



**REPUBLIC OF KENYA**

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

**CAUSE NO.1269 OF 2015**

**HELLEN ADHIAMBO MAGAWI.....CLAIMANT**

**VERSUS**

**THE TRUSTEES OF EDENVALE TRUST,**

**JAMAA HOME AND MISSION HOSPITAL**

(Jacinta Mbatha, Samuel Macharia, Aloysius Wanda,

Ema Muraya, Alex Joseph Magembe, Muthoni Rachel) ... **RESPONDENT**

**JUDGEMENT**

The claimant is an adult female who was employed by the respondent, a social welfare institution founded for rehabilitation services and registered under a Trust Deed with the Ministry of Social Services.

On 5<sup>th</sup> May, 2014 the claimant was employed as a cateress under a written contract and was placed under 3 months' probation but on 19<sup>th</sup> December, 2014 she was issued with letter terminating employment without notice or any reasons being given.

The claim is that on 19<sup>th</sup> December, 2014 the respondent purported to have evaluated the claimant's work performance as the basis for termination of employment. There was no hearing or any allegations with regard to work performances and which was unfair as her employment had since been confirmed after the probation period ended.

The claimant is seeking for payment of compensation at 12 months and costs of the suit; and issuance of a certificate of service.

The claimant testified in support of her case.

Response

The response by the respondent is that there is no proper respondent to the claim and the suit is should be dismissed and further denies the claim on the grounds that the letter dated 8<sup>th</sup> April, 2014 does not show the relationship between an employer and employee.

The response is also that the claimant's work performance was evaluated towards the end of her probation period and a report made and the results given to the claimant. Due to dismal performance and complaints raised in the report, employment could not be confirmed and the probation period was extended to December, 2014 when work performance was found to be below average leading to notice dated 19<sup>th</sup> December, 2014 terminating employment.

The claims made are not justified and there was no unfair termination of employment.

No evidence was called by the respondent.

Determination

By letter dated 8<sup>th</sup> April, 2014 the respondent employed the claimant as a cateress at a monthly wage of Ksh.42, 500 gross and on condition that;

*1. Your employment takes effect from 5<sup>th</sup> May, 2014 and you will serve a probation period of three months. During this time, this*

offer can be terminated by either party giving a 2 weeks' notice or salary in lieu.

By letter dated 19<sup>th</sup> December, 2014 the respondent terminated the claimant's employment on the grounds that;

*Your probation period with the Hospital ended in September, 2014. We evaluated you during this month and your performance was below our expectation. With your consultation we agreed to extend the probation further to allow you to perfect your performance. The situation has not improved.*

*I confirm that we have decided not to continue your employment beyond this period. As a result we have given you two weeks' notice. ...*

The respondent has not attached the alleged consent extending the probation period.

Effectively, the probation period lapsed on 4<sup>th</sup> August, 2014 pursuant to the provisions of section 42 of the Employment Act, 2007 (the Act). The claimant became entitled to all rights and benefits of an employee under the law.

Termination of employment based on alleged extension of a probation period already lapsed was procedurally and substantively unfair as this was contrary to the provisions of section 35, 41 and 45 of the Act. Such required notice of not less than a month, a hearing, establishment of valid and reasonable grounds leading to termination of employment. See **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**.

Further, the respondent in terminating the claimant's employment cited the reasons that she was of poor work performance. That her work had been evaluated and found *below expectation*. No record of the evaluation is attached.

Section 41(1) of the Act requires an employer to issue notice upon the employee before termination of employment on the grounds of work performance. The employee must be allowed an opportunity to be heard before employment is terminated. The employer has demonstrate the efforts put in place to support an employee alleged to be of poor work performance or one who is found below expectation.

Section 41 of the Act requires that;

***(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 reasons 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.***

The due process of the law requires the employee alleged to be of poor work performance to be issued with notice and given a hearing in the presence of another employee of choice at the shop floor. Even in a serious case which may require summary dismissal for grounds of *misconduct or poor performance*, the employee must be taken through the mandatory due process outlined under section 41 of the Act. see **Naumy Jemutai Kirui v Unilever Tea Kenya Limited [2020] eKLR** and the Court of Appeal in the case of **National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR** while addressing the question of keeping an employee on the performance review plan and using it as the basis for termination of employment held that;

*... In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee*

And in the case of **National Bank of Kenya v Anthony Njue John [2019] eKLR** held that;

*Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with the m. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations levelled against him by the employer.*

In this case, save for the respondent to state that the claimant's probation was extended, which is without evidence of her consent and that she was of poor performance and despite a review she failed to improve, the mandatory provisions of section 41 of the Act were not adhered to.

Pursuant to section 45 of the Act, employment is terminated unlawfully where the provisions of the law on due process is not followed. Termination of employment is substantively unfair where there are no valid and reasonable reasons for the same.

In this case the court finds the claimant's employment was unfairly terminated by the respondent as it lacked both procedural and substantive justification. Compensation is due under the provisions of section 49 of the Act.

The claimant is seeking compensation, costs and certificate of service.

The claimant worked for 6 months only. One (1) compensation at gross wage of Kshs. is hereby found appropriate. All at Ksh.42,500.

Costs are due as the claimant have been forced to file suit due to unfair termination of employment.

A certificate of service should issue under the provisions of section 51 of the Act.

**Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;**

- (a) Compensation at Kshs.42,500;**
- (b) Issuance of certificate of service; and**
- (c) Costs of the suit.**

Delivered in open court at Nairobi this 14<sup>th</sup> day of October, 2021

**JUDGE**