



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2176 OF 2015

JOHN GAKURU MBUGUA.....CLAIMANT

VERSUS

SAMEER AGRICULTURE & LIVESTOCK (K) LTD.....RESPONDENT

JUDGMENT

1. John Gakuru Mbugua (Claimant) instituted legal proceedings against Sameer Agriculture & Livestock (K) Ltd (Respondent) on 9 December 2015 alleging unfair termination of employment and breach of contract.
2. The Respondent filed a *Defence* on 8 April 2016 prompting the Claimant to file a *Reply to Defence* on 26 May 2016.
3. The Claimant's evidence was taken on 11 June 2019 and the Respondent's case was scheduled for 24 September 2019 but the Court did not sit on that day.
4. When the Respondent's case next came up on 9 December 2019, it sought another adjournment which the Court declined (reasons on record). The Respondent therefore closed its case without leading evidence.
5. The Claimant filed his submissions on 15 January 2020 (should have been filed/served by 27 December 2019) while the Respondent filed its submissions on 24 January 2020.
6. The Court has considered the pleadings, evidence and submissions (judgment could not be delivered on 21 February 2020 because the Court did not sit on that day).

Unfair termination of employment

7. The Claimant was appointed as a *Deliveryman* by the Respondent on 1 April 2015. The contract was to run for 2 years subject to probation of 6 months.
8. On 22 June 2015, the Respondent wrote to the Claimant to notify him of the termination of the appointment, and the reason given was involvement in fraudulent activities (the letter also set out particulars of the fraud).
9. The Respondent contended in its *Response* that Claimant's contract started on 1 April 2015, and because he was still on probation, the termination of employment was lawful.
10. In respect to the lawfulness, the Respondent cited the decision of this Court differently constituted in *Danish Jalango & Ar v Amicabre Travel Services Ltd* (2014) eKLR where the Court opined that unfairness did not arise in termination of probationary contracts.
11. The Claimant's case was that he had been employed by the Respondent initially on 1 October 2012 and that upon expiry of the contract, he was issued with another contract from 1 April 2015, performing the same duties, and consequently, he could not have been on probation under the new contract.
12. The Claimant produced a copy of the Certificate of Service issued to him by the Respondent to reiterate that he had been in continuous service and was not a new employee to be placed on probation.
13. The Certificate of Service indicated the date of commencement of employment was 1 October 2012.
14. The Claimant urged the Court to follow in the footsteps of the Court in *Carole Nyambura Thiga v Oxfam* (2013) eKLR to endorse and

find that a continuing employee cannot be placed on probation and that such a practice constituted an unfair labour practice. The Court endorses that view as sound in law.

15. In consideration of the commencement date indicated in the Certificate of Service and the Claimant's testimony, the Court is of the view that the probation period in the appointment letter of 2015 was not only invalid, but superfluous for the Claimant was still continuing to perform same duties, albeit under a new contract.

16. The Claimant was therefore entitled to a notice under section 35(1)(c) of the Employment Act, 2007, and a hearing as envisaged under section 41 of the Act.

17. And if the Court is wrong on that conclusion, it is also of the view that in terms of sections 42(4) of the Employment Act, 2007 and clause 6 of the contract, the Respondent was under an obligation to give the Claimant 7 days' notice or 7 days' pay in lieu of notice. No such notice or pay in lieu was tendered and that would *ipso facto* render the termination unfair and unlawful.

18. Although the Respondent suspended the Claimant pending investigations, there was no evidence that the notice contemplated by the aforesaid provision of law or contract was issued before termination. The suspension letter cannot serve as a notice.

19. The Court, therefore finds that the termination of the Claimant's employment was unfair and unlawful.

Compensation and pay in lieu of notice

20. The Claimant continuously served the Respondent continuously for about 3 years, and in consideration of the length of service, the Court is of the view that the equivalent of 3 months' salary as compensation would be fair (gross salary for April/May 2015 was Kshs 25,566/-).

21. The Court also finds that the Claimant was and is entitled to the 1-month salary in lieu of notice (basic salary was Kshs 19,000/-).

Underpayment of wages

22. The Claimant sought Kshs 107,712/- on account of underpayment of wages for 33 months.

23. Underpayment of wages may arise where the employer pays below the minimum prescribed wages or the contractually agreed rates.

24. The Claimant did not set out the particulars or details of the underpayments in the pleadings, witness statement or during oral testimony. It is only in the submissions that the Claimant made reference to certain Regulation of Wages (General)(Amendment) Orders.

25. Nevertheless, the Claimant did not prove his wages from 2012 to 2015 and he only produced copy of pay slip for April/May 2015.

26. Further, the Claimant's contract gave his designation as *Deliveryman* but did not set out clearly the duties of that position and match it with an appropriate occupation outlined in the Regulation of Wages (General)(Amendment) Order.

27. The Court is therefore unable to match the Claimant's designated occupation with any of the designations in the Regulation of Wages (General)(Amendment) Orders, and finds that this head of claim was not proved to the required standard.

Leave days

28. Annual leave is both a statutory and contractual entitlement. The Claimant pleaded that he had a balance of 16 leave days for which he sought Kshs 11,874/-.

29. The Claimant had served only 2 months under the new contract, and without elaboration that leave days under the previous contract had been carried forward with permission to the new contract, the Court declines to make an award under this head.

Conclusion and Orders

30. The Court finds and declares that the Claimant was not on probation at time of termination of employment, and that the termination of his employment was unfair.

31. The Claimant is awarded

(a) Compensation Kshs 76,698/-

(b) Pay in lieu of notice Kshs 19,000/-

TOTAL Kshs 95,698/-

32. Claimant is denied costs for having filed submissions outside the agreed timelines without offering any explanation.

Delivered, dated and signed in Nairobi on this 10th day of March 2020.

Radido Stephen

Judge

Appearances

For Claimant Mr. Rakoro instructed by Rakoro & Co. Advocates

For Respondent Mr. Karanja instructed by Cheloti Karanja Advocates

Court Assistant Lindsey/Judy Maina