



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 655 OF 2016

HAPPINESS NYABONYI MAINGO.....CLAIMANT

-VERSUS-

SHREEJI CHEMICALS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent as an Accountant effective from 1.1.2016 for a monthly salary of Kshs. 40,000. The contract provided for a probation period of 6 months which could be terminated depending on the Claimant's work performance.

2. On 3.3.2016, the Claimant's probationary contract was terminated on ground that her work was not up to the Company's standards. She therefore brought this suit on 21.4.2016 seeking the following reliefs: -

(a) A declaration that the Respondent's termination of the Claimant's contract of employment was unlawful, unfair and illegal hence null and void ab initio.

(b) Compensation; salary in lieu of notice and salary for day worked totalling to Kshs. 523,111/-.

(c) Costs and interests.

3. The Respondent denied the alleged unfair termination of the claimant's contract of service and averred that she terminated the contract during the probation period and in accordance outlined for termination of probationary contracts. She further averred that the reason for terminating the probationary contract was failure by the Claimant to meet the Company's expectations. Finally she averred that the reliefs sought should fail and the suit be dismissed with costs.

4. The suit went to full hearing whereby both parties gave evidence and thereafter filed written submissions.

Claimants Case

5. The Claimant testified as Cw1 and told the court that she joined the Respondent on 17.11.2015 on a verbal contract but on 1.1.2016 she was engaged under a written contract for one year. On 17.2.2016, she fell in the bathroom and she was rushed to Shalom Hospital by her husband because she was pregnant. She was given a sick sheet and her husband reported the matter to the Respondent's HR Officer by phone.

6. CW1 further told the court that she reported to work the following day and continued until 25.2.2016 when she fell ill while on duty. She told the court that she started vomiting and feeling dizzy and reported to the supervisor. However, the supervisor was her junior and he told her that he could not give her permission to leave work. She thereafter notified the Boss's Secretary and continued with work.

7. She never reported to work the following day but went to the hospital and she was given sick off for 3 days. She resumed work on 29.2.2016 and gave the sick sheet to the Respondent. However, on 3.3.2016 she was served with a termination letter. She therefore prayed for the reliefs set out in the statement of claim.

8. On cross-examination she admitted that the contract of employment she signed provided for 6 months' probation period. She further admitted that she was dismissed during the probation period on allegation of poor performance. She also admitted that after the termination she was paid Kshs. 18000/- through her lawyer as terminal dues but she did not know how it was computed. However, she contended that the termination offered 7 days salary in lieu of notice.

9. On re-examination, she contended that the alleged poor performance was not true because according to the certificate of service given to her, the employer described her performance as excellent.

Respondent's Case

10. Ms. Caroline Majuma Okeyo is the Respondent's HR Manager and herein she testified as RW1. She confirmed that the Claimant was employed by the Respondent on a one year contract starting 1.1.2016 but the contract was terminated after only two months due to poor performance, negative attitude, insubordination and absenteeism.

11. She further testified that the claimant was paid all her required dues upon the termination but she still left with the company's property including a flash disk, modem and password for the computer she was using.

12. On cross-examination, RW1 admitted that she signed the Certificate of Service for the Claimant which stated that the Claimant was a hardworking, proficient and reliable employee. She further admitted that she never issued the Claimant with any warning letter about her performance but only a show cause letter. She also admitted that the claimant sent a text message that she was sick but thereafter she never availed any sick off sheet thereafter. She denied that the Claimant brought the sick sheet from Shalom Hospital (Exh.4). She maintained that the Claimant was paid 7 days salary in lieu of notice because the termination was done during the probation period. However, he admitted that the contract did not provide for notice period for termination during the probation period.

13. On re-examination she contended that the termination of the claimant's contract was because she went on sick leave without following the company policy and procedures. She explained that the claimant was required to inform her supervisor first and thereafter present a sick off sheet. She reiterated that the termination was done in accordance with section 42 of the Employment Act.

Claimant's Submissions

14. The Claimant submitted that the termination of the contract of service as unfair because it was without any valid reason and the Claimant was not accorded prior hearing. She contended that by the Certificate of Service issued by the RW1, the Claimant was described as hardworking, proficient and reliable employee. As regards the procedure followed, she contended that she was not accorded any hearing in the presence of her witness or served with prior notice as required by the law.

15. In view of the foregoing, the Claimant submitted that she is entitled to compensatory damages under the Employment Act.

Respondent's Submission

16. The Respondent submitted that the applicable law in this case is Section 42 of the Employment Act which provides that section 41 of the Act shall not apply where a termination of employment relates to a probationary contract, and that probationary contract is terminable by a notice of not less than 7 days or payment of 7 days' wages in lieu of notice. She contended that the termination herein was lawful because the claimant was still on a probationary contract and he was paid 7 days' salary in lieu of notice.

17. For emphasis, she relied on **Danish Jalong'o & Another v Amicabre Travel Services Ltd [2014] eKLR** where the court held termination of probation contract is not subject to the strict requirements of fairness provided under the Employment Act. The foregoing notwithstanding, the Respondent submitted that she informed the Claimant the reason for the termination, paid her terminal dues and issued her with a Certificate of Service. She therefore, prayed for the suit to be dismissed with costs.

Issues for determination

18. Having carefully considered the pleadings, evidence and submission by both parties, it is a fact that the Claimant was serving under probationary contract when her services were terminated. The issues in dispute are:

- (a) Whether the termination was unfair and unlawful.
- (b) Whether the Claimant is entitled to the reliefs sought.

Was the termination unfair?

19. Termination of probationary contracts is governed by section 42 of the Employment Act which provides that: -

“(1) The provisions of section 41 shall not apply where a termination of employment terminates probationary contract.

(2) . . .

(4) A party to a contract for probationary period may terminate the contract by giving 7 days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice.”

20. Flowing from the foregoing provision, an employer is only required to serve a notice of seven days to the employee before terminating a probationary contract or just pay to the employee the wages from the said notice period of 7 days. He is not bound to conduct disciplinary hearing under section 41 of the Act when terminating the probationary contract for misconduct, physical incapacity or poor performance.

However, the waiver is only with respect to the procedure for the termination of a probationary contract.

21. The question that arises is whether section 42 of the Act also waves the legal requirement for substantive justification of a termination on the part of the employer so that he can terminate a probationary contract without any valid and fair reason. My considered view is that an employer must have a valid and fair reason for terminating a probationary contract prematurely. All what section 42 of the Act has done is to waive the requirement of according disciplinary hearing to an employee before terminating probationary contract but it has not given the employer a freehand to terminate probationary contracts whimsically.

22. Section 42 also does not bar a dismissed employee from challenging the fairness or lawfulness of termination of the probationary contract. The rationale of section 44(4) and section 43 of the Act is that any party to employment contract has the right to challenge termination of a contract of employment including a probationary contract. Whereas, a probationary contract is a sort of “testing waters” engagement, the rights of the employee are not sacrificed. The employees remain entitled to the protection of the law from arbitrary and whimsical terminations by employers.

23. For example, the law has put in place certain safeguards in favour of employees regardless whether they are employed under a probationary contract. Section 46 of Employment Act sets out reasons which render termination of employment contracts unfair. The said reasons are those which point to discrimination and denial of rights and freedoms provided for in the Constitution, statute and contract of service. They include reason connected to pregnancy, going on leave, membership to trade union; holding or seeking office in a trade union; refusal to join or withdraw from trade union; employees race, colour, tribe, sex, religion, opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability; employee instituting suit or complaint against the employer; and finally, employee participating in a lawful strike.

24. In view of the foregoing, I reiterate that the obligation to justify the reason for terminating contract under section 43,45 and 47 (5) of the Employment Act applies equally to termination of probationary contract. Consequently, an employee has every right to challenge termination for probationary contract for want of substantive fairness.

25. To that extent I respectively decline to follow the decision by Rika J in **Danish Jalang’o & Another v Amicabre Travel Services Limited** where he held that: -

“The probation law should be retained. Employers should retain a freehand in evaluating employees’ suitability, and in terminating the relationship during probation, where the employee is found wanting. ..It is not proper that rules of natural justice, procedural, and substantive justice under section 41, 43 and 45 of the Employment Act 2007 are imported into probationary contracts. Section 42 of the Employment Act 2007 is a standalone law, regulating a special, formative, employer – employee relationship, and should be read as a reasonable limitation, or the constitutional rights flowing from Article 41 of the Constitution of Kenya, as well as those rights and protections given under the other provisions of the Employment Act 2007.”

26. Having concluded that an employer must have a valid and fair reason for terminating his employee’s probationary contract, the question that must be answered is whether in this case the employer has proved any valid and fair reason justifying the termination of the claimant’s probationary contract. RW1 stated that there was a valid reason while the Claimant said there was none.

27. The termination letter stated as follows:

“RE: TERMINATION OF PROBATIONARY CONTRACT LETTER

It is with great regret to inform you that during your probation period, which started in January 2016 to 3rd March 2016 you were found to be ineffectual as per your performance, communication and coordination of work. In this regard you will be paid seven (7) days in lieu of notice, the number of days worked including overtime and leave, if any, at the end of this prevailing month through your bank account or anytime as agreed by management.

To this effect by copy of this letter, consider yourself terminated on early probation for the above mentioned reasons . . . “

28. On the same day the Respondent issued the Claimant with a Certificate of Service in which she made the following compliments:

“During her period with us, she proved to be hardworking, proficient and reliable employee. We appreciate her contribution during her period with us and would not hesitate to recommend her to any employer who may want her services.”

29. The Claimant relied on the said Certificate of Service dispute the alleged poor performance. RW1, on the other hand stated in her written witness statement that after joining the company the claimant suddenly developed a negative attitude that was beyond control of the co-workers and supervisors in their department; that she was skipping work without informing her supervisor and colleagues in the department; that she was guilty of insubordination on several occasions by failing to perform assigned duties, and that on 26.2.2016 she failed to report to work and sent SMS alleging that she was sick but thereafter failed to present sick off sheet from the hospital as a result of which she was served with a show cause letter.

30. I have considered the evidence and submission by both sides and wondered why RW1, on the same day, wrote a termination letter to the Claimant citing poor performance as the reason the termination and then wrote a Certificate of Service describing the Claimant as a stellar performer and even recommended her to any employer. RW1 never gave any explanation to justify the said contradiction in the two crucial documents. Consequently, I agree with the claimant that the reason cited for the termination in the termination letter was not valid and for that matter unjustified.

31. The compliments made in the Certificate of Service sharply contradicted with the termination letter and I have no option but to find that the unsolicited compliments, which are not a requirement under section 51 of the Employment Act, confirms that, the reason cited for the termination of the probationary contract was not true. I therefore, must hold that the employer herein has failed to prove and justify the reason upon which the Claimant's probationary contract was terminated and as such the termination was unfair and unlawful within the meaning of section 45 of the Employment Act.

32. In making the foregoing holding I am cognisant of the fact that section 45 (3) of the Act was repealed after being declared unconstitutional by the Court in **Samuel G. Momany v The Attorney General and Another [2012] eKLR**. The essence of the said legal development is that it is now possible for an employee who has served for less than a year to sue for unfair termination of employment contract.

Reliefs sought

33. In view of the finding that the termination of the claimant's probation was not justified by a valid and fair reason, I make declaration that the termination was unfair and unlawful as prayed. Flowing from the foregoing declaration, it is my holding that the claimant is entitled to salary in lieu of notice plus compensation for the unfair termination by didn't of section 49(1) of the Employment Act. since the claimant was paid Kshs. 18,000 inclusive of 7 days' salary in lieu of notice and salary for the days worked in March 2016, I will only award him one-month salary as compensation for the unfair termination considering her short period of service and also because she had reasonable expectation to continue serving for a further 4 months before the probationary contract lapsed.

34. In conclusion, I enter judgment in favour of the claimant declaring the termination of her probationary contract unfair and unlawful and awarding her **Kshs. 40,000 plus costs and interest** from the date hereof. The said award if subject to statutory deductions.

Dated and delivered at Nairobi this 23rd day of November, 2020.

ONESMUS N MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE