



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 741 OF 2015

BENSON KITEMA MUTUA.....CLAIMANT

-VERSUS-

PRESTIGE AMERICAN FRIED CHICKEN.....RESPONDENT

JUDGMENT

1. The claimant brought this suit on 5.5.2015 seeking the following reliefs against the respondent:

- (a) A declaration that the respondent's termination of the claimant was wrongful, illegal and unfair.
- (b) The sum of Kenya Shillings Four Hundred Thousand, Four Hundred and Thirty Three Shillings only (Kshs. 400,433/= in accordance with paragraph 7 of the Memorandum.
- (c) Interest and costs incidental to this suit.
- (d) Certificate of Service
- (e) Any such other or further relief as this Honourable Court may deem it and just to grant.

2. The respondent admitted that she dismissed the claimant but denied that the dismissal was unfair and wrongful. She averred that the dismissal was done while the claimant was on probation and it was justified because of his poor performance of his duties. She further averred that she accorded the claimant a hearing before the termination. She therefore prayed for the suit to be dismissed with costs, contending that she paid the claimant his outstanding salary through his lawyer.

3. Both parties tendered evidence during the hearing and hereafter filed written submissions.

Claimant's case

4. The claimant testified as Cw1 and stated that he was employed by the respondent on 3.0.2014 as a supervisor of waiters only. He was placed on three (3) months probation after which he continued serving without any confirmation letter. His salary was Kshs. 26,000 per month and no statutory deductions were made including NSSF and NHIF.

5. On 17.3.2015 at 10.30 a.m. Mr. Hakoma Boy, a Director of the respondent called him to sit at the customers sitting bay of the hotel and told him that, the way in which the company was performing he would not continue serving and as such he should pack his belongings and leave. No termination letter was given to him that day or terminal dues paid. However, five (5) days he received an email from Mr. Boy forwarding the termination letter.

6. The claimant contended that he was not accorded any disciplinary hearing or served with a warning letter before the dismissal. He further denied knowledge of the stock theft from the kitchen and contended that his role was to supervise waiters and not kitchen. He reiterated that he never received any letter extending the probation period. He therefore, prayed for the reliefs set out in his statement of claim.

7. On cross-examination, the claimant admitted that his letter of appointment provided for three (3) months probation starting 3.10.2014. He admitted that after the lapse of the probation period, he was not given any confirmation letter. He denied that he was served with the letter dated 3.1.2015 for extension of the probation period and contended that he saw the letter when it was served as a document in the defence bundle. He admitted that his salary was paid in lumpsum but denied that it was inclusive of house allowance.

8. As regards the reasons for the dismissal, he contended that the employer never complained about his performance until the day he was dismissed verbally. He further denied ever being called to discuss his performance before the dismissal.

9. He denied that he was paid the salary for March 2015 and contended that he saw the letter dated 5.3.2018 forwarding cheque to his former advocate for the first time during the hearing herein. He reiterated that he did not get any letter for extension of his probation period and that he served for over six (6) months.

Defence Case

10. Mr. Hakoma Boy one of the respondent's directors testified as Rw1. He confirmed that the claimant was employed by the respondent as a Supervisor on 3.10.2014 vide a written agreement. He further confirmed that the claimant's gross salary was Kshs. 26,000.00 inclusive of house allowance.

11. Rw1 contended that the claimant's performance as a supervisor was not to the expectation and as such his probation period was extended by the letter dated 3.1.2015. He contended that the reason for the extension was the complaint from clients plus his late reporting to work. He however admitted that the claimant never signed the letter extending the probation period.

12. He further testified that he received a tip off that his workers were stealing stock and on 16.3.2015, he made a surprise visit to the hotel at 9.15 p.m and met his workers at the basement of Prestige Mall while leaving work. When he stopped them, they threw the bags which they were carrying and ran away. Upon checking, he found chicken, pieces of beef, cooking oil, and tomatoes inside the bags. According to him, the said employees were under the supervision of the claimant because he was in charge of the stocks.

13. RW1 further testified that the same night he went to speak to the claimant in the hotel about the matter and then went home. At home he discussed the matter with his co-director and decided to terminate the claimant's services. The following day, he called the claimant to a meeting and told him how his performance was poor and also how he was reporting to work late. Thereafter he gave the claimant a termination letter. He contended that the appointment letter provided that either party could terminate the probation contract by one day notice.

14. Finally, he testified that after the termination, he paid the claimant his terminal dues through his lawyer vide the letter dated 5.3.2018. He contended that the dues totaled to Ksh. 13,866.00 and included salary upto 17.3.2015 plus salary in lieu of notice. He denied all the prayers made by the claimant contending that the dismissal was done during the probation period.

15. On cross-examination, Rw1 admitted that the claimant was not given any job description in the appointment letter. He further admitted that he never remitted any NSSF and NHIF contribution for the claimant. He also admitted that the claimant was entitled to give consent before extension of his probation period and in this case he never did so. He contended that in his company there is no register for delivery of mails.

16. He contended that it was the claimant's duty to supervise deliveries by suppliers and also supervise employees. He contended that the employees he caught stealing ran away and never reported back to work. He admitted that he never reported the theft to the police.

17. He reiterated that on 16.3.2015 he met his co-odirector and decided to dismiss the claimant after which he discussed the matter with the claimant the following day and served him with a dismissal letter. He admitted that the claimant gave his explanation after the dismissal had been decided. Finally he contended that he paid the claimants terminal dues to his advocate and the advocate acknowledged receipt of the cheque.

Issues for determination

18. After careful consideration of the evidence and submissions presented by both parties the following issues arose for determination:

- (a) Whether the dismissal was done during the probation period.
- (b) Whether the termination was grounded on a valid and fair reason.
- (c) Whether a fair procedure was followed
- (d) Whether the claimant is entitled to the reliefs sought.

Was the dismissal done during probation period.

18. The contract of service commenced on 3.10.2014 and it was subject to three (3) months probation period terminable by one days's notice. The claimant worked until 17.3.2015 when he was dismissed on account of poor performance and misconduct. According to the claimant, he successfully served his probation period of three (3) months without any complaint or warning. RW1 testified that he extended the claimant's probation period by a further three (3) months vide the letter dated 3.1.2015. However the claimant denied the alleged extension and averred that the said letter was neither served on him nor did he, in any way consent to any extension.

19. I have considered the evidence and submissions by both sides. There is no documentary evidence to prove that the claimant was served with the letter dated 3.1.2015 and gave his consent for the extension of his probation period. Rw1 admitted in evidence that the claimant was entitled to give consent to the extension of his probation but he did not. Section 42(2) of the Employment Act provides that a probationary

period shall not exceed six (6) months but it may be extended for a further (6) six months with the agreement of the employee.

20. Section 26 of the Act, provides that the terms of service enacted in the Act are the irreducible minimum but the parties can negotiate better terms. In this case the parties negotiated a probation period of three (3) months only. It follows therefore that in accordance with section 42(2) of the Act, the claimant's probation period of three (3) months could not be extended without his consent. That was the view taken by Abuodha J in **Lucy Wangui Wanyika v NAM Consult Ltd [2016]eKLR** when he held that:

“What this means is that the claimant ought to have been consulted and agreed to the extension of her probation period. The agreement could only have been signified in writing or by a Memorandum in writing between the parties. In absence thereof the court finds that the claimant became regular employee of the respondent to which the requirements for termination of a regular employee applied.”

21. Again in **Wilson Simiyu v. Chairman BOG Friends School Bokoli & Another[2016]eKLR**, Maureen Onyango J held that:

“ . . .the employee must agree to the extension as provided under section 42 of the Employment Act . . .

For these reasons I find and hold that the claimant's probationary employment expired upon expiry of the 4 months probationary period and he is deemed to have been confirmed into employment at expiry thereby.”

22. In view of the finding that the respondent has not proved by documents that the claimant was consulted and consented to the extension of his probation, I return that his probation period lapsed automatically by effluxion of time and the claimant's contract of service was confirmed and it could only be terminated for valid reasons and after following fair procedure, as required under section 45 of the Act.

Was there valid and fair reason for termination

23. The respondent cited poor performance and late reporting as the reasons for the dismissal. No evidence of late reporting was tendered by RW1 like an attendance and log register. Likewise, there is no evidence adduced by the employer to prove the alleged poor performance. RW1 admitted that the claimant was not given any job description. He also did not produce any records of performance appraisal or any letter or warning issued to the claimant on the alleged poor performance of duty. The employees who were allegedly caught carrying stolen stocks were not named by RW1. Therefore, I return that the respondent has failed to prove that the reason for dismissing the claimant was valid within the meaning of section 45 of the Act.

Procedure followed

24. Section 41 of the Employment Act provides that before the employer terminates the services of his employee on ground of misconduct, poor performance or physical incapacity, he shall explain the reason to the employee in the presence of another employee and thereafter invite the employee and his chosen companion to air their representations before the decision to terminate is decided.

25. In the present case, the claimant contended that he was dismissed without being heard. RW1 admitted that the decision to dismiss the claimant was made before according the claimant a hearing. It follows that the respondent has failed to prove that a fair procedure was followed before dismissing the claimant as required under section 41 of the Act.

Reliefs

26. In view of the failure by the respondent to prove a valid and fair reason for dismissing the claimant and that a fair procedure was followed, I make declaration that the dismissal was unfair and unlawful as prayed. Accordingly, under section 49 of the Act, the claimant is entitled to salary in lieu of notice plus compensation for unfair termination as per the appointment letter. The claimant is granted one month salary in lieu of notice. In addition I award the claimant one month salary compensation for the unfair termination because he served for only six months.

27. The claim for salary for 17 days worked in March 2015 is declined because it was paid through the claimants counsel vide the letter dated 5.3.2018. However, the claim for leave earned in 6 months is granted at the rate of 1.75 days per month equaling to 10.5. leave days. Hence Kshs. 26,000 x 10.5/26 = Ksh. 10,500.00.

28. The claim for unremitted NSSF and NHIF contributions is dismissed because the claimant admitted in evidence that he was earning Kshs. 26,000.00 without any statutory deductions. However, the claim for house allowance is granted at the rate of 15% of the salary because under section 31 of the Employment Act, an employee is entitled to housing at the employers expense or be paid house allowance. I, therefore, award the claimant Kshs. 26,000.00 x 15/100 x 6 = Kshs. 23,400.00.

29. Finally, the claimant is entitled to a Certificate of Service under section 51 of the Employment Act and as such I allow that prayer.

Conclusion and disposition

30. I have found that the dismissal of the claimant was unfair and award him compensatory damages plus accrued terminal dues. Consequently, I enter judgment for the claimant as follows:

Notice.....Kshs. 26,000.00

Compensation.....Kshs. 26,000.00

Leave.....Kshs. 10,500.00

House allowance.....Kshs. 23,400.00

TotalKshs. 85,900.00

The said sum is less statutory deductions but in addition to costs and interest at court rates from the date hereof.

Dated, signed and delivered in Nairobi this 26th day of June, 2020.

ONESMUS N. MAKAU

JUDGE