



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO 1822 OF 2016

CHRISTINE JUMA WERE.....CLAIMANT

VERSUS

KENAFRIC INDUSTRIES LTD.....RESPONDENT

JUDGMENT

1. This is a claim against the Respondent for unlawful termination. The Respondent disputes liability.
2. Both parties filed pleadings. In the Memorandum of Claim, the Claimant asserts that she was employed by the Respondent on 1st February 2012. Her first engagement with the Respondent was as an Online Quality Checker (OQC). Later on, she was re-engaged as an Assistant Value Stream Leader (AVSL). This engagement was first on probationary terms.
3. It is while serving in this position that she lost her job. The job loss occurred when the Respondent declined to confirm the Claimant in the position of AVSL. The Claimant asserts that the termination happened on 1st July 2015.
4. On this date, the Claimant asserts that she was advised by a letter of even date (1st July 2015) that the decision not to confirm her was because of alleged poor performance on her part. She contends that this in effect resulted in her termination. She asserts that the termination was unlawful as she was neither given a show cause nor subjected to a disciplinary session. It is her position that the termination was in violation of the principles of natural justice and was unduly harsh.
5. The Claimant prays for several reliefs including the following:-
 - a) A declaration that her termination was unlawful and unfair.
 - b) A declaration that she is entitled to terminal dues as pleaded.
 - c) An order that the Respondent pays her terminal dues as follows:-
 - i) One month's salary in lieu of notice Ksh 40,000/=.
 - ii) Untaken leave for 3 years Ksh 96,923.07.
 - iii) Underpayments Ksh 96,000/=
 - iv) Compensation equivalent to 12 months' salary Ksh 712,932.07.
 - d) An order that the Respondent issues the Claimant with a Certificate of Service.
 - e) Costs of the claim.
6. The Respondent filed a statement of response to the claim. In the statement, the Respondent concedes that the Claimant was terminated but denies that the termination was unlawful.
7. The Respondent asserts that the Claimant was unable to perform in her new position of AVSL in accordance with the expectations of the Respondent. This led to the Respondent extending the probation period for the Claimant by one month effective 1st April 2015. However, the Claimant did not improve and hence the decision by the Respondent to decline to confirm her contract of service.

8. The Respondent states that the Claimant was paid her terminal dues. Therefore, there is no valid claim by the Claimant against the Respondent.
9. At the trial, the parties adopted their respective written statements in support of their cases. They also introduced their respective documents as exhibits.
10. The matter proceeded to full hearing where after the parties closed their cases. Submissions were then tendered by the Claimant.
11. The evidence by the parties generally restates the parties' respective positions in the case. Except where necessary, I will therefore not reproduce either the evidence or submissions here.
12. From the pleadings and the evidence as presented, the following are the issues for determination:-
- a) Whether the Claimant was still on probation when she was terminated by the Respondent.
 - b) Whether the Claimant's termination was lawful.
 - c) Whether the Claimant is entitled to the reliefs in the Statement of Claim.
13. On the first issue, it is noteworthy that after the Respondent re-engaged the Claimant as AVSL, she was placed on probation. According to the letter of re-engagement dated 5th January 2015, the Claimant was to be on probation for three months. However, by another letter dated 13th April 2015, the Respondent extended the probation period by a further one month with effect from 1st April 2015. Effectively, this was to run up to 30th April 2015.
14. Come 30th April 2015 and the Claimant did not receive any communication from the Respondent regarding whether she had been confirmed. And this was to remain the position until 1st July 2015 when the Claimant was handed a letter declining to confirm her into the position of AVSL on account of below average performance. The question that needs to be addressed then is what was the status of the Claimant in the Respondent organization between 30th April 2015, the date she was to be confirmed and 1st July 2015 when her contract of service was purportedly not confirmed for reasons of poor performance?
15. This matter has already been addressed by this court in ***Benjamin Nyambati Ondiba v Egerton University [2014] eKLR***. At the close of the probation period agreed on by the parties and subject to the limits imposed by statute, the employer must either confirm or terminate the employee concerned. Consequently, where the employer remains silent on the matter at the close of the probation period, the employee is deemed as constructively confirmed.
16. In this cause therefore, the Claimant was deemed as constructively confirmed on 1st May 2015 when the Respondent did not communicate the fate of her probation status. As a result, the Claimant became eligible to the protections provided to employees other than probationary employees as contemplated under section 41 of the Employment Act as read with sections 43 and 45 of the Act.
17. I am aware that debate on this issue is now probably rendered mute by the recent decision in ***Nairobi Petition number 94 of 2016, Monicah Munira Kibuchi and others vs Mount Kenya University and the Attorney General*** in which section 42(1) of the Employment Act was declared inconsistent with articles 24, 41 and 47 of the Constitution. However, as this dispute was presented to court much earlier and to avoid any doubts, it is necessary that the foregoing observation is made.
18. On the second issue, the Respondent could not properly end the Claimant's employment by reference to the probation contract. There was no probation contract relating to the parties that the Respondent was capable of confirming or not confirming as at 1st July 2015. By this time, the Claimant had already gained the status of a permanent and pensionable employee of the Respondent.
19. How then was the Respondent to terminate the Claimant's contract if at all? The Respondent had to follow the requirements of sections 35, 36 and 41 of the Employment Act. These require that the affected employee be given notice of the impending termination. For a contract falling in the category of the contract of service herein, such notice must be for a minimum duration of twenty eight days. Alternately, the employer has to pay the employee salary in lieu of such notice and vice versa.
20. The employer must also inform the affected employee of the grounds for the proposed termination in a language that the employee understands. Importantly, under sections 43 and 45 of the Employment Act, the employer must be able to substantiate and justify whatever grounds that he has for his decision.
21. Similarly, the employee must be given the opportunity to ventilate his/her defense. All these should be undertaken in the presence of a co-employee of the affected employee's choice. It is only then that the employer can make his/her determination regarding the fate of the employee's contract of service.
22. In the present case, the apparent ground for termination was poor performance. On this, the Claimant asserts that she was not subjected to performance review before she was terminated. Although the Respondent has filed performance review forms suggesting that the Claimant was reviewed in April 2015 and although RW1 states that the Claimant was indeed so reviewed, the Claimant denies this fact.
23. Despite the Claimant's position on this matter, the Respondent produced and sought to rely on document number 2 on the Respondent's list of documents. This is the alleged performance evaluation record on the Claimant. The Respondent indicates that it was done in April

2015 and was the basis upon which a decision was taken to extend the Claimant's probation by another one month.

24. The form has a rating column in which the Claimant is consistently rated either at 2 or 3 on all performance indicators. According to the guide provided on the form, rate 2 stands for 'very good performance' and rate 3 stands for 'satisfactory performance'. Therefore, if the form is to be believed as reflecting the true state of affairs regarding the Claimant's performance, it is clear that her performance was between satisfactory and very good.

25. I note that this evaluation is indicated to have been done on 11th April 2015. The next evaluation of the Claimant was apparently undertaken on 30th June 2015. This information is contained in the letter of termination dated 1st July 2015 and produced as an exhibit. According to the letter, the Claimant's performance had declined to 46% which was, as observed by the Respondent, below par.

26. What is of concern at this point is that the parameters the Respondent applied to gauge the Claimant's performance are not disclosed this time round. All that RW1 stated and what appears in the termination letter is that the Claimant had been subjected to some form of performance evaluation.

27. RW1 conceded in cross examination that the grading system the Respondent used to gauge the Claimant's performance during the June 2015 performance evaluation had not been filed in court. Yet, it is this particular performance that provided the foundation for the Respondent's decision to terminate the Claimant.

28. Absent the above details on the performance evaluation of 30th June 2015, it is not possible for the court to declare the Respondent's decision relating to existence of poor performance as a ground for termination as objectively verified. It cannot be said that the employer has justified the ground in terms of sections 43 and 45 of the Employment Act.

29. In relation to the procedure prescribed under sections 35 and 41 of the Employment Act, there is evidence that the Respondent issued the Claimant with the requisite notice to terminate. The letter dated 1st July 2015 communicating the decision not to confirm the Claimant indicates that the Claimant's last working day was 30th July 2015. Indeed in cross examination, the Claimant conceded that she was given a termination notice. The termination therefore took effect on 30th July 2015 following the notice issued on 1st July 2015. Accordingly, I find that the Respondent met requirements of section 35 of the Employment Act as regards notice to terminate a contract of service.

30. In respect of the requirements of section 41, I see no evidence of a request to the Claimant to show cause why she should not be terminated for poor performance. I see no suggestion that she was advised of the right to defend herself in respect of such charge or that she was informed of her right to appear before the employer on the issue in the presence of any other employee of her choice.

31. Therefore, on the basis of the evidence on record, I am not satisfied that the Respondent observed the statutory strictures that regulate termination of contracts of service in terms of the Employment Act. Accordingly, I find that the Claimant's contract of service was irregularly terminated by the Respondent.

32. Is the Claimant entitled to the reliefs set out in her Statement of Claim? Before addressing the compensatory remedies due to the Claimant if at all, I would like to address two issues that will affect the decision in this respect.

33. First, I will consider the effect of the executed discharge voucher on the Claimant's future claim for compensation. Second, I will address the question of what the current Claimant's salary entitlements were at the point of her exit.

34. On the first issue, the Respondent's contention is that the Claimant was paid her terminal dues on exit. That these payments were final and that the Claimant is not entitled to pursue the claim for further compensation.

35. To support its contention, the Respondent has produced documents numbers 4, 5 and 6 on the Respondent's list of documents as proof of settlement. Document 4 is the discharge voucher. Document 5 is the Claimant's August 2015 pay slip and document 6 is a copy of the cheque issued to the Claimant in payment of her dues.

36. I agree with the Respondent that where parties agree on some settlement of final dues, the court may be precluded from revisiting the matter of compensation. Such settlement, being in the nature of a contract between the parties, is binding on them.

37. However, not all settlements constitute a release of the employer from further claims. Therefore, to be able to determine whether a party who has received previous payments cannot still pursue additional payment, the court has to evaluate the settlement between the parties and determine whether it constitutes a bar to all future claims. This is an exercise that must be undertaken on a case by case basis.

38. The Court of appeal has given some guide on how to evaluate this issue. In *Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR* the court observed as follows regarding the effect of pre-trial settlements on further demands for payments through litigation:-

"We would agree with the trial court that a discharge voucher per se cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial Court from enquiring into the fairness of a termination. That is however, as far as we are prepared to go. The court has, in each and every case, to make a determination, if the issue is raised, whether the discharge voucher was freely and willingly executed when the employee was seized of all the relevant information and knowledge".

39. In *Coastal Bottlers Limited v Kimathi Mithika [2018] eKLR*, the court said as follows regarding these agreements:-

“Whether or not a settlement agreement or a discharge voucher bars a party thereto from making further claims depends on the circumstances of each case. A court faced with such an issue, in our view, should address its mind firstly, on the import of such a discharge/agreement; and secondly, whether the same was voluntarily executed by the concerned parties”.

40. In, *Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited [2015] eKLR*, the court said this of pretrial settlements:-

“The execution of the discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum....”.

41. From the foregoing, I think that the following guidelines are critical in dealing with questions relating to the effect of pre-trial settlements on further claims by the parties affected by such settlements through future litigation:-

- a) As a general principle a pretrial settlement operates as a contract between the parties.
- b) It is to be considered as generally binding on the parties unless it is assailed on the usual grounds that will vitiate a contract.
- c) Such settlements may, although not always, constitute a full settlement of the issues under consideration with the consequence that parties to them may not pursue further settlements on the same subject either in court or otherwise.
- d) There is no general principle that such settlements will inevitably discharge an employer from his/her statutory obligations under a contract of service.
- e) In order to determine whether the pretrial settlement operates as a bar to further claims by the parties to it, a trial court or other arbiter must consider: the import of the settlement; whether the parties executed the agreement freely; and whether they had relevant information and knowledge regarding the settlement.
- f) The mere existence of a pretrial settlement should not be construed as taking away the court’s jurisdiction to inquire into the lawfulness of a termination of a contract of service.

42. With the foregoing principles in mind, I will now seek to evaluate the effect of the settlement between the Claimant and the Respondent dated 4th September 2015 on the current claim. In the discharge voucher, the Claimant accepted Ksh. 9,858/= in full settlement towards her dues. This payment was itemized as per the Claimant’s pay slip of August 2015. The pay slip shows the sum of Ksh. 9,858/= constituted the Claimants August 2015 salary after the several deductions shown in the pay slip.

43. In his statement filed in court on 18th April 2019, RW1 says this at paragraph 11 regarding the sum paid to the Claimant:-

“ That after her termination the Claimant was paid her July salary less deductions and liabilities which amounted to Ksh. 9,858 as her final dues.”

In her testimony in court, the Claimant said that the payment of Ksh. 9,858/= was understood to cover her salary for August.

44. What comes out clearly from the above evidence is that the parties were operating under a common belief and understanding that the final dues covered in the payment voucher related to the Claimant’s salary. This is the information and knowledge that the parties mutually had at the time of finalizing the payments. The settlement did not, to their minds, deal with other claims such as compensation for wrongful termination. As a result, I am of the view that the settlement in this case, understood in the context of the evidence on record and the information that the parties were seized of, did not constitute a bar to the Claimant pursuing other settlements other than her salary.

45. On the second issue, the Claimant seems to suggest that as AVSL, she ought to have been receiving monthly salary of Ksh. 40,000/=. However, she provides no adequate evidence for this proposition. All she states in support of her claim in this respect is that the Respondent posted details about the salary scale for AVSL in the job advertisement she saw on the Respondent’s Notice Board. Conversely, RW1 stated that no such document was posted on the Respondent’s Notice Board. That going by the Respondent’s wage guidelines, the salary of the Claimant as AVSL would have been about Ksh. 30,000/=.

46. Salary is a fundamental term of a contract of service that parties negotiate freely. Indeed, this position has been suggested in *Krystalline Salt Limited vs. Kwekwe Mwakele & 67 others [2017]* when the court said as follows:-

“In that sense employment is seen as an individual relationship negotiated between the employee and the employer according to their needs”.

47. In the absence of a floor that has been set by a Wage Order, the court cannot, outside some agreement between the parties, impose a particular amount on the parties as the quantum of salary. Therefore, in the absence of the basis for the proposal of Ksh. 40,000/=:, the court will rely on the last pay slip of the Claimant as a guide on her actual salary.

48. Having considered the two issues above, I will now move onto the question whether the Claimant is entitled to the compensatory reliefs presented. The Claimant has prayed for pay equivalent to one month’s salary in lieu of notice in terms of section 36 of the Employment Act.

49. As has been pointed out earlier in this judgment, the letter terminating the Claimant by way of refusal to confirm her services with the Respondent issued on 1st July 2015. Through it the Claimant was notified that her last working day was 31st July 2015, some 30 days down the line. This communication comprised the notice to terminate the Claimant's contract under section 35 of the Employment Act. In any event, the Claimant conceded in her evidence that she was served with notice to terminate her contract of service. As a result, the claim for salary in lieu of notice is unwarranted. It is accordingly dismissed.

50. In relation to the claim for accrued but unutilized leave days, the Respondent has supplied the court with several leave application forms signed by the Claimant and covering the period between 2012 and 2015. The Claimant has not challenged these documents. The totality of the leave forms supplied show that the Claimant took 16 days leave in 2012, 21 days in 2014 and 19 days in 2015. There is no indication of the leave taken in 2013.

51. Under section 28 of the Employment Act, an employee who has worked continuously for one year is entitled to a minimum of 21 days leave. This means that the Claimant had leave balance of 5 days in 2012 and 21 days in 2013.

52. It is noted that the Claimant had taken 19 days leave in 2015 before the year came to a close. She had more or less exhausted her leave for 2015 on pro rata basis. Importantly, according to the August 2015 pay slip, the Claimant was paid Ksh. 4,890/= to cover the balance of her leave. I will therefore award the Claimant leave for the year 2013 only at the rate of Ksh 19, 789/=, her monthly salary then.

53. For the avoidance of doubt, I have considered the legal requirements on limitation of actions in making this award. This claim was filed on 7th September 2016 some three months before the Claimant's right to recover her leave dues for 2013 was lost.

54. In relation to compensation for unlawful termination, I consider that the Respondent treated the Claimant quite unfairly to grant her a new job only to terminate her shortly thereafter and also decline to re-absorb her in her earlier position. Between the two contracts as OQC and AVSL, the Claimant had served the Respondent for a long time and was deserving of more humane treatment. But for the obligation to take into account the duty on parties to mitigate their losses, this is a case in which I would have awarded the Claimant the full twelve months salary as compensation.

55. However, I am reminded of my duty under section 49 of the Employment Act to consider various factors in assessing damages. As I have mentioned, I think that the Claimant was duty bound to mitigate her losses. I did not see evidence from her in this regard. In the circumstance, to award her the full figure equivalent to her twelve months salary is to commit an injustice against the Respondent. It is tantamount to requiring the Respondent to shoulder the inaction of the Claimant with regard to the duty to mitigate her losses. Balancing these two competing dictates for justice, I will award the Claimant a discounted sum equivalent to her salary for eight months.

56. From her August 2015 pay slip, the Claimant's gross monthly salary was Ksh. 24,200/=. This figure has excluded her leave award in the said pay slip. Compensation under the foregoing head will therefore work out to Ksh. 193,600/=.

57. The Claimant has also claimed for underpayments of Ksh. 96,000/=. Apparently, the underpayments are premised on the difference between what the Claimant was earning and her projected salary of Ksh. 40,000/=. For the reasons set out elsewhere in this judgment regarding whether the Claimant was entitled to salary of Ksh. 40,000/=: this claim is declined. In any event, the letter by which the Claimant was re-engaged is clear that her salary review was to happen only upon her confirmation into her new position.

58. The Respondent is ordered to provide the Claimant with a Certificate of Service.

59. I will also award the Claimant interest at court rates on the sums awarded above together with costs of the Claim.

60. The sums herein awarded to be subject to applicable statutory deductions if any.

61. Summary of the Award

- a) **The Respondent's termination of the contract of service between the parties to this action is declared unfair and unlawful.**
- b) **The Claimant is awarded Ksh. 213,389/= in damages.**
- c) **The Respondent to issue the Claimant with a Certificate of Service.**
- d) **The Claimant to be paid interest at court rates on the amount in b) above.**
- e) **The sums herein awarded to be subject to applicable statutory deductions if any.**

DATED, SIGNED AND DELIVERED ON THE 13TH DAY OF SEPTEMBER, 2021

B O M MANANI

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B O M MANANI

JUDGE