
19. It is the Respondent's assertion that the Claimant had a mean grade of D+ and not C- in her Kenya Certificate of Secondary Education, which was the qualifying grade for the position of clerical officer and therefore she did not qualify for the impugned appointment.
20. It was the Respondent's prayer that the Claimant was not entitled to the reliefs sought and asked the court to dismiss the suit with costs
21. The Claimant testified in support of her case.
22. The Respondent called one Mr. Peter Bunde, its Assistant Director for Human Resource to testify on its behalf.
23. Both parties filed submissions in the matter.

The Claimant's Submissions

24. It was submitted for the Claimant that she was an employee of the Respondent pursuant to Clause B.12 of the Respondent's Human Resource Manual, by dint of the letter of appointment issued to



her by the Respondent. The Claimant sought to rely on the case of Fidelix Mwendwa Muli v Bamburi Cement Limited (2018) eKLR to buttress this position.

25. It is submitted for the Claimant that she was neither given notice nor an opportunity to make representation before her appointment was revoked. She further submits that the only formal information she got in regard to the revocation of her appointment was after she had written to complain upon being asked to return her letters of appointment and posting.
26. It is further submitted for the Claimant that the withdrawal of her appointment and posting letters, amounts to an unfair labour practice contrary to the dictates of Article 41 of the Constitution.
27. It is further submitted, that by virtue of Sections 2, 9 and 10 of the Employment Act, 2007, the Respondent was bound to observe the law on fair termination under Section 45 of the Employment Act.
28. It is further submitted that failure by the Respondent to adhere to fair procedure in terminating the services of the Claimant entitles the Claimant to the reliefs sought.

The Respondent's Submissions.

29. It is submitted for the Respondent that there did not exist an employment relationship between the Claimant and the Respondent on account of misrepresentation on the part of the Claimant, making the contract between them void ab initio. The Respondent sought to rely on the case of First City Capital Ltd v B. C. Building Corp (1989) CanLII 2868 to support this position.
30. It is submitted for the Respondent that for reason that the contract between the parties was repudiated, the Claimant cannot be entitled to the reliefs sought under a void contract. It relies on the case of Kenya Broadcasting Corporation v Geoffrey Wakio (2019) eKLR
31. The respondent submits that for reason that the Claimant was on probation at the time of her termination, she was only entitled to a 7 days' notice in accordance with Section 42(4) of the Employment Act, 2007.
32. It is submitted that the Claimant's claim for payment for the 36 years she would have worked with the respondent had she not been terminated, is untenable and contrary to the provisions of Section 49(1) (c) of the Employment Act.

Analysis and Determination

33. The basis of the Claimant's claim, is breach of contract.
34. It was argued for the Claimant, that the letter of appointment, coupled with the Claimant's acceptance created a contract between the Claimant and the Respondent.
35. It is her case that for reason of having been issued with an appointment letter and a letter of posting and the subsequently withdrawal of the same amounted to breach of contract.
36. It was further argued for the Claimant that the demand to hand back her appointment letter to the Respondent was contrary to her expectation that she would work for the Respondent until retirement and further, that the said action of the Respondent affected her both financially and emotional as she had resigned from her previous employment arising from the appointment by the Respondent.
37. The Claimant in her testimony before court admitted knowing that she did not qualify for the position of clerical officer and was according to her, only trying her luck or what she called "taking advantage of mass recruitment".



38. She however denied cheating the system but admitted being aware that her confirmation was dependent on the completion of her 6 months' probation period.
39. It was urged for the Claimant that the recruitment went through a number of committees and an interview panels, which had access to her academic documents and which should have known before appointment that she did not qualify for appointment, but nonetheless went ahead to appoint her.
40. The Respondent on their part acknowledged that the Claimant's appointment was an oversight but which they claim was due to the high number of positions being filled at the time.
41. The Respondent's witness could not explain how the interview panel was unable to detect that the Claimant was not qualified for the position at the time of the interview when they had her academic certificates.
42. It was the Respondent's position that the Claimant's appointment was probationary and that her confirmation depended on various factors including verification of her academic certificates, which verification, revealed that she was not qualified for the position she was appointed to and hence the revocation of the appointment.

Issues for Determination

43. The court identified the following as issues for determination in the matter:
 - i. Whether there was a contract of service between the Claimant and the Respondent;
 - ii. Whether the contract of service if found to have existed, was fairly and procedurally terminated; and
 - iii. Whether the Claimant is deserving of the reliefs sought

Whether there was a contract of service between the Claimant and the Respondent

44. The evidence before court is that the Claimant was appointed to the position of clerical officer and that the Claimant accepted the said appointment leading to her eventual posting.
45. For this singular reason, the court finds and holds that by virtue of the letter of appointment issued to the Claimant by the Respondent, and the subsequent acceptance of the offer of appointment by the Claimant, a contract of service existed between the parties herein.

Whether the contract of service if found to have existed, was fairly and procedurally terminated

46. Having found that indeed a contract of employment existed between the Claimant and the Respondent, the next question the court will pose, is whether the contract was fairly and procedurally terminated.
47. The letter of appointment issued to the Claimant indicated that she was to be on probation for a period of six months, after which her employment with the Respondent would be confirmed.
48. The Employment Act, 2007 defines an employee to mean "a person employed for a wage or a salary and includes an apprentice and indentured learner".
49. If the employment Act recognizes an apprentice and an indentured learner as an employee, how much more for a holder of a letter of appointment? The court finds that the Claimant herein was an employee of the Respondent, and was entitled to the rights enshrined in both the Constitution and the Employment Act, 2007.



50. Further, although Section 42(1) of the Employment Act, 2007 limits the application of Section 41 of the Act to employees on probation, I follow the holding of Hon. Ndolo J in the case of *Evans Kiage Onchwari V Hotel Ambassadeur Nairobi* [2016] eKLR, where she observed as follows:

“Article 41 of the Constitution guarantees employment and Labour rights for all. To my mind these rights may only be limited to the extent that is permitted under Article 24 of the constitution. To limit enjoyment of a right by the mere reason of the length of service does not in my view meet the threshold of Article 24. To this extent I agree with the holding of Lenaola J in *Samwel G. Momanyi v The Attorney General & Another* that Section 45 (3) of the Employment Act is unconstitutional. I venture to add that Section 42(1) would also be unconstitutional. I say so because even assuming that an employee is found unsuitable within the probation period, the rights secured under Article 41 must still be respected.”

51. There is no doubt in my mind that probation period notwithstanding, the Claimant was an employee of the Respondent and was entitled to procedural fairness in the manner in which her employment is terminated. In the case of *Mercy Njoki Karingithi v Emerald Hotels Resorts & Lodges Ltd* [2014] eKLR the court held that the fundamental rights of an employee not to be unfairly terminated as provided for in Section 45(1) and (2) of the Employment Act, cannot be abrogated during the probation period.

52. In the case of *Monica Munira Kibuchi & 6 others v Mount Kenya University & another* [2017] eKLR, the court found Section 42(1) of the Employment Act to be unconstitutional in so far as it excludes an employee holding a probationary contract from the provisions of Section 41 of the Employment Act, contrary to Articles 41 and 47 of the Constitution.

53. Following the aforementioned provisions of the law and judicial precedent, I find and hold that the termination of the Claimant though justified, was unfair for failure to adhere to procedural fairness stipulated both in the Constitution and the Employment Act, 2007.

Whether the Claimant is deserving of the reliefs sought

54. The Claimant’s prayers to the court are that she be paid Kshs. 25, 920,000 as salary she would have earned had she worked for the Respondent to retirement age as she was only 30 years old at the time.

55. The remedies available for unfair termination under Section 49 of the Employment Act, 2007, do not include compensation for the term an employee would have served had she/he not been terminated as working to retirement is not guaranteed. Moreover, the Claimant was well aware from the time of putting in her application, that she was not qualified for the job and for this reason, the termination in the court’s opinion did not come to her as a surprise.

56. The court finds and holds that the Respondent had valid reasons for terminating the Claimant but having failed to comply with the law on procedural fairness in the termination process, entitles the Claimant to compensation.

57. In making an award for compensation, the court is guided by the provisions of Section 49 of the Employment Act, 2007, In the case of *Alphonse Maghanga Mwachanya v Operation 680 Limited* [2013] eKLR the Court held that in determining whether to make an award of compensation, the court is to consider the 13 factors set out under section 49 (4) of the Employment Act, and being so guided, the Claimant herein is awarded an equivalent of five (5) months’ salary in compensation for unfair termination.

58. It is trite law that costs shall follow the event. The Claimant is awarded costs of the suit.



59. In conclusion, Judgment is entered for the Claimant against the Respondent in the following terms:
- i. A declaration that the termination of the Claimant was unprocedural and unfair
 - ii. The Respondent to pay the Claimant 5 months' salary equivalent in compensation for unfair termination at Kshs. 300,000
 - iii. Costs of the suit.
 - iv. The Deputy Registrar to transmit this file back to Nairobi after the delivery of this Judgment

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 30TH DAY OF SEPTEMBER, 2021.

CHRISTINE N. BAARI

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform.

A signed copy will be availed to each party upon payment of court fees.

CHRISTINE N. BAARI

JUDGE

Appearance:

M/S Wachira for the Claimant

M/S Wafula holding brief for Mrs. Kounah for the Respondent

Christine - Court Assistant.

