



**REPUBLIC OF KENYA**

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

**CAUSE NO. 3 OF 2015**

**SAMSON AUGUSTINE WANYANGU.....CLAIMANT**

**VERSUS**

**ROY HAULIERS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant was employed by the respondent as Human Resource Officer from 17.9.2011 to 31.1.2012 when he was terminated for poor performance. Thereafter he brought this suit seeking the following reliefs:

(a) Reinstatement without loss of benefits and position.

(b) Alternatively he be paid the following:

(i) One month salary in lieu of notice – Ksh.65,000

(ii) 12 months salary compensation for unfair

termination .....Ksh. 77,0000

(iii) General damages emoluments/contingencies

Kshs. 709,750

TOTAL .....Ksh.1,544,756

(c) Costs.

2. The respondent field defence admitting that she employed the claimant on 17.9.2011 for a consolidated salary of Kshs. 65,000 per month. She averred that the claimant was placed on a 3 month’s probation and under the contract of employment his confirmation was subject to good performance failure of which the probation could either be extended until she was satisfied with his performance. She further averred that the claimant performed poorly despite his probation period being extended and consequently she decided to terminate his employment contract.

3. The respondents contended that the termination was lawful by dint of section 42 of the Employment Act and the contract of employment signed by the claimant. She also contended that after the termination the claimant reported as dispute to the Labour office and the matter was resolved and she paid the claimant all the dues assessed by the Labour Officer through the same office. She therefore contended that the suit was res judicate and should be dismissed with costs.

**Evidence tendered**

4. The claimant testified as CW1. He reiterated the he was employed by the respondent on 17.9.2011 as Human Resource Officer whereby the first 3 months were probation period. He further testified that he served the 3 months probation successfully and his appointment was confirmed by implication because he never receive any letter. Thereafter he worked well until 31.1.2012 when he was served with a termination letter citing poor performance as the reasons for the termination.

5. He contended that the termination was unfair and it amounted to breach of the contract of employment because he was not given any chance to defend himself of the alleged poor performance, in a hearing or show cause letter. He further contended that he was not paid his

terminal dues after the termination and he was escorted to the gate by security officers before doing any clearance. He therefore prayed for the reliefs set out in the claim plus certificate of service.

6. In cross-examination, he admitted that the letter of appointment provided for 3 months probation. He further admitted that confirmation of his appointment was to be done after successful completion of the probation. He further admitted that confirmation was subject to satisfactory performance. He however contended that the employer had the option of either extending the probation or confirming the appointment.

7. He testified that he worked for 41/2 months after the appointment before the termination on 31.1.2012. He maintained that his probation was never extended after the lapse of the 3 months probation period. He however admitted that he never received any letter confirming his appointment. He maintained that he was unfairly dismissed and prayed for compensation for unfair termination. He admitted that the claim for 15% General Emolument was not provided in his letter of appointment.

8. The respondent called no witnesses and as such she closed the defence case without tendering any evidence. However both parties filed written submissions.

#### **Claimants' submissions**

9. The claimant submitted that it is a fact that he worked for the respondent for 4 ½ months without any warning about his performance. He further submitted without prior notice and he was not given any hearing to defend himself against the alleged poor performance, which according to him was invalid.

10. He further submitted that the computation of his dues at Kshs. 80169 gross and the net of Kshs. 56116 was not clear to him as it was not accurate. He further contended that the depositing of the Kshs. 56116 was done without his knowledge. He however urged that by the respondent accepting to pay one month salary in lieu of notice was an indication that the probation period had lapsed and his appointment confirmed.

11. He maintained that he had successfully completed his probation and his employment was unfairly terminated. He relied on **Narry Philemons Onaya-Odeck – Technical University of Kenya [2017] eKLR** for emphasis and prayed for the relief set out in the claim.

#### **Respondent's submissions**

12. The respondent submitted that the claimant was terminated within 6 months of his employment and as such he was still in his probation. He relied on Section 42 of the Employment Act to urge that employee can be placed on probation for 6 months without his agreement and a further 6 months with his agreement. He relied on **Danish Jalong'o & another v Amicabre Travel Services Limited 2014** eKLR (to urge that probation is a period for parties to gauge each other before committing themselves to permanent employment relationship, and as such it can be terminated without the formal procedure of hearing under Section 41 or 45 of the Employment Act.

13. As regards the reliefs sought, she submitted that the claimant is entitled to nothing because his dues amounting of Ksh. 56116 being leave and Notice pay was paid to him at the Labour Office. She further submitted that the claim for compensation must fail because the claimant was terminated during probation period. Likewise she contended that the claim for General emoluments is not founded on the contract. However, she did not oppose the claim for certificate of service.

14. The issues for determination are:

**(a) Whether the termination of the claimants employment was done during probation period or not.**

**(b) If not, whether the termination was unfair**

**(c) Whether the reliefs sought should be granted.**

#### **Analysis and determination.**

##### **Terminated during probation or not**

15. There is no doubt that the contract of service herein provided for three months probation in the following terms:

***“You will be employed on probation for a period of 3 months and on successful completion of the said probation, you will be absorbed as a permanent member of staff. Should the management feel that your performance has been wanting, you may be relieved of your duties or the probation period extended to such a period that the company is satisfied that you have attained satisfactory level of performance. You will be expected to carry out your duties diligently and most efficiently with minimum supervision.”***

16. The question that arises is whether the employer has any obligation to notify the claimant before extending the probation period. In my view, the answer to the said question is in the affirmative.

17. The employer had an obligation of notifying the claimant about his alleged poor performance before the lapse of the probation period and also to notify him that an extension of the probation was being considered. It was not upon the employer to say nothing after the lapse of the

agreed probation period and expect the claimant to know that his probation period had been extended. It follows therefore that the failure by the employer to notify the claimant about the alleged poor performance and that his probation period was being extended rendered the claimant's appointment to be confirmed by implication.

18. The contract letter never indicated that after the lapse of the 3 months probation period, a confirmation letter was to be issued as a condition for confirmation. There was also no requirement under the contract that a performance appraising was to be done to assess his fitness before confirmation was accorded. Consequently, I return that the termination of the claimant's employment did not occur during his probation period.

19. To fortify the foregoing view, I rely on *Narry Philemons Onaya-Odeck v Technical University of Kenya [2017]eKLR where Mbaru J* held that:

***“29. In this case the contemplated 6 months of probation for the claimant came and went. The claimant was not reviewed and was not issued with a letter of confirmation. Such process did not take place as agreed. The respondent sought to review the claimant's employment for purposes of confirmation 8 months into the employment. The inaction of the respondent as the employer cannot be visited upon the claimant. The benefit of this lapse can only apply to protect the claimant's rights in the employment relationship.”***

#### **Whether the termination of employment was unfair**

20. Under section 45 (2) of the Employment Act termination of employee's employment is unfair if the employer fails to prove that it was grounded in a valid and fair reason related to the employees conduct, capacity and compatibility or based on employers operational requirement; and that a fair procedure was followed. In this case the respondent never adduced any evidence to rebut the claimant's case that he was dismissed after the probation period without any valid reason and without being accorded a chance to defend himself. I, therefore, find and hold that the failure to tender evidence means that the respondent has not discharged her burden of proving valid reasons for the termination and that fair procedure was followed and as such I return that the termination was unfair within the meaning of section 45 of the Employment Act.

#### **Reliefs**

21. Under section 49 of the Act, I award the claimant two months salary as compensation for unfair termination of his employment considering his short service. The claim for salary in lieu of notice is dismissed because it was paid through the Labour Office.

22. The claim for General damages emoluments is not founded on law or the contract of service and is also dismissed.

23. The claim for certificate of service is granted as prayed cause it is a right under section 51 of the Act.

24. In the end I enter judgment for the claim in the sum of Kshs. 130000 plus costs and interest at court rates from the date hereof. The award is however subject to statutory deductions.

**Dated, signed, and delivered in open court at Nairobi this 17th day of January, 2020.**

**ONESMUS MAKAU**

**JUDGE**