



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 539 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

FRANCIS ABOGE ODUK.....CLAIMANT

VERSUS

HASBAH KENYA LIMITED.....RESPONDENT

JUDGMENT

Vide the letter of 15th September 2013, the Claimant was engaged by the Respondent as a regional sales manager, Mombasa, earning a gross salary of Kshs.85,000 and a car allowance of Kshs.35,000. The terms of his employment contract were as follows-

- a. The Claimant would be subject to deductions and assessment on his work performance on a continuous basis and that he would be informed of any revised plan and any future objectives would be agreed upon between the Claimant and the Claimant's immediate supervisor.
- b. He would be placed on a probation period of 6 months which could be extended by a further period of 6 months and the reasons for extension given in writing.
- c. The Claimant would at the end of the probation period be confirmed into permanent employment with effect from the date of appointment.

The Claimant commenced his work on 4th September 2013 and completed his probation. The probation period was not extended and neither was his employment formally converted to permanent terms. On 19th June 2014, his employment was terminated for non-performance. Aggrieved by this decision, the Claimant filed the suit herein seeking the following reliefs-

1. Kshs.1,380,000 damages for unfair, unlawful and wrongful termination of employment.
2. Kshs.115,000 being one month pay in lieu of notice.
3. A declaration that upon completing 6 months' probation period, and no reason in writing or extension of the period having been issued to the Claimant, the Claimant was a permanent employee with effect from 4th September 2013.
4. An order compelling the Respondent to calculate and pay to the Claimant arrears of salary based on permanent employment terms.
5. Damages
6. Costs of this suit.
7. Any other returns.

During examination in chief, the Claimant testified that his probation period ended in February 2014. He denied any non-performance on his part and stated that he usually met his targets apart from the month when he scored 86% and which was still okay. He stated that he was not given a work manual. It was his testimony that he was paid Kshs.177,534 as his dues.

The Respondent filed a reply to the memorandum of claim on 10th August 2015 contending that the Claimant was issued with several warnings by the branch manager, Mombasa and that his work needed a lot of improvement. The Respondent avers that the Claimant's employment was still under review for purposes of confirmation as a permanent employee or extension of the probation period or termination.

The Respondent contends that the Claimant was given a hearing by the general manager and the Human Resource Manager and the reasons for termination given to him. The Respondent denies refusing to pay the Claimant his dues.

The respondent did not call any witness and relied on its pleadings, documents filed therewith and written submissions.

Submissions by the Parties

In his submissions filed on 21st March 2019, the claimant submitted that since there was no extension of the Claimant's probationary contract as provided under Section 42(2) of the Employment Act, the Claimant's employment should be presumed to have automatically converted to permanent. He relies on the case of **Benjamin Nyambati Ondiba vs. Egerton University [2014] eKLR**.

The claimant further submitted that the termination of his employment was unfair, unlawful and wrongful because he surpassed his monthly targets and that no charges were levelled against him and neither was he issued with reports, evaluations or assessments done over his work. Further, that the meeting with the General Manager which was for redeployment turned out to be a disciplinary hearing that had been predetermined. He relies on the case of **Abraham Gumba vs. Kenya Medical Supplies Authority [2014] eKLR** and **Benjamin Kai Chilumo vs. Mombasa Water Supply and Sanitation Limited [2015] eKLR**.

In its submissions of 12th April 2019, the Respondent submits that the compensation of Kshs.1,380,000 is excessive as the Claimant barely worked for 9 months. In its view, the compensation should not be a means for the Claimant to enrich himself. The respondent

relies on the case of **Naomi Ruwa vs. Peter Odote [2018] eKLR**.

As regards payment in lieu of notice, the Respondent submits that the Claimant is only entitled to half his salary as the other half had already been paid. The Respondent submits that the Claimant's claim for 30% of his gross salary is baseless and not founded in any provisions of law. That the Claimant was using the court to unjustly enrich himself.

Determination

I have considered the pleadings filed by the parties, the evidence adduced, together with the submissions filed and find that the following are the issues for determination before this Court-

- a. Whether the Claimant was on probation at the time of termination of his employment.
- b. Whether the Claimant's employment was unlawfully terminated.
- c. Whether the Claimant is entitled to the reliefs sought.

Probation

Section 42 of the Employment Act provides as follows-

- (1) ...
- (2) **A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.**
- (3) **No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2).**
- (4) **A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice.**

The Claimant's contract of 4th September 2013 made provisions as follows-

"5. Probation:

- a. You will be on probation for a period of 6 months. During probation, your services may be terminated by either party giving the other 14 days' notice, or 14 days pay in lieu of notice.*

b. The probationary period may be extended by up to a maximum of a further 6 months. The period of extension

and the reason for extension will be given in writing.

c. On successful completion of probation, you will be confirmed into permanent employment with effect from the date of appointment.”

From the above terms, the Claimant’s probationary period was supposed to end in March 2014. However, after the lapse of the period, the Claimant’s contract was not terminated and neither was his probation period extended in writing as per contract. Instead, the Claimant continued to work for the Respondent until 19th June 2014 when he was issued with a termination letter, effective immediately.

By failing to extend the Claimant’s probation or terminate his contract upon expiry of the probation period, he became constructively confirmed as a regular employee after 5th March 2014.

Termination

Section 41 of the Employment Act provides as follows-

(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of poor performance ... explain to the employee, in a language the employee understands, the reason 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.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

The Claimant’s assertion that he went to Nairobi on the presumption that he was being transferred yet he was attending a disciplinary hearing, was not controverted by the Respondent. His termination letter indicated that the Claimant’s disciplinary process was conducted in a day. He had no notice of the disciplinary hearing and was not informed of the charges against him beforehand or given an opportunity to prepare for the disciplinary hearing. He was further not given the opportunity to be accompanied to the disciplinary hearing as provided in Section 41 of the Act which provides that –

41. Notification and hearing before termination on grounds of misconduct

(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 reason 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.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

In *Margaret Auma Ingwe vs. Kenya Power and Lighting Company Limited* [2015] eKLR the court observed as follows –

“For disciplinary process to pass the fairness test set out in section 41 of the Employment Act, the charges made against the employee must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence.”

Although the reason for the Claimant’s termination was poor performance, the Respondent did not adduce any evidence to show the backdrop or the process that was used to measure the Claimant’s performance. It is now trite law that poor performance should be supported by evidence of specific performance targets, appraisal of performance, with specific results. It is not enough to claim that an employee’s performance was poor.

The Respondent further averred that the Claimant was issued with several oral warnings regarding his performance, yet no witness was called to fortify this position.

In view of the foregoing, I find that the Respondent has failed to justify its reason for terminating the Claimant’s employment as required by Section 43(1) of the Act hence failed to discharge its burden as required under Section 47(5). Consequently, the termination of the Claimant’s employment is declared unfair.

Reliefs

The Claimant is awarded one’s salary as compensation for unfair and unlawful termination taking into consideration his service to the

Respondent of 9 months. The Claimant is awarded 17 days' pay in lieu of notice as he had already been paid for notice of 14 days at the time his employment was terminated. The claim for arrears of salary based on permanent employment terms fails because there is no legal or contractual justification for it. The claim for damages fails as the same has already been awarded in the form of compensation for unlawful termination.

I thus award the claimant the following –

(i).. One month's salary compensation..... Kshs.120,000

(ii).. Balance of pay in lieu of notice..... Kshs.78,462

Total Kshs198,462

The costs of this suit is awarded to the Claimant. Interest shall accrue at court rates from date of judgment to date of payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF JANUARY 2020

MAUREEN ONYANGO

JUDGE