



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO. 639 OF 2014

WINNIE AWUOR OCHIENG.....CLAIMANT

VERSUS

SHAH LALJI NANGPAR ACADEMY.....RESPONDENT

JUDGEMENT

On 1st July, 2013 the respondent offered the claimant employment as a teacher and placed her on probation for six (6) months starting from 1st September, 2013. The claimant completed the probation period successfully but the respondent imposed an extension of the probation period through letter received on 28th March, 2014 and backdated 1st March, 2014. The claimant was then issued with letter of summary dismissal dated 28th March, 2014.

The claim is that the claimant was subjected to unfair termination of employment, her probation was unlawfully extended, she was not issued with notice prior to summary dismissal and there was no valid reason to justify termination of employment.

The claimant is seeking the following;

- a) a declaration that her employment was terminated unfairly;
- b) notice pay at ksh.35,000;
- c) compensation for unfair termination of employment
- d) accrued leave Ksh.35,000;
- e) general damages for emotional loss; and
- f) costs of the suit.

The claimant testified that she is a trained teacher and was employed by the respondent and placed on 6 months' probation after which she would be confirmed. Her employment was to commence on 1st September, 2013 and was the learning support teacher for special need students within the respondent's different campuses. The claimant was also required to replace a vacant position after the subject teacher left and had to run a programme for her regular classes and cover for the vacant position.

The claimant also testified that she worked diligently and assisted the students with leaning needs and upon the expiry of her probation period at the end of February, 2014 she was not issued with a letter of confirmation but remained at work.

The claimant asked to meet with the deputy and the manager over her dual duties and noted that since she had few students with learning need she could attend to the English and Literature classes. She also noted that her probation period had ended and had not been issued with a contract. She was advised to proceed with her duties.

On 28th March, 2014 the claimant was called to the office and issued with a letter dated 1st March, 2014 extending her probation period for 3 months. On 31st march, 2014 this was on Monday and they held a meeting and the respondent terminated her employment vide letter backdated to 28th March, 2014. She was not given an opportunity to improve her work performance during the extension period of her probation. At this time the students were not in school to be able to assess them and areas of improvement.

The claimant testified that at the time her employment was terminated she suffered emotionally being a single parent and unable to support her family without a source of income. She was evicted from her rented premises and her pastor had to house her and was then forced to move to the village. This caused her psychological distress and all arose following the abrupt termination of employment.

The defence is that the claimant's letter of offer of employment clearly stipulated she would only sign a contract of employment upon successful completion of the probation. By letter dated 28th April, 2014 the claimant's employment was terminated lawfully.

The defence is also that the claimant was under 6 months' probation and she was then found there was need to improve on her job performance which necessitated the extension by letter dated 1st March, 2014. The extension was lawful and sanctioned by the Employment Act and to which the claimant did not raise objections.

While terminating the claimant's probationary contract the respondent complied with the law pursuant to the letter of offer dated 1st July, 2013. The claims made are without foundation and should be dismissed with costs to the respondent.

Andrew Thuku the manager of the respondent school testified that the claimant was a teacher from 1st September, 2013 on probation terms for 6 months in special needs department which has different students with slow learning and therefore a teacher is assigned to help them improve. The claimant was to help these students improve but there was no improvement in 6 months. There was a report from in December, 2013 and March, 2014 and those examined and given a comparison there was no improvement. This was the basis for the confirmation of employment. The respondent was therefore not satisfied with the claimant's work performance and the probation period was extended for 3 months.

Mr Thuku also testified that at the end of March, 2014 the students reports showed lack of improvement. The claimant's work was found not satisfactory and the respondent decided to terminate her employment. It was clear that during the period of extension of probation period, the claimant work performance had not improved.

The claimant did not challenge the extension of the probation period. The contract allowed for 48 hours termination period. There were notices issued in accordance with the law and the probationary contract.

Section 42 of the Employment Act, 2007 (the Act) allow the issuance of probationary contracts of employment. According to the employment Act **probation contract** of employment is one which is of not more than twelve months duration and is duly written stating that it is for the agreed period of probation. This is to protect the employee to show cause their best work performance during the probation period and to allow the employer the opportunity to assess the employee stated skills and knowledge in the performance of their duties.

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

*... an employer puts an employee on probation so as to be able to assess his performances and capability within the workforce and the essence of section 42 of the Employment Act, 2007 is to allow the employer terminate the contract of service less time where the employee's performance should be found wanting. The law therefore gives the employer the right to retain an employee on probation for 12 months and terminate employment on short notice as held in **Hesbon Ngaruiya Waigi versus Equatorial Commercial Bank Limited [2013] eKLR**.*

in the case of **John Muthomi Mathiu versus Mastermind Tobacco (K) Limited [2018] eKLR** That;

...the probationary part of a contract of employment is the period where an employee is tested and he cannot therefore anticipate the same safeguards to be available for him/or her like for an employee already confirmed to position. Section 42 of the Employment Act makes provision that permits the dismissal of an employee without ascribing reasons.

In this case, the claimant was issued with a 6 month probation contract with effect from 1st September, 2013 and thus ending February, 2014.

The respondent's case is that the claimant was found wanting in her work performance, it was not satisfactory and the probation period was intended by 3 months by letter dated 1st March, 2014 and the claimant did not object to the same. The claimant on the other hand testified that she was issued with letter dated 1st March, 2014 extending her probation period on 28th March, 2014 and on 31st March, 2014 she was issued with letter of summary dismissal dated 28th March, 2014.

Whether the respondent issued the letter dated 1st March, 2014 on the same date or On 28th March, 2014 as the claimant pleaded and testified to, the law required the parties to the contract, the employer and the employee, the claimant and the respondent to agree by mutual consent to the extension of the probation period. Section 42(2) of the Act provides that;

(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.

These provisions are couched in mandatory terms. The probation period can only be extended with the agreement of the employee.

This is imperative as the employer if not satisfied with the work performance of the employee must address such matters with the employee and put in place mechanisms to support the employee. On the other hand the employee who refuses and or fails to abide the given terms of probation has the risk of the contract of employment being terminated at the end of the given probation period.

In this case, the claimant did not agree to the extension of the probation period.

The continued enjoyment of the claimant's labour beyond the probation period converted her employment with benefits and rights under the Employment Act, 2007. Probation period ended in February, 2014.

Effectively, termination of employment vide letter and notice 28th March, 2014 and the contents thereof is unprocedural and of no legal effect on the face of section 42 of the Act. the alleged termination of employment for lack of *no improvement in that department* ought to have been addressed under the provisions of section 41(1) of the Act.

poor work performance is a serious lapse in employment and the due proves of the law is imperative.

The respondent terminated the claimant's employment without any substantive justification and it was procedurally unfair.

Under section 45 and 49 of the Act the claimant is entitled to compensation and under section 35 of the Act the claimant is entitled to notice pay equivalent to one (1) months gross wage at ksh.35,000.

The claimant worked for 7 months and her contract had been extended for 3 month and therefore there was a legitimate expectation that she would have worked for such period had this been lawfully enforced to show cause her skills. She was not given a fair chance by the respondent in this regard. Compensation for 3 months gross pay is therefore found appropriate all at Ksh.1055,000.

The claimant is seeking for general damages for psychological distress following unlawful termination of employment and being placed under great hardship. The unfairness against the claimant is addressed with notice pay and compensation. The court finds the foundation of the claims herein are based on unfair and unlawful termination of employment and there is/are no violation(s) requiring the court to apply the provisions of section 12 of the Employment and Labour Relations Court Act, 2011 remedies in this case.

On the claim for unpaid leave days, there is no evidence by the respondent that this was addressed on paid. No work records are filed in this regard. However, it is common cause, all registered teachers have the benefit to taking teaching breaks. The claimant testified that she commenced her employment from 5th September, 2013 which was the beginning of the new school term and the first terms ended in December. The 2nd term was from January to march with two weeks break.

In this regard, with the term break, the claim for leave pay is not justified.

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

(a) a declaration the claimant's employment was unfairly terminated by the respondent;

(b) compensation awarded at Ksh.105,000;

(c) notice pay ksh.35,000; and

(d) costs of the suit.

Dated and delivered electronically this 27 April, 2020 at 1200 hours.

M. MBARU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in reference of the directions issued by his Lordship the Chief Justice on 15th March, 2020 and on given consent, the Judgement herein is delivered via e – mail; Issued electronically this 27^h April, 2020.

M. MBARU

JUDGE