



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 297 OF 2020

ELRCC NO. E013/2020

NANCY OMOLO.....CLAIMANT

VERSUS

MERCY CORPS.....RESPONDENT

JUDGMENT

1. The Claimant instituted this suit against the Respondent vide a Memorandum of Claim dated 16th June 2020 and filed on 10th July 2020, for the alleged unfair termination of her contract. She prays that the Court do order and make award for:

- i) Notice pay (one month gross pay)
- ii) Unpaid house allowance
- iii) Salary for two days' worked in April 2020
- iv) Unpaid motivation/bonus/service pay
- v) Salary for remainder of the contract
- vi) Compensation for unfair termination
- vii) Compensation for violation of the Claimant's right to fair labour practices
- viii) Costs of the suit
- ix) Interest on (i) to (viii) above from the date of filing of the suit till payment in full.

2. The Claimant avers that she was employed by the Respondent on 1st October 2019 as the Gender, Youth and Social Dynamics Lead earning a basic monthly salary of Kshs. 540,000/-. He averred that prior to the employment she was head-hunted through her Linked-In account by the Respondent, interviewed by its three international officers and thereafter offered the job vide a letter dated 13th May 2013 because of her skills, knowledge and experience in the concerned field. She further avers that as per the terms of her contract, the employment was a fixed term contract running for a period of one year from 1st October 2019 to 20th September 2020 and that there was no consensus that she would be on probation. The Claimant averred that the Respondent also made pension contribution for her to the pension scheme it had arranged with ICEA Lion Life Assurance and she also enjoyed medical benefits under the Respondent's insurance policy. The Claimant averred that however on 20th January 2020 the Respondent issued her with a document titled 'Probation Review' it required her to sign lest her pay slip is not processed and she only signed to acknowledgment receipt of the same and not as an acceptance of a variation of her terms of employment. The Claimant averred that the said document which purportedly extended her probation, was not a negotiated contract and did not alter the terms in the employment agreement. She contends that her contract was constructively confirmed since she continued working and earning a salary after expiry of the supposed probation period. The Claimant further avers that on 2nd April 2020, her contract was abruptly terminated via a letter dated 25th March 2020 which letter did not refer to a determination of a probationary contract but stated the reason for dismissal as poor performance. She avers that the USAID NAWIRI project run by the Respondent and for which she was employed was a five-year project and contends there was no valid reason to terminate her contract. The Claimant averred that she was supposed to report to the Chief of Party who did not report until 7th January 2020 and that the Respondent did not fill the 3 key departments

of the Chief of Party as the Overall Head of the Project, Monitoring and Evaluation Lead and Governance Lead. She averred that the Chief of Party and Deputy Chief of Party were absent during the first 3 months and 6 months respectively of her employment and there was thus no one she could report to or discuss issues with. Furthermore, the said Chief of Party to whom she reported and who purportedly reviewed her performance is not a technical person and neither knowledgeable on matters of gender and youth, and therefore lacked capacity to competently and objectively assess and rate her performance. She avers that the Respondent deliberately frustrated her at work so as to make her resign and when the plan failed it resorted to terminating her employment. The Claimant averred that she was a target of her supervisor whom she had reported for bullying her and who thus sought her dismissal so as to scuttle the looming investigations against him. It is the Claimant's averment that she was neither formally accused nor heard before the decision to terminate her contract was arrived at and that when she asked for the allegations of poor performance to be documented, she was asked to either resign or wait for a termination letter. She also avers that her contract was terminated without notice and that the conduct of the Respondent amounted to unfair labour practice which she particularises as follows:

- i) *Unilaterally converting the Claimant's regular employment into probationary contract;*
- ii) *Allowing the Claimant to continue working for 20 days in January 2020 before asking her to sign an extended probation period;*
- iii) *Unilaterally and retrospectively revising the terms of the employment contract to impliedly insert a clause on extension of probation period;*
- iv) *Backdating the time when the extended probation period started to run being 10th January 2020 when the Probation Review was signed on 20th February 2020;*
- v) *Treating the Claimant as an employee on probation even after the contract had been constructively confirmed;*
- vi) *Asking the Claimant to either resign or face termination;*
- vii) *Failing to deal promptly and properly with the Claimant's complaint on bullying;*
- viii) *Declining to pay the Claimant her motivation/service pay upon the separation; and*
- ix) *Failing to provide a reasonably suitable working environment for the Claimant.*

3. The Claimant further avers that she legitimately expected to work up until the end of the contract period being 20th September 2020 and was thus denied 6 months of expected income in terms of salary. That her last day of work was on 2nd April 2020 and she was not paid for the two days she worked in April 2020 and was also never paid house allowance for the 6 months she worked for the Respondent as evidenced in the annexed pay slips. She asserts that the Respondent did not also pay her the agreed amount of bonus as stipulated in her contract upon her termination.

4. The Respondent was opposed to the suit and filed a Response dated 5th August 2020 asserting that the termination of the Claimant's probationary contract was lawful and procedurally fair. It avers that contrary to the Claimant's assertions, her Employment Contract was clear she would be placed on a three months' probation period effective 1st October 2019 and that it cannot be construed that her employment was confirmed from the said date as alleged. It further denies that it coerced the Claimant into signing the said Probation Review Report, asserting that the Claimant signed the said document while aware she was on probation and that she would undergo a probation review before her employment with the Respondent could be confirmed. That she consensually had her probation extended due to her poor performance. The Respondent further avers that it was a term of contract that the Claimant was entitled to various benefits as per the Benefits Summary attached to the Employment Contract and that the same accrued to her from the said 1st October 2019. The Respondent averred that however, benefits such as service pay were conditional upon her completing a year of continuous employment and that the Claimant is precluded from averring that the Employment Contract was ambiguous, having willingly signed the without raising any concerns or seeking clarifications on any of the terms therein. It is the Respondent's averment that it issued the Claimant with a 7 days' notice effective 26th March 2020, clearly indicating that her probation period had ended and her employment would be terminated on account of poor performance. It asserts that in the course of the Claimant's probation, it at all material times consistently gave her feedback, including written feedback, on the areas of improvement in relation to her work output. That she cannot thus attribute her failure to competently perform her duties to the alleged absence of the Chief of Party and the Deputy Chief of Party and that contrary to her assertions, she indeed had a supervisor to assess her performance. It further avers that the hearing she refers to does not apply to probationary contracts and that she was duly informed of her termination with reasons in the letter dated 25th March 2020. The Respondent denies that the Claimant was bullied in the office or that she reported the same or that she was targeted as a result of making such complaint. It further avers that the issue of the Claimant's alleged legitimate expectation that the contract would end on 30th September 2020 cannot arise since it was a term of contract that the employment contract would end on 30th September 2020 "*unless otherwise terminated*" and she was terminated on 2nd April 2020. The Respondent averred that she is thus not entitled to any benefits for remainder of the term of the contract as demanded and that she was also duly paid for all the days she worked for the Respondent. It contends there is no basis for the claim for housing allowance as the Claimant was paid a consolidated salary and that she would only have been entitled to service pay/motivational pay had she worked for a full continuous year.

5. The Respondent filed a Witness Statement dated 5th August 2020 signed by the Respondent's Chief of Party, Darius Radcliffe, who was the Claimant's overall supervisor. He states that at the close of the Claimant's probation period in or around 31st December 2020, he had various discussions with her and assessed her performance on inter alia competence, initiative, quality of the work, professionalism, adherence, and understanding of Mercy Corps' policies, but which assessment the Claimant failed to pass on account of poor performance. He stated that the outcome of the said assessment was documented and communicated to her in the *Performance Review Report for the period 1st October 2019 to 31st December 2019* and he recommended extension of her probation to allow her improve her performance. He

stated that the Claimant consented to the extension of her probation from 10th January 2020 to 17th March 2020, by the emails dated 10th January 2020 and duly signed the probation review report and further submitted her development plan to the Respondent. He asserts that despite the extended probation and support accorded to the Claimant by the Respondent in meeting her development plan, the Claimant still failed to improve in her performance. He stated that upon assessing her again at the end of 17th March 2020, he concluded she did not have a strong grasp of what was required of her and the role was not a good fit for her. Mr. Radcliffe further states that he is aware the Claimant's dues paid to her consisted the Claimant's 3 days accrued leave being Kshs. 61,327.35, and Kshs. 42,468.09 being her prorated salary for the two days she worked in April 2020. He stated that the Respondent has produced in its Bundle of Documents before court, copies of the cheque issued to the Claimant and remittance advice for payment of her terminal dues, and which the Claimant acknowledged receipt of by email. He is of the view that the claims against the Respondent are without basis and should thus be dismissed.

6. The Respondent also filed a Witness Statement made on dated 4th August 2020 by its Amy Ibold who asserts that while closely working with the Claimant to ensure that the objectives of the NAWIRI Project were met, she realised the Claimant was unable to translate her knowledge and/or experience into her work for the said Project. She stated that the Claimant failed to deliver on concrete deliverables and performed dismally and also suggested some quantitative tools for a qualitative analysis which raised major red flags in her performance. She states that overall, the Claimant did not bring the technical capacity and leadership to the role of Gender, Youth and Social Dynamics Lead for the NAWIRI Project.

7. In a Reply dated 30th September 2020, the Claimant denies being aware that she was on probation and reiterates that she only signed the performance review after being threatened with dismissal. She further avers that there was no policy or formula to measure poor performance against good performance and that the reasons given for her termination were based on the prejudiced personal views of her supervisor. She averred that Amy Ibold did not spend sufficient time with her to enable her assess her performance and that Darius Radcliffe purportedly assessed her performance based on information/feedback/opinion of others.

8. The Claimant submits that documentary evidence on record support her averments that she was not on probation either at the time of termination or at all. The Claimant submitted that Clause 1.3 of the employment contract provides the duration of the contract as one year while Clause 1.4 provides that she was employed to work as a *regular full-time employee*. The Claimant submitted that her Job Description describes her position of Gender, Youth and Social Dynamics Lead as *Full-time, Regular* and that as per the National Team Handbook which forms part of terms of the employment, employees on probation are not entitled to the benefits listed at Clause 9 therein but regular/full time employees are. It is the Claimant's submission that she has shown she enjoyed benefits like pension, annual leave and medical cover which are not available to employees on probation, while the Respondent failed to call a credible witness to explain how an employee said to be on probation enjoyed such benefits. The Claimant submitted that without prejudice to the foregoing, if the Court were to believe that Clause 2.3 of the employment **contract** placed her on probation for 3 months, her probation having lapsed on 31st December 2019 meant her contract was confirmed by conduct as she continued working. She relies on the case of **Benjamin Nyambati Ondiba v Egerton University [2014] eKLR** where the Court held that the effect of the respondent deferring confirmation of the claimant unilaterally and failing to review and confirm his employment was that the Claimant became constructively confirmed at the end of the probation period as permanent and pensionable. She further submits that the employment contract providing for the period of service and concurrently providing for a 3 months' probation period renders the contract ambiguous. The Claimant submitted that it is settled law that such ambiguity ought to be interpreted against the Respondent as the maker of the document and she refers the Court to the doctrine of *contra proferentem rule* discussed by Ojwang, J. (as he then was) in **Kenneth Kasemo Karisa v Kenya Bureau of Standards [2011] eKLR**. It is the Claimant's submission that as her termination was not preceded by a fair disciplinary process and a valid reason for the decision, the same was unfair within the meaning of Section 45 (2) of the Employment Act, 2007. The Claimant submitted that the ingredients of a fair disciplinary process were outlined in **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR**. She submitted that the Respondent herein did not tender evidence to prove that it observed these procedural requirements. The Claimant further submits that the Respondent did not demonstrate to court that the reason for the termination was valid by producing either a performance review policy or evidence that she was retrained. In support of this submission she relies on **Jane Samba Mukala v Ol Tukai Lodge Limited [2013] eKLR** where the Court found the reason for termination on the basis of poor performance not valid as the Respondent did not tender evidence or policy against which the performance of the Claimant was fairly measured and what steps were taken to improve the employee's performance before the decision of dismissal was made. The Claimant submits that as under Section 49 of the Employment Act, she deserves the maximum 12 months' salary as compensation since her termination was cruel. Further, chances of her securing another job are now minimal as her professional image was dented with the termination on account of failure to meet expectations. The Claimant submitted that she is entitled to salary for remainder of the contract as stipulated in the employment contract which the Respondent is bound by and she relies on the case of **Principal and B.O.G Machakos Teachers College v Wainbua Muange [2016] eKLR** cited with approval in **Zacheus Okoth Oketch v Sustainable Aid In Africa International [2018] eKLR** in which the Court stated that an employee in a fixed-term contract who is summarily dismissed in breach of contract is entitled to damages in the sum he would have been paid for the remainder of the term of the contract. The Claimant submitted that in the case of **Charles Muturi Mwangi v Invesco Assurance Company Limited [2016] eKLR**, Wasilwa J. found that the employment contract of the claimant was unfairly terminated and awarded him 16 months' salary for the remainder of the contract term. She further submits that Section 35 of the Employment Act, 2007 requires employers to pay their employee one month salary in lieu of notice which she urges the court to award since her contract was unfairly terminated without 30 days' notice or payment. That as she was not provided accommodation or paid house allowance as under Section 31 of the Employment Act, she is entitled to house allowance at the rate of 15% of the basic salary as per Regulation 4 of the Regulation of Wages (General) Order. To this end she urges the Court to consider the reasoning of the Court in **Charloy Sikuku Madiangi v Bunson Travel Service Limited [2018] eKLR** where the Court observed that the claimant was entitled to house allowance at the rate of 15% of basic pay as the contract did not provide that the salary was consolidated. It is the Claimant's submission that because the Respondent did not provide proof of payment of the two days she worked in April 2020, she entitled to the same and that she is also entitled to the unpaid motivation/service pay being Kshs. 45,000/- per month deducted on her pay slips for each of the 6 months she worked for the Respondent. The Claimant also relies on the case of **Esther Njeri Maina v Kenyatta University [2020] eKLR** where the Court observed that fair labour practices include adherence to the law through confirmation of employment after serving under probationary period among others and that the respondent failed to adhere to the law and therefore subjected the Petitioner to unfair labour practices. She cited the case of **National Union of Water and Sewerage Employees v Lake Victoria North Water Services Board Kakamega-Busia Water Supply [2018] eKLR** where the court awarded each claimant Kshs. 2,000,000/- as damages for being subjected to unfair labour practice. It is the Claimant's submission that in light of the injury she has suffered, she urges this Court to award her compensation proposed at Kshs. 2,000,000/-.

9. The Respondent submits that an employer retains the discretion whether or not to confirm an employee on a probationary contract. It relies

on the cases of **Danish Jalang'o & Another v Amicabre Travel Services Limited [2014] eKLR**; and **Benjamin Nyambati Ondiba v Egerton University [2014] eKLR** and submits that the Claimant's termination was fair and she is not entitled to any damages as alleged. The Respondent submits that the Claimant is not entitled to payment of any notice pay having been given 7 days' notice of the termination of her probationary contract and that the Court in the case of **Danish Jalang'o & Another (supra)** stated that there can be no further demands on the employer where the employee has received notice of 7 days before termination, or is paid 7 days' wages before termination. Further, the notice period under a probationary contract is 7 days and not one month and the Claimant is therefore not entitled to a one month notice payment. On the issue of House Allowance, the Respondent refers the Court to Clause 4.1 of the Claimant's Employment Agreement which provides that housing allowance was included in the Claimant's gross salary and which allowance is also provided for in Clause 9.12 of the Employee Handbook which states that:

"Mercy Corps Kenya has included in each team member's base salary, a portion which should be used to obtain or maintain housing accommodation. Mercy Corps provides a group housing benefit, as space allows, to team members who have accepted a post away from home to work in a hardship designated location. Where space does not allow, Mercy Corps will include in that team member's base salary, a portion which should be used to obtain housing accommodation".

10. The Respondent submits that it is clear from the above that the Claimant's housing allowance is consolidated in the base salary amount of Kshs. 540,000/- which amount is part of the gross salary amount of Kshs. 633,800/- and that this fact is confirmed in the Claimant's payslip annexed in her Bundle of Documents. The Respondent relies on the authority in **Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR** where the Court of Appeal held that it is "common sense" interpretation that gross monthly wages are inclusive of allowances. It is the Respondent's submission that the claim for housing allowance therefore has no claim and ought to be dismissed and that having paid the Claimant all her terminal dues she is not entitled to the claims for salary for two days in April 2020 and to payment for the remaining part of the contract as the contract was terminated. The Respondent further submits that the claim of compensation for violation of right to fair labour practices is not awardable as damages must be specifically pleaded and proved and the Claimant did not lead any evidence touching on the manner in which her right to fair labour practices had been violated. It further submits that the Claimant is not entitled to costs as her claims are without merit and contends that the cases cited by the Claimant in her submissions are irrelevant to the facts in issue herein and do not support any of her claims.

11. The Claimant was said to have been terminated during probation and after failure to accord her a fair process in evaluation. The evidence before the Court however points to a performance review which was undertaken albeit by someone who did not know the Claimant as he had not worked with the Claimant at the time. She asserts abuse at work but did not particularise the abuse so as to permit the Court to make a definitive determination on the matter. As the Court was unable to discern any unfairness and because the Respondent unilaterally extended probation, the parties will each bear their own costs for the suit which I hereby dismiss.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2021

NZIOKI WA MAKAU

JUDGE