



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAKURU
CAUSE NO.640 OF 2014

SETH O ONCHARI.....CLAIMANT

VERSUS

SHAH LALJI NANGPAR ACADEMY.....RESPONDENT

JUDGEMENT

The claim is that the claimant was employed by the respondent as a teacher vide letter of offer dated 19th August, 2013 and put on probation for 6 months with effect from 2nd September, 2013 after which he would be confirmed.

The claim is that the respondent imposed an extension of the probation period on the claimant through letter received on 10th March, 2014 and backdated to 1st March, 2014. By letter dated 22nd April, 2014 the claimant was summarily dismissed from his employment by the respondent. The claimant was not offered an opportunity to be heard before termination of employment. No reasons were given for the unfair termination of employment.

The claim is for the following dues;

- a) Salary deduction in April Ksh.8,000;
- b) Notice pay ksh.40,000;
- c) Compensation Ksh.480,000;
- d) Accrued leave ksh.40,000
- e) General damages for emotional loss; and
- f) Costs and interests.

The claimant testified that he was employed by the respondent and placed on probation for 6 months starting 2nd September, 2013 and thus ending February, 2014 but on 7th March, 2014 the respondent verbally informed him that his probation had been extended for 4 months. He appealed against the decision on 10th March, 2014 but on 28th March, 2014 he was issued with letter backdated to 1st March, 2014 extending his probation period.

The claimant also testified that on 22nd April, 2014 he received letter terminating his employment. There was no notice save to allege that there had been no work improvement while in the music department yet he had been dedicated to his work, helped in the purchase of music instruments, trained learners from nursery school to senior school to play music instruments and also went out of his way to coach in games and sports. He helped to procure English books that the respondent was unwilling to purchase for learners to enhance performance.

The claimant also testified that there was a salary deduction of ksh.8,000 for 6 hours absence in the month of April, 2014.

Following termination of employment the claimant was unable to meet his financial obligations and this caused him emotional stress. The purported extension of probation and summary dismissal was unjustified and contrary to the Employment Act.

The probation terms of employment were that employment could be terminated within 48 hours. The notice dated 22nd April 2014 was to

end on 24th April, 2014.

The defence is that the claimant was employed on probationary terms and the letter of offer stipulated that a contract would only be signed upon successful completion of probation. By notice dated 22nd April, 2014 the respondent terminated employment for on the probationary terms and therefore there is no unfairness as claimed.

Without prejudice, the defence is based on the probationary terms of the employment, at the end of 6 months the respondent found there was need for improvement on the claimant's work performance which necessitated the extension of the probation period vide letter dated 1st March, 2014. The extension was legal and sanctioned by the Employment Act and upon the extension the claimant did not have any objection.

The defence is also that the claimant worked until 24th April, 2014 hence he is not entitled to Ksh.8,000 claimed for the salary due in April, 2014 and the claims made should be dismissed with costs to the respondent.

Andrew Thuku the manager of the respondent school testified that the claimant was employed on 2nd September, 2013 and placed on 6 months' probation. Confirmation of employment was not automatic and based on work performance at the end of the probation period the claimant was found he was not at par with the requirements and the probation was extended. The claimant as a teacher was hired to impart knowledge and skills to students and his students did not seem to improve. Upon the extension of the probation period, work performance went down and there was a decision to terminate employment with effect from 24th April, 2014 and the required notice issued.

At the close of the hearing both parties filed written submissions.

It is common cause that the claimant was employed by the respondent vide letter dated 19th August, 2013 and placed on 5 months' probation. At the end of the probation period, there was no employment confirmation, the respondent issued notice extending the probation period and then terminated employment before the period ended.

Section 42(2) of Employment Act states as follows;

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.

This Section is couched in mandatory terms in respect to the probationary period. In this case, where the claimant's probation period was extended, after the 6 months lapsed, it should have been extended in agreement with him.. There is no indication that immediately after 28th February, 2014 when the 6 month lapsed the Claimant was informed of any extension of this probationary period and even if this was done, he was to be consulted. See **James O Oloo versus Tana and Athi River Development Authority [2016] eKLR**.

In the case of **Narry Philemons Onaya-Odeck versus Technical University of Kenya [Formerly, the Kenya Polytechnic University College] [2017] eKLR** the court held that;

*The emphasis here is that the employer has the right to terminate the employment of an employee during the probation period on short notice or upon payment in lieu thereof. However, such probation period cannot be for more than 6 months or for a period as agreed by the parties and where the employer finds the need to have the probation period extended beyond the agreed period, this must be done with the agreement of the employee. In this regard, the court in **Peris Nyambura Kimani versus Dalbit Petroleum Ltd, Petition No.63 of 2013** held as follows;*

Section 42 therefore becomes one of the most outstanding provisions of the law and part of the new thinking in employment and labour relations in Kenya. That an employee under probation has to ensure good performance at all times as such an employee's employment can be terminated legally within this period without hearing, can be terminated within 7 days or less or be terminated immediately upon payment of 7 days wages. This is exceptional for the law to be couched in this manner.

Parties to an employment contract are allowed to set their own parameters as to the applicable period for probation. Such a period must however follow the basis of law and cannot go beyond the legal maximum of 12 months. Such a probation period shall not be for more than 6 months but it may be extended for a further period of not more than six months with the agreement of the employee. As much as an employer has long latitude with exercise of their powers within the probation period, the legal requirements therein are set in mandatory terms. Such a probation time can be for up to 6 months and may be extended with the agreement of the employee. [underline added].

In the South Africa Labour Appeal Court, in the case of **Ubuntu Education Fund versus Paulson N.O. & others, Port Elizabeth Labour Appeal Court Case No.12 of 2017** that;

It is trite that the purpose of a probationary period is not only to assess whether the employee has the technical skills or ability to do the job. It also serves the purpose of ascertaining whether the employee is a suitable employee in a wider sense. This allows consideration of matters of "fit" – aspects of demeanour, diligence, compatibility and character. Nevertheless, an employee on probation is still entitled to substantive and procedural fairness.

Noting the above, 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.

It is not a defence that the claimant accepted the extension of the probation period or did not protest or did nothing. Section 42 of the Employment Act, give the employer the duty to address the probation period with an evaluation, appraisal or as the case maybe and allow the employee confirmation of employment or apply the termination provisions thereof.to allow continuation of employment with an extension of the probation period without the agreement of the employee and to help the employee appreciate the areas of poor work performance. so that such can be addressed within the extension period is to go contrary to the statutory provisions regulation probationary terms of employment.

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.

Mr Thuku in his evidence testified that the claimant was reviewed and found to have failed in impacting knowledge and skills to his students and based on poor work performance, his employment was terminated and he was given 48 hours' notice on 22nd April, 2014. Such subjective evaluation is fraught with illegalities looked at visa-is-vies the provisions of section 41 (1) of the Employment Act, 2007 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 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.

Upon the lapse of the probationary period, the claimant became an employee of the respondent even where there was no contract of service issued. He had served for 6 months as the offer letter indicated. Any termination of his employment should have complied the mandatory provisions of section 41 of the Act and where such related to his alleged poor work performance, the procedural safeguard under section 41 should have been followed.

To thus terminate employment under the guise of probation terms is to engage in unfair labour practice. the summary dismissal of the claimant was substantively and procedurally unfair and contrary to the provisions of section 45 of the Employment Act, 2007. Notice pay should have been for one (1) month and compensation is due under the provisions of section 49 of the Act.

The claimant worked for a total of 7 full months and 24 days. He was denied a fair chance to offer his labour even for the period the respondent allegedly extended his probation period. Accordingly, compensation for 4 months pay is hereby found appropriate compensation all at 40,000 x 4 all at Ksh.160,000.

The claimant is also seeking for a salary refund of ksh.8,000 deducted from his April, 2014 salary. The claimant was paid for days worked in April, 2014. He testified to this fact that after 24th April, 2014 he was not required to attend work.

On the claim for leave pay, the claimant testified that he is a resisted teacher. It is common cause that employment of teachers is regulated and there are scheduled school term breaks. To claim for annual leave over and above such periods and failing to take these into account would be to make double payment for time off work.

The claimant is seeking payment of general damages for emotional loss. That he offered his labours to the respondent and went out of his way to support his students. The employment termination caused the emotional distress to the claimant. This is found unfair and has been addressed and compensation found appropriate. This effectively addresses the unfairness visited against the claimant by the respondent.

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

1) A declaration that the claimant was by operation of the law a full time employee of the respondent at the time of termination of employment;

2) A declaration that the claimant was by operation of the law a full time employee of the respondent at the time of termination of employment; 2) A declaration that the claimant's employment was unfairly terminated;

3) Compensation awarded at ksh.160,000;

4) Notice pay Ksh.40,000;5)

Costs of the suit.

Delivered at Nakuru this 13th day of February, 2020.

M. MBAR?

JUDGE

In the presence of:

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