



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 22 OF 2019

STEPHEN WERE.....CLAIMANT

VERSUS

WAMUTI DISTRIBUTORS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for his alleged unlawful and dismissal from employment. He averred that he was employed as a general manager on 1st March 2017 and that he worked as such until 31st August 2017 when he was summoned by Dadson Kamau Mwangi one of the directors of the Respondent and summarily dismissed. He averred that he earned Kshs. 114,000/- a month and the summary dismissal was alleged to be due to his poor performance. He averred the letter tarnished his name as he had never been summoned for performance related issues or for neglect of duty. The Claimant averred that during his tenure the company performed well and led the company to be the best distributor within the Mt. Kenya region. The Claimant averred that he was not offered a hearing or explanation and no reasons for his dismissal were given. He sought a declaration that his dismissal was unlawful, inhumane and unfair. He thus sought one month's salary in lieu of notice – Kshs. 114,000/-, pro rata leave – Kshs. 39,000/-, 12 months salary as compensation for the traumatic and sudden dismissal as well as interest on the sums claimed from date of filing till payment in full together with costs of the suit plus interest thereon.

2. The Respondent averred that the Claimant failed to perform as expected within the probation period and the probation was extended for a further three months vide a letter dated 9th May 2017. The Respondent gave reasons as to why the probation period was extended. The Respondent averred that on 31st August 2017 when the Claimant's contract was terminated he was still on probation. The Respondent averred that though the subject of the letter is headed 'summary dismissal' the purpose of the letter was to terminate for poor performance. The Respondent averred that it was within the law to terminate the Claimant's services. It denied acting contrary to the law or that the Claimant was entitled to any terminal dues or damages for illegal and unfair dismissal set out in the claim. The Respondent thus sought the dismissal of the suit with costs.

3. The Claimant testified as did Richard Kamau Mwangi a director of the Respondent. The Claimant testified that he was employed as a general manager and that he did not receive the letter of extension of probation. He referred to his statement which stated that he served the Respondent with diligence. He stated that he guided the company to be the best distributor in the Mt. Kenya region. He stated that in his short stint as general manager the sales soared high since the inception of the company. He stated that he was handed a summary dismissal letter by the director Dadson Kamau Mwangi. He stated that his perusal of the dismissal letter showed that it was for poor performance and that he raised the issue that he had completed the probation period successfully without any issue of performance being raised as no performance appraisal had been conducted. He stated that his dismissal was unlawful and without basis and sought the court to declare it as such. In cross-examination he testified that he was on probation for 3 months and denied receiving the letter for extension. He stated that some communication was via email, others were posted on the notice board and that he signed the job description on appointment. He stated that he signed the job induction and the job description in his appointment letter. He testified that there were no complaints per se and that most of the complaints sent were misinformed. He stated that he would clarify the matters upon receipt. He said that he did not receive a letter on confirmation. He stated the meetings that were called were not about his performance. He stated that stock had been outsourced to Jeff Hamilton and KK and the agreement was that in case of loss they were to compensate. He testified that his role was to liaise with and ensure the distribution. He stated that he would confirm the same from Jeff Hamilton and KK who were physically checking on the stocks. He stated that he was not aware of the extension of his probation. He said that when he joined the Respondent it had not attained Gold Standard and they received a bonus and 2 awards for being the best in Mt. Kenya region which he attributed to his all round performance. He stated the parameters were cleanliness, staff morale and so on. He testified that he believed that he was not on probation after the 3 months. In re-exam he stated that he did not get extension of probation and that he continued working after the lapse of probation. He stated that he worked up until 31st August and that the letter on business review meetings was addressed to all senior managers.

4. The Respondent's witness testified that the Claimant received the letter of employment and a job description but was not sure of the Claimant signed for the job description. He wondered how the Claimant would have worked without a job description. He testified that the Claimant was given the letter of extension and that it was correct the Claimant did not sign for it. He stated the Claimant underperformed and

that he was not aware if the Respondent received an award during his tenure. He stated that during the Claimant's tenure the company lost 1.2 million and that as a good general manager he should have ensured that he controlled the financial expenses. He stated that the Claimant failed to manage the top management of the company to the extent some of them did not attend the business review meeting which was a very important meeting as it looked at the performance of the previous month, strengths and weaknesses and the prognosis for the future. He stated that on the compliance check by KRA, the letter came to the Claimant and he was to liaise with the other managers and the Claimant did not see it fit to take it seriously. He testified that it took the director to inform the Claimant of the same. He stated that the Claimant was on probation for 3 months and it could be extended and after 6 months they found it not satisfactory. He refuted that the Respondent had anything against the Claimant. He stated that the Claimant was expected to work for 6 days but he would report on Wednesday and did not work for 4 days. He said there was no quarrel with the Claimant and that even when the termination took place the Claimant wrote a letter acknowledging there was no malice. He said if there was any grouse they would have taken him to court for the loss of 1.2 million. He stated the claim was misplaced and ought to be dismissed. In cross-exam he stated that the Claimant was issued with extension of probation and he believed the Claimant received it. He testified that because he did not sign the letter does not mean he did not receive it. He said that it was not always for an officer to sign for a letter he is given and that he was not aware of any award given by Kenya Breweries Limited. He said that the company received awards and he was not sure when it was received. He stated the extension was a month before expiry and that it may have been slightly before than the was the case and it was to give the Claimant time to improve. He testified that it was not correct to state that the letter was for the case. He stated that they thought the Claimant would be a good general manager. He said the company lost 1.2 million and that he had documents but he did not know if these were before the court. On further cross-exam he conceded they are not before court and that the Respondent had not filed a counterclaim. He testified that the Claimant had been given a cautionary letter via email. The email was not before the court. He stated that the letter on meetings was addressed to all senior staff and the Claimant was to enforce the directive by the director. He stated that it gave instructions to do something the Claimant had not done. He testified that the Claimant worked for 4 days not 6. He stated that they did not call the Claimant for a hearing before dismissal and no notice to show cause was issued. He stated the Claimant was not given a 7 day notice. In re-exam he stated the Claimant was aware the stock taking was done daily. He stated that the Claimant was dismissed since he did not perform well. He testified that the probation could be extended. He stated that he was not aware that they were to undertake disciplinary proceedings on probation.

5. The Claimant submitted that he had not done anything wrong to warrant the drastic steps taken by her employer. The Claimant submitted that the Respondent's witness had a hard time proving whether the letter was served upon him as he could not state when it was delivered. The Claimant submitted that the failure to notify him of the extension or termination of contract and exercise its prerogative to extend the probationary contract. The Claimant cited the case of **Narry Philemons Onaya-Odek v Technical University of Kenya (formerly The Kenya Polytechnic University College) [2017] eKLR** and asserted that by the time of dismissal he had already been confirmed by operation of law. The Claimant submitted that fair procedure was not applied before the decision to terminate him contrary to Article 27(1) and Article 41 of the Constitution. He submitted that under Section 42 of the Employment Act he was entitled to notification and hearing before the dismissal. He submitted that he had proved the unfair dismissal in terms of Section 43 of the Employment Act. He cited the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** on the substantive justification and procedural fairness test. The Claimant also relied on the cases of **Kenya Union of Domestic, Hotels, Educational Institutions & Hospitals Workers v Mombasa Sports Club [2014] eKLR** and **Kenfreight (EA) Limited v Benson Nguti [2016] eKLR**. The Claimant submitted that on the strength of the evidence he adduced, the law and precedents he was entitled to the relief sought in his claim.

6. The Respondent submitted that it was common ground that the Claimant was employed by the Respondent as its general manager and was to serve on probation for 3 months and his contract was terminated on 31st August 2017 vide a letter of the said date. The Respondent submitted that the point of departure was whether the probation period was extended or not. The Claimant asserted that after the expiry of the 3 months probation period, he continued working as a confirmed member of staff though no letter of confirmation was written to him. The Respondent submitted that the Claimant denied receiving the letter of extension of probation dated 9th May 2017. The Respondent's position is that the Claimant failed to perform as expected during the probation period and a decision was made to extend the probation period for a further 3 months and that this decision was communicated to the Claimant in the letter dated 9th May 2017. The Respondent submitted that it is apparent the Claimant was still under probation when his services were terminated. The Respondent referenced the provisions of Section 42 of the Employment Act on the procedure of termination of probationary contracts. The Respondent submitted that the Claimant was not entitled to any reliefs other than those prescribed in Section 42 of the Employment Act as he was under probation. The Respondent cited the case of **Danish Jalang'o & Christopher Kisia Kivango v Amicabre Travel Services Limited [2014] eKLR** where it was held that the provisions of Section 43 and 45 both in terms of procedural and substantive justification have no application to termination of probationary employment contracts. The Respondent argued that an employee serving probation has no justification to seek reasons for termination as probation is when an employer decides whether an employee is suitable for the job. The Respondent submitted that the only remedy the Claimant was entitled to was the 7 days notice which was not given or payment made in lieu thereof. The Respondent urged the dismissal of the claim with costs as prayed.

7. The Claimant's services were terminated on 31st August 2017 after working for the Respondent for 5 months. He had been employed as a general manager and the Respondent's position was that he did not perform to expectation and therefore could not be confirmed to the position and that his probationary period was extended for a further 3 months. The Claimant is alleged to have failed to execute his duties with diligence and therefore lawfully dismissed. The Respondent as employer had under the contract of service every right to extend the probation period on account of the raft of reasons an employer may wish to do so. In the termination, the Respondent was required, if the contract was still in the probationary period, to give 7 days notice which the Respondent admits was not given. The dismissal was summary by letter dated 31st August 2017 effective that day. The Respondent asserts the probationary period of the contract was extended on 9th May 2017. The letter was said to have been received by the Claimant and he denied receipt. The fact of extension would only be applicable where an employer can demonstrate the same. By operation of law and in accord with section 42 of the Employment Act, the Claimant completed his probation period after 3 months. If the period had been extended the Claimant would have been notified and the notification was to be unequivocal. Effectively, under the terms of service, once the Claimant continued to offer his services to the Respondent upon the lapse of the 3 months probation period, he could only have his services terminated in accordance with Sections 35, 40, 41 or 44 of the Employment Act 2007 or by mutual agreement of the parties. The Respondent as the employer had no right to purport to review the terms retrospectively by allegedly issuing a letter on 9th May 2017 purporting to extend the probationary aspect of the contract. As such the dismissal on 31st August 2017 in as much as it is stated to have been on account of performance was therefore illegal and unlawful. The Claimant ought to have been notified of the intention, heard and if the explanation was unsatisfactory, dismissed. This was not done and the Claimant is therefore entitled to recompense for the unlawful termination. As no notice was issued, he is entitled to one month's salary in lieu of notice. In the final result I enter judgment for the Claimant against the Respondent for:-

1. One month's salary in lieu of notice – Kshs. 114,000/-
2. Compensation of 2 months salary – Kshs. 228,000/=
3. Costs of the suit
4. Interest at court rates on 1) and 2) above from the date of judgment till payment in full.

8. This decision was rendered online in keeping with the express consent by parties to the waiver of Order 21 Rule 1 and 3 of the Civil Procedure Rules and in line with the Chief Justice's Practice Directions to Mitigate COVID-19 dated 16th March 2020 and the Kenya Gazette Notice 2357 of 20th March 2020 issued in Vol. CXXII No. 50. In line with the Practice Directions of the Chief Justice and the statement he made in the NCAJ address to the Nation of Kenya when the Judiciary and the other stakeholders in the administration of justice agreed to scale down operations to mitigate the effects of COVID-19, execution of the judgment is automatically stayed for 14 days. On lapse of the 14 days if any execution is to issue it must be sanctioned by the Court.

It is so ordered.

Dated and delivered at Nyeri this 30th day of March 2020

Nzioki wa Makau

JUDGE