



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

ELRC CAUSE NO. 2020 OF 2017

OLGA ANYANGO OKELLO.....CLAIMANT

VERSUS

THE REGISTERED TRUSTEES OF THE SISTERS

OF MERCY (KENYA) T/A THE MATER HOSPITAL.....RESPONDENT

JUDGMENT

1. Olga Anyango Okello instituted the claim on 10th October 2017 and later filed an Amended Memorandum of Claim dated 20th February 2018 against The Registered Trustees of the Sisters of Mercy (Kenya) t/a The Mater Hospital. She sued the Respondent for unfair termination and/or wrongful dismissal of employment and the unlawful withholding of her terminal dues. The Claimant avers that the Respondent head-hunted her from her stable job with AMREF-Health Africa in Kenya where she had worked for 4 years and 5 months, earning a salary of US Dollars 1,637. The Claimant averred that she was engaged by the Respondent as a Personal Assistant to the Hospital's Managing Director from 2nd June 2017 under contractual terms and conditions set out in the Employment Contract dated 2nd June 2017. She further avers that she reported to work on 17th July 2017 but was asked to go back home and report the next day due to a check-up routine at the hospital, but was however called on 18th July 2017 and asked not to report until the hospital communicates with her. That she scheduled a meeting with the Human Resource Officer on 19th July 2017 who informally told her that her engagement had been cancelled by the Board of Trustees and she was also asked to collect her effects and leave the premises. She contends that the Respondent has refused to process and release to her the terminal dues and compensation she formally demanded for and that its actions and or omissions against her amount to unfair labour practice.

2. The Claimant sought a declaration that the Respondent's action unfair; that she was and still is duly employed by the Respondent. She also sought a further declaration that the Respondent should continue paying her salary as contemplated in the employment agreement. In the alternative, she seeks an order for the Respondent to reinstate her to her position and that if indeed the Respondent terminated her employment, the Court should find and declare such termination illegal, unfair, unprocedural and unlawful. The Claimant sought compensation for unfair termination/wrongful dismissal, wages for the days worked, notice pay, compensation for the unexpired contract period, general damages for loss of employment/expectation of earnings, general damages for unfair termination, payment of actual pecuniary loss from the date of termination to the date of determination of the dispute and interest on the foregoing at court rates.

3. The Respondent filed a Statement of Response dated 22nd March 2018 averring that the Claimant and the former Acting Chief Executive Officer (CEO) engineered and executed the Claimant's employment on probationary terms of service under the letter dated 2nd June 2017, without authorisation by the Trustees. The Respondent averred that the Claimant was interviewed as the sole candidate for the position of Personal Assistant to the former Acting CEO on 5th May 2017 without any advertisement for the position and that the said former Acting CEO had poached her from her previous employer, where they had previously worked together. It avers that while the recommended gross salary for the Claimant was Kshs. 180,000/- per month, she was offered a gross salary of Kshs. 200,000/- per month and that the probationary terms of service were to commence on 10th May 2017. The Respondent averred that however the Claimant did not assume her duties on the scheduled date as she requested for a one-week extension to finalise the hand-over exercise at AMREF Kenya.

4. The Respondent further avers that on 19th July 2017 in a meeting held with the Claimant, the said former Acting CEO and the Director of Human Resources, the Claimant was duly informed that the Trustees had made enquiries and determined she was unsuitable for the position offered. The Respondent averred that the Claimant did not at any time assume any duties at the Mater Hospital as her letter of probationary contract had been cancelled. The Respondent's averment that the Claimant has specifically pleaded "unfair termination and/or unlawful termination" of her probationary contract but which cause of action is unsustainable since the impugned termination was effected during the pendency of her probationary contract and before she assumed duty. The Respondent prays for the dismissal of the Claimant's claim with costs.

5. The Claimant testified in examination-in chief that she was invited for an interview for the position of Personal Assistant to MD through a

phone call from the HR Office at the Respondent and that she went for interview before a panel of 4 people. That about 3 weeks after the interview the HR Officer called and told her she had been successful and when she was given an offer over the phone she requested to negotiate a salary. The Respondent averred that she attended a meeting with HR, Director and MD wherein she brought her payslips for the negotiation and they settled on Kshs. 200,000/- a month and that a contract was then drawn and signed on 2nd June 2017. She stated that the procedure of hiring was followed until the day of reporting on 17th July 2017 when she was told to return the following day for induction which would start at 8:00am. The Respondent averred that however at 5:00pm the same day she received a call from the HRD who told her to wait for a call on 18th July and that when she did not receive any call, she called the HRD to enquire on her induction and was told to report on 19th July at noon. The Respondent that she then met the HRD and MD who told her that the Board of Trustees had instructed them to cancel all new recruitments and told her to just go home and that they have never given her a letter of contract. She relied on the contract, the contract with AMREF, the payslips, the resignation letter of AMREF and the acceptance from AMREF.

6. The Claimant further stated that she seeks damages for unfair dismissal or termination of employment as she had to go back to job searching and that she was unemployed for 2 years or so. She asserted she was not given any notice nor did she receive any payment of benefits and confirmed that they did not agree on terms during the mediation session. She also seeks damages for loss suffered, pain and mental anguish. The Claimant stated under cross-examination that she never worked directly under Dr. Manyoni but was at the field. She confirmed no duties were assigned to her, she did not offer services and was not even given a desk and also confirmed that paragraph 4 of her contract indicates "period of probation" which period was not guaranteed. She stated in re-examination that despite giving her resignation she still had untaken leave days from AMREF and that leave days are not paid.

7. The Respondent's witness, Evelyn Maina relied on her filed statement and testified that the Claimant's contract as drafted by the MD gave her a salary way above what the PA already in service who was earning Kshs. 120,000/-. She confirmed that the contract provided a probation period of 4 months and stated that the Claimant was terminated on account of referee feedback and which was communicated to her in the meeting with the HR. She denied that the issue was from the Trustees and stated that the said MD was terminated 3 or 4 months after head hunting the PA. Under cross-examination, the Respondent confirmed she was not in employ of the Respondent at the time and did not conduct the interview and that she therefore does not know the Claimant. She asserted that the Claimant's file indicated an issue on the background checks and confirmed that background checks are undertaken after interview and not after offering employment. She stated one cannot be guaranteed that the replies will come before offer is made. She confirmed in re-examination that from her experience, one cannot control feedback on the background checks and denied that the Claimant was terminated on account of knowing Dr. Manyoni. That marked the end of parol hearing and the parties were to file submissions.

8. The Claimant submits that Section 45 of the Employment Act 2007 provides for instances under which an employee can raise a claim for wrongful, unlawful and/or unfair termination while Section 41 of the Act entitles the employee to have another employee or a shop floor union representative of his choice present during explanation of the reason for termination and for the employer to hear and consider any representations of the employee before termination or summary dismissal. The Claimant submits that while it seems Section 45(3) of the Employment Act would ideally lock her out from raising a claim of unfair termination, in the case of **Samuel G. Momanyi v Attorney General & Another [2012] eKLR**, a claim where the employee had only worked for eleven months and twenty-seven days as opposed to the provided minimum of not less than thirteen months, Lenaola J. (as he then was) declared the said provision unconstitutional. As to whether the revocation/termination during probation is subject to procedural and substantive fairness test, the Claimant submits that it was a term of her contract that a 7 days written notice was to be given by either party intending to terminate the said contract, but the Respondent has never issued her with an official written termination letter to date. It is also the Claimant's submission that the Respondent breached Article 47 of the Constitution which provides for the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and to be given written reasons for the action. She cites the case of **Loice Otieno v Kenya Commercial Bank Ltd [2013] eKLR** where the Court held that the doctrine of natural justice or procedural fairness is now an essential part of the employment relationship and that an employer must comply with the procedures set out in Section 41 of the Act even where summary dismissal is contemplated. The Claimant submits that probationary contracts of employment are provided for under Section 42 of the Employment Act and that authorities observe that although an employer is not bound under Section 41 of the Employment Act to procedure for termination of a probationary contract, substantive justification of termination of a contract is required when terminating a contract prematurely. She relied on the case of **Mercy Njoki Karingithi v Emerald Hotels Resorts & Lodges Ltd [2014] eKLR**, Radido J. who held that:

"16. Section 42 of the Employment Act ousts the application of the procedural fairness requirements of section 41 of the Act in dismissals during probationary period. The consequence of section 42 of the Act is that an employee who is still serving under probation is not entitled to notification and hearing before a decision to terminate is taken. Natural justice does not apply in such situations.

17. On this basis, the Respondent did not breach the statutory protection of following fair procedure before terminating an employee.

18. But as far as the contract itself was concerned the Respondent was under a duty to give 7 days' notice or pay in lieu of notice. No notice was given but the revocation letter informed the Claimant that she would be paid the equivalent of 7 days wages as notice. But that is not all that is to it.

19. I say so because the fairness of termination of employment is not evaluated merely on the basis of the employer complying with procedural fairness but also on the basis of substantive fairness.

20. The question in other words, is whether the provisions of section 45 of the Employment Act are ousted or are not applicable in complaints of termination during probationary period.....

21. It cannot be disputed that although still serving under probation, an employment relationship between parties has commenced. Immediately on the commencement of the relationship, legal obligations on the side of each of the parties arise. These obligations are in terms of duties and rights. Duties of the employer (Respondent) and rights of employee (Claimant) and vice versa.

22. *The fundamental rights of employees not to be unfairly terminated and the Claimant in this case, as provided for in Section 45(1) and (2) of the Employment Act cannot be abrogated during the probation period unless clearly expressed so. The only right as far as termination is concerned which has been abrogated during the probationary period is the right to procedural fairness in section 41 of the Act. That is the import of section 42 of the Employment Act.*

23. *However the security of tenure given to ordinary employees by section 45 of the Employment Act is still applicable. The employees' right not to be unfairly terminated still binds the employer and is applicable during the probationary period. An employer is obliged to prove the reasons and that the reasons are valid and fair reasons.*

24. *Further, Article 41 of the Constitution which protects the right of all workers to fair labour practices is now a Constitutional norm against which all conduct and practices in employment must be measured.*

25. *With the above, the Court proceeds to discuss whether the revocation meets the substantive fairness threshold test.*

26. *The reason given in the revocation letter was that the manner of appointment of the Claimant was unprocedural and that the Claimant was free to reapply for the position. The Claimant's employment was not being revoked because of misconduct, poor performance, incapacity' or lack of qualifications on her part. It was because of factors to which the Respondent alone was privy/responsible."*

9. Further, similar sentiments were expressed in the case of **Happiness Nyabonyi Maingo v Shreeji Chemicals Limited [2020] eKLR** where O.N Makau J. observed that whereas a probationary contract is a sort of "testing waters" engagement, the rights of employees are not sacrificed and they remain entitled to the protection of the law from arbitrary and whimsical terminations by employers. The learned Judge went on to find that the obligation to justify the reason for terminating contract under Section 43, 45 and 47(5) of the Employment Act applies equally to termination of probationary contract. The Claimant submitted that the reasons advanced by the Respondent do not seem to hold any water in the circumstances. The Claimant submitted that further, on 3rd August 2021 a three-judge bench of the ELRC held that Section 42(1) of the Employment Act takes away the right to a fair hearing as it does not give the employee an opportunity to shop for a union representative, or an employee to plead his or her case, and that the said provision was hence unconstitutional. The Claimant submits that she has proved she entered into a legally binding contract with the Respondent and on which basis she tendered her resignation notice to AMREF Health Africa on 9th June 2017 and that she therefore had legitimate expectation. The Claimant submitted that her contract was likely to be renewed like on previous occasions and was not actively looking for employment and that the Respondent has also acknowledged that they did indeed poach her from AMREF. The Claimant submitted that with regards to legitimate expectations in employment, Ongaya J. in the case of **Mathew Munyao v National Transport & Safety Authority [2019] eKLR** followed the holding in **Teresa Carlo Omondi v Transparency International Kenya [2017] eKLR**, where Rika J. held that that:

"...Legitimate expectation is not the same thing as anticipation, desire or hope. It is a principle based on a right, grounded on the larger principles of reasonableness and fair dealing between Employers and Employees. The Employee must demonstrate some rational and objective reason, for her expectation. The representation underlying the expectation must be clear and unambiguous. The expectation must be induced by the decision maker. The decision maker must have the authority to renew. Repeated renewals, extended service beyond the period provided for in the fixed term contract, and promise of renewal, are some of the elements that would amount to objective reasons underlying expectation of renewal. The presence of these elements however, is not taken as conclusive proof of legitimate expectation."

10. The Claimant submits that having found that the termination was unfair she is entitled to the prayers sought in her memorandum of claim as prayed and that Section 49(1)(c) provides for compensation of up to 12 months gross salary for unlawful termination. She further submits that the general principal on costs is that it should follow the event unless otherwise directed by the court and that she should be awarded costs of the claim. She relies on the case of **Nixon Mandala Malongo v Clifford Okello Rachuonyo & Another [2014] eKLR** where the Court found that the termination of the claimant's employment was both substantively and procedurally unfair and ordered respondents pay the claimant the costs of the claim.

11. The Respondent submits that the Claimant has disclosed on the face of the Notice of Motion dated 10th October 2017 that her probationary contract of employment was terminated just before her employment commenced. The Respondent submits that the Claimant further confirmed during cross examination that she neither assumed any duties nor offered any services at the "Mater Hospital" and also confirmed being informally notified that her engagement had been cancelled by the Board of Trustees. The Respondent submits that since the notification cancelling her engagement was two days after her would-be reporting day, it is conclusive that the Claimant's contract was cancelled during the probation period. It submitted that the Claimant did not adduce any evidence to prove unfair dismissal and has therefore not discharged her duty as required by Section 47(5) of the Employment Act, 2007. The Respondent submitted that Claimant admitted in evidence that she was terminated just two days into start of her probation period. That termination of a contract during the probation period does not require the employer to comply with Sections 41 and 45 of the Employment Act. The Respondent submits that the Claimant's claim does not fit into the unfair termination socket, that requires valid reasons, fair reasons, and fair procedure and that the claim can thus only stand on the foundation of Section 42 of the Act. The Respondent relies on the case of **John Muthomi Mathiu v Mastermind Tobacco (K) Ltd [2018] eKLR** which effectively addressed the issue of termination of probationary contract.

12. The Respondent submits that the Claimant is not entitled to the reliefs sought because her claim has failed the test of veracity required for an unfair termination claim. The Respondent further submits that the claim for an award or remedies commensurate with unfair termination also fail as termination happened during probation. On the issue of reinstatement, the Respondent submits that the same is granted upon taking into account the considerations outlined in Section 49 of the Employment Act 2007 and that the Claimant has not demonstrated existence of any special circumstance to warrant the grant of the said relief. It submits that the unexpired period of the AMREF contract is the opportunity cost the Claimant traded for her new job and that it should not pay for the risks willingly undertaken by her. The Respondent submits that further, the Claimant signed the probation clause and the other terms on the new contract without coercion or duress and that therefore the relief for the unexpired period should fail. It is the Respondent's submission that the relief for payment in lieu of notice would amount to unjust enrichment since the notice period prescribed by the law for probationary termination is 7 days' pay. The

Respondent submits that the Claimant cannot also be paid wages for days worked as she admitted that she neither assumed any duties nor offered any services and that since she declined the 7 days' pay in compensation, she should not be awarded costs for the suit. The Respondent further submits that the prayer for damages fails because general damages are not offered in employment disputes and the Claimant has also failed to specifically prove and plead the special damages.

13. The Claimant herein was employed as a personal assistant to the MD of the Respondent but before she commenced work the Respondent's Board declined the appointment and made some drama of it sending the Claimant into the abyss of unemployment. The Respondent unfortunately did not deal with the Claimant with the mercy that is vividly splashed in its name. It is sad that the Claimant cannot recover for the emotional anguish the Respondent subjected her to as general damages are ordinarily not awarded in employment contracts. In the case of **Monica Munira Kibuchi & 6 Others v Mount Kenya University; Attorney General (Interested Party) [2021] eKLR** per Mbaru, Abuodha & Ndolo JJ stated:-

a) To the extent that Section 42(1) of the Employment Act, 2007 excludes employees having probationary contracts from the provisions of Section 41, it is inconsistent with Articles 24, 41 and 47 of the Constitution.

14. The Claimant is stated to have been terminated during probation and as such, and in line with the decision cited above was subjected to termination that is inconsistent with Articles 24, 41 and 47 of the Constitution. The Claimant however failed to prove certain aspects of her claim but having proved the elements resulting in the judgment in her favour, she will recover as enumerated below. Having suffered indignity as she did and having been unfairly terminated is entitled to recover the following:-

- i. One month's salary as notice – Kshs. 200,000/-,
- ii. Two month's salary as compensation for unlawful termination – Kshs. 400,000/-,
- iii. Cost of the suit,
- iv. Interest on the sums in i) and ii) above at Court rates from the date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF SEPTEMBER 2021

NZIOKI WA MAKAU

JUDGE