REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1076 OF 2017

(Before Hon. Justice Dr. Jacob Gakeri)

DAVID ARAKA.....CLAIMANT

VERSUS

UCHUMI SUPERMARKETS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent as a Branch Manager on 15th October 2016 under a contract dated 11th October 2016, at Kshs.100,000 per month. Under the letter of employment, the Claimant would be on probation for 6 months to facilitate checking of references and assess his performance. A two weeks' notice of termination was provided for and he would work for 6 days and one day off duty each week. The Claimant was entitled to 25 working days leave for every 12 months of service, prorated for the period worked if less than 12 months. Finally, termination was by either party giving the other 30 days' notice in writing or in payment of salary in lieu of notice. Summary dismissal was reserved in cases of misconduct, negligence, omission or insubordination.

2. The Claimant alleges that he was unfairly terminated on 6th February 2017 in that he had not been evaluated by the Respondent no prior warning or notice of the alleged grounds, were provided no opportunity to be heard. The memorandum of claim was filed on 12th June 2017. The Claimant alleges that he suffered loss and seeks the following reliefs –

(a) A declaration that the termination on 6th February 2017 was wrongful and unlawful

(b) 30 days' leave and off days for Kshs.200,000.00

(c) 12 months' salary at Kshs.1,200,000.00

(d) Damages for loss and suffering

(e) Interest on (b) and (c) at Court rates

(f) Costs of this suit

(g) Such other or further relief as the Court may deem just and fit to grant.

3. The Respondent was not represented at the hearing and tendered no oral evidence. Attempts by the Claimant's Counsel to contact its Counsel proved futile.

4. The Respondent filed its response to the memorandum of claim on 30th April 2018. It admitted the contents of paragraph 4 of the memorandum of claim to the extent of the duration of the probationary period only and that the Claimant would be confirmed if his performance was satisfactory and on receipt of satisfactory references from his referees.

5. The Respondent prayed that the memorandum of claim be dismissed with costs to the Respondent.

Evidence

6. The Claimant testified that he was engaged by the Respondent in 2016 and adopted the letter of appointment dated 11th October 2016. That he worked for the Respondent until February 2017 when he was terminated by a letter dated 6th February 2017 on the premise that subsequent reviews ad evaluation of performance against agreed deliverables was below expectation. He testified that he was diligent employee but faced numerous challenges for instance lack of support from suppliers and poor staff morale as per the email dated 22nd January 2017. That he engaged suppliers and held meetings with staff to improve performance. He told the Court that he was on probation for the entire duration of 6 months. He further testified that sales were comparatively higher during the time he served. That he was evaluated on 14th February 2017 after dismissal on 6th February 2017 and was not invited for disciplinary hearing. He prayed for the reliefs as particularised in the memorandum of claim.

7. In its response to the memorandum of claim, the Respondent avers that the Claimant's performance was monitored and appraised regularly by the Line Manager, Regional Manager and the Chief Operating Officer as per the Human Resource Policy and Procedures Manual. That both the Claimant's Line Managers found his performance unsatisfactory, that he lacked the necessary capabilities for his role as the Branch Manager. The probation review forms dated 28th October 2016 stated that –

a) That the Claimant was unable to bring change to his branch.

b) That the Claimant lacked leadership skills and that he was not committed to the business as exhibited by his work schedule.

c) That the branch managed by the Claimant continued to perform dismally despite inflow of substantial stocks and that it had poor sales.

d) That the Claimant was inclined to generalities more than actionable points.

e) That the Claimant was having challenges fitting in a team.

f) That the Claimant was poor in problem solving.

8. It further averred that the Claimant's probation was extended by a further three months to accord the Claimant opportunity to improve his performance. The Claimant was advised to demonstrate commitment to the business and improve leadership skills and his relationship with others. The Respondent avers that it supported the Claimant with resources including a strong supervisor to assist him but his performance remained dismal. That a self-assessment form was sent to the Claimant on 11th January 2017 but the Claimant failed and/or neglected to complete the same as required. A copy of the email from P. Kamau on 11th January 2017 was attached as evidence. It required the recipients to fill the assessment form in preparation for a one-on-one session. That the Claimant appraised himself on 14th February 2017 when he went to hand over his responsibilities to the Line Manager.

9. Further averments were that the Claimant was evaluated by the Regional Manager and the Chief Operating Officer as per the Human Resource Policy and Procedures Manual, (HR Policy) 2015.

10. That the Claimant's references were not positive on leadership skills which rendered him unsuitable for employment by the Respondent.

11. It was also averred that the Claimant was aware of the Respondent's financial challenges and was part of the team engaged to turn around its fortunes.

12. Finally, the Respondent avers that the Claimant's termination was lawful since his performance fell below expectations of the Respondent.

Submissions

13. The Claimant's Counsel submitted that the Claimant was offered employment on 11th August 2016 and placed on probation for 3 months under paragraph 3.2.5 of the Respondent's HR Policy which dealt with acting appointments not probation. Provisions on probation are set out in paragraph 3.6.3 of the Respondent's HR Policy. That the first evaluation/appraisal was conducted towards the end of October 2016 when the Respondent decided to extend the probation for another 3 months. The next evaluation was supposed to be conducted in January 2017. Counsel contended that since the Claimant was terminated on 6th February 2017, had not been confirmed or terminated. Previously, he had competed the probation period. Counsel relied on the decision in **Narry Philemons Onaya-Odeck v Technical University College (2017) eKLR** for the proposition that if a probationary contact is not terminated, confirmed or extended after 6 months, an employee is deemed to have been confirmed by operation of law and termination must be in accordance with Sections 35, 40, 41 and 44 of the Employment Act, 2007 or by mutual agreement of the parties.

14. It was further submitted that the Claimant was terminated without compliance with Section 41 of the Employment Act and reliance was made on **Agnes Yahuma Digo v PJ. Petroleum Equipment Ltd, Industrial Case No. 2049 of 2011** as well as **Jane Samba Mukala v Ol Tukai Lodge Ltd, Industrial Cause No. 823 of 2011** to buttress the arguments. On the procedures applicable before an employee is terminated for poor performance which Counsel contended were not complied with tendering the termination unlawful and unfair.

15. On payment of Kshs.200,000 for accrued 15 leave days and 15 off days and salary for February 2017, Counsel submitted that Section 28 of the Act gave all employees the right to annual leave and because the Claimant had not preceded on leave, he was entitled to compensation for the accrued days. Reliance was made on the decision in **Gilbert Mbugua Kairu v Coffee Research Foundation (2014) eKLR** to reinforce the claim on leave days. The issue of off days was not addressed by the submissions.

16. On the 12 months' salary compensation for wrongful dismissal, Counsel contended that under Section 49 of the Employment Act, 2007, where the Labour Officer is of the opinion that summary dismissal or termination of employment is unjustified the Labour Officer may recommend to the employer to pay the employee the equivalent of a number of months wages or salary not exceeding 12 months based on the gross monthly wage or salary of the employee at the time of dismissal. Reliance was made on the decision in **Charles Samson Namusisi v West Kenya Sugar Company Ltd (2019) eKLR** to reinforce the entitlement under Section 49(1)(c) of the Act.

17. The Respondent was not represented at the hearing, and did into file written submissions as directed by the Court.

Determination

18. I have considered the pleadings, evidence and the submissions and the issues for determination are: -

(i) Whether the Claimant was on probation or not

(ii) Whether the Claimant's termination was wrongful and unfair.

(iii) Whether the Claimant is entitled to the reliefs sought.

Probation

19. Section 2 of the Employment Act, 2007 provides that probationary contract, means a contract of employment, which is of not more than twelve months' duration or part thereof is in writing and expressly states that it is for a probationary period.

20. Paragraph 30 of the Claimant's letter of appointment stated that *"your appointment is subject to a probationary period of six months, during which time we will complete the checking of your references and asses your performance. A two weeks' notice of termination will apply to either party during this probation period."*

21. Being a general requirement for new employees in many organizations, the Claimant does not appear to have had any issue with the 6 months' probationary period.

22. It is common ground that the Claimant was engaged by the Respondent effective 15th August 2016 and placed on probation for six (6) months and either party was at liberty to terminate the contract by two weeks' notice to the other. It is not in dispute that the Claimant's gross salary was Kshs.100,000 payable and the end of each month in arrears. It is also not in dispute that the Claimant was subject to evaluation or appraisal by the Respondent. The Claimant was evaluated in October 2016 to assess his suitability in accordance with paragraph 3.6.3 of the Respondent's Human Resources Policy and Procedures Manual, November 2015 (herein after HR Policy).

23. The Line Manager, Mr. Peter Kamau, the Chief Operations Officer found the Claimant's performance on several deliverables unsatisfactory and provided a strong supervisor in the stare to assist the Claimant and recommended extension of the Claimant's probation period up to a maximum of three months with monthly reviews effective 28th October 2016.

24. The next appraisal was conducted on 14th February 2017, 8 days after the Claimant had been terminated. The appraisal form is authenticated by the Appraiser and the Appraisee and states that the Claimant required practice and experience in retail operations to enhance skill in management.

25. Paragraph 3.6.3 of the Respondent's Human Resources Policy and Procedures Manual 2015 has detailed provision on how an employee on probation should be treated. A new employee shall be put on probation for a period of three (3) months. An employee appointed on probation must be regarded as being on trial with a view to learning his work and being tested as to his suitability first. It is the duty of the Line Manager to ensure that every employee on probation is given adequate opportunities to qualify for confirmation in appointment. Within 14 days before expiry of the probationary period, the Supervisor should consider in light of the report on the employee's conduct, capabilities and performance whether or not the employee is suitable for confirmation.

26. Where an employee's conduct and performance are unsatisfactory, he shall be informed in writing and the probation period may be extended by a maximum of three (3) months.

27. It is not in dispute that the Respondent's letter to the Claimant dated 6th February 2017 gave the Claimant a two weeks' notice of termination of probation due for expiry on 14th February 2017. Thus, the Claimant was still on probation on the date the letter of termination was written and whose effective date was 7th February 2017. The notice meant that the Claimant's probation ended on 21st February

2017.

28. The Claimant's Counsel's submission that the probation ended at the end of January 2017 is not supported by evidence other than the recommendation made by the Appraiser. There is no evidence to show that the period of probation changed from the original 6 months. Significantly, the Claimant was evaluated on 28th October 2016 after only two and a half months.

29. The Claimant's letter of employment was categorical that he would be on probation for 6 months to facilitate the checking of references and evaluate his suitability for employment. This provision was never amended by the parties to the employment agreement. This, however does not totally diminish the Claimant's argument that the Respondent terminated the Claimant's probation after the prescribed duration.

30. In sum, the Claimant's probation period ended on 21st February 2017 as opposed to 14th February 2017 when the 6 months' duration lapsed. Undeniably, the Respondent did not comply with the terms of the contract of service with the Claimant.

31. More importantly, the Respondent did not observe the contents of paragraph 3.6.3 of its HR Policy in that it provided no evidence that it had written to the Claimant on the unsatisfactory performance and extension of the probationary period. The letter as provided by the HR Policy, had to indicate the consequences of his performance not improving. This does not appear to have been done. According to the HR Policy, if the employee's performance did to improve on expiry of the extended probation period, his/her services had to be terminated.

32. From the evidence on record, the Claimant was first evaluated on 28th October 2016 and was due for another or other evaluations at any time thereafter, but none took place until 14th February 2017 by which time he had been served with a notice informing him that he would not be confirmed by the Respondent. The notice dated 6th February 2017 took effect from 7th February 2017 to 21st February 2017, seven days after the probation period of 6 months had lapsed. Effectively, the termination took place after the probation period had lapsed and although the Claimant did not protest, this is an unfair labour practice.

33. It is the view of the Court that since the Claimant was notified of the termination of probation during the currency of the probationary period, he was still on probation which lapsed on 14th February 2017. On whether the termination wrongful and unlawful, the Court is guided by the observations **CMC Aviation Limited v Mohammed Noor (2015) eKLR,** that –

> "**…** *wrongful dismissal involves breach of employment contract, like where an employer dismisses an employee without notice or without the right amount of notice contrary to the employment contract."*

34. Relatedly, paragraph 3.6.3 of the Respondent's HR Policy has detailed provisions on how employees on probation should treated until confirmation or termination.

35. From the evidence on record, it is clear to the Court that although the Respondent's HR Policy required the Respondent to do certain things to ensure that an employee on probation qualified for appointment, this did not happen in this case. For instance, the Claimant complained of stock outs, lack of support, low staff morale and absenteeism. He testified on how he attempted to address the changes to promote sales by engaging suppliers and talked to employees to boost their morale. This evidence was not controverted. The Claimant's emails dated 2nd November 2016 at 5.09 pm and 22nd January 2017 at 10.54 am on stock out of basic commodities such as sugar and vegetables demonstrates how dire the situation was. It was inevitably difficult for sales to improve when basic products were often unavailable. Was the Claimant "*given adequate opportunity to qualify for confirmation as required by the HR Policy?"* The Court is of the view that this did not happen. The Court is not oblivious of the fact that the Respondent was facing serious financial challenges as alleged.

36. Finally, from the evidence on record, the Claimant was terminated on 6th February 2017 on the ground that his performance against agreed deliverables was below expectation. He was accorded a two weeks' notice effective 7th February 2017. Other than the appraisal conducted in late October 2016, there was no evidence of another evaluation of the Claimant's performance prior to termination. The subsequent evaluation/appraisal was conducted on 14th February 2017 on the day the Claimant visited the office for purposes of handing over as directed by the letter of termination. It is unclear how the Respondent arrived at the decision to terminate the Claimant on 6th February 2017.

37. The issue of poor performance was addressed in **Agnes Yahuma Digo v PJ Petroleum Equipment Ltd, Industrial Cause No. 2049 of 2011** as well as in **Jane Samba Mukela v Ol Tukai Lodge Ltd, Industrial Cause No. 823 of 2010**. In the latter case, the Court observed as follows

> " **…** *where poor performance is shown to be a reasons for termination, the employer is placed at a high level of proof as outlined under section 8 of the Employment Act to show that in arriving at this decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance. Section 5(8) (c) further outline the policy and practice guidelines that include having a performance evaluation system that can be used by an employer in ensuring their employees get a fair chance when they are of poor performance.*

Therefore it is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further what measures they have taken to address poor performance once the policy or evaluation system has been applied. It will not suffice to just say that one has been terminated for poor performance. The effort leading to this decision must be demonstrated. Otherwise, it would be an easy option for abuse.

Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and an explanation on their poor performance shared where they would in essence be allowed to defend themselves or be given an opportunity to address their weaknesses. In the event a decision is made to terminate an employee on the reasons of poor performance, the employee must be called again and in the presence of another employee of their choice, the reasons for termination shared and explained to such an employee.

Where this procedure as set out under section 41 of the Employment Act is not followed, then a termination that arises from it will be procedurally flawed. It is procedurally irregular. This holding was as similarly held in the case of Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration & others (2006) 27 ILJ 1644 (LC) that when an employee is charged with poor performance, it must be clearly set out and differentiated between what is a misconduct and incapacity both conceptually and practically."

38. In light of the foregoing and the evidence on record, the Court is satisfied that the Respondent did not accord the Claimant a fair playing

field and terminated him without a second evaluation which should have been the basis for its decision to confirm him or not. Consequently, the Court finds and holds that the Claimant's termination dated 6th February 2017 was wrongful.

39. On the lawfulness of the termination, the Court is guided by the decision in **Narry Philemons Onaya-Odeck v Technical University of Kenya (Formerly, the Kenya Polytechnic University College (2017) eKLR** where Nduma J. observed that –

> *"… the probationary terms of the claimant's contract of service lapsed after 6 months. By operation of the law and in accordance with Section 42 of the Employment Act, the claimant successfully completed his probation period and thus his employment confirmed. After the lapse of 6 months, the respondent as the employer had no right to review such contract of service retrospectively. Effectively, under the terms of service, once the claimant proceeded to offer his labours to the respondent upon the lapse of 6 months, he could only be terminated from such employment in accordance with section 35, 40, 44 of the Employment Act, 2007 or by mutual agreement of the parties."*

40. Since the Claimant was an employee of the Respondent until 21st February 2017, seven (7) days after expiry of the probation period he is deemed to have confirmed by operation of law, and the necessary substantive and procedural requirements before termination had to be complied with. As submitted by the Claimant's Counsel, an employee who is not on probation cannot be terminated without due process as envisaged by Section 41 of the Employment Act, the employee must be given an opportunity to be heard and make representations on the allegations facing him.

41. In addition, the provisions of Section 42(1) which addresses instances of poor performance were not complied with. The decision in **Agnes Yahuma Digo v PJ Petroleum Equipment Ltd, Industrial Cause No. 2049 of 2011** is also instructive on how an employer should address issues of poor performance.

42. In view of the foregoing, the Court finds and holds that the Claimant's termination was unlawful.

Whether the Claimant is entitled to the reliefs sought

(a) A declaration that termination was wrongful and unlawful

Having found that the Claimant's termination was wrongful an unlawful, a declaration is hereby made that the Claimant's termination dated 6th February 2017 was wrongful and unlawful

(b) Payment of Kshs.200,000 for 15 accrued leave days and 15 off days and February salary

(i) Leave Days

The Claimant was entitled to 24 working days leave every 12 months prorated for the period worked. Since he worked for 6 months and 7 days, he is entitled to 12.6 days + ¼ day = 13 days equivalent to Kshs.43,333. The Court awards **Kshs.43,333** for leave days.

(ii) Off duty days

The Claimants was entitled to one day off day per week and pleaded that 15 days were outstanding equivalent to Kshs.50,000. The Court awards **Kshs.50,000** for off duty days.

(iii) Salary for February 2017

Since the Claimant's employment was confirmed by operation of law effective 14th February 2017, he was entitled to a one (1) month's notice and is thus entitled to one (1) month's salary in lieu of notice. The Court awards him one (1) month's salary of **Kshs.100,000**.

(iv) 12 months' salary damages for wrongful dismissal

Compensation for wrongful and unlawful or unjustified termination is provided for under Section 49(1)(c) of the Employment Act and the Court is enjoined to take into account the circumstances set out in Section 49(4) of the Act.

Considering that the Claimant was in employment for only 6 months and the attendant circumstances, the Court is satisfied that one (1) month's salary is sufficient.

In the circumstances, the Court awards **Kshs.100,000** as compensation for the wrongful and unlawful termination.

(v) The claim for damages for loss and suffering is dismissed for lack of evidence.

43. **In sum, judgment is entered for the Claimant for the sum of Kshs.293,333 with costs and interest at Court rates from the date of this judgment.**

44. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF OCTOBER 2021

DR. JACOB GAKERI

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE