



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 770 OF 2017**

(Before Hon. Lady Justice Maureen Onyango)

**ALLOISE NGUGI MUIA..... CLAIMANT**

**VERSUS**

**GREEN POT ENTERPRISES LIMITED.....RESPONDENT**

**JUDGMENT**

The claim herein was instituted vide the claimant's Statement of claim dated 21<sup>st</sup> April, 2017 and filed on 25<sup>th</sup> April, 2017. It is the claimant's averment in the Statement of claim that he was employed by the Respondent herein, a Limited Liability Company vide an employment contract dated 7<sup>th</sup> April, 2016 in the position of sales manager earning a monthly salary of Kshs.140,000/-.

The Claimant maintained during the subsistence of his employment contract he performed his duties diligently and to the Respondent's satisfaction until 8<sup>th</sup> February, 2017 when his services were verbally terminated on account of alleged redundancy.

The Claimant maintained that the Respondent failed to adhere to the mandatory provisions of Section 40(1)(b) of the Employment Act, 2007 as well as terms of his Contract of employment and was therefore unlawful, wrongful and unfair.

Aggrieved by the decision to unfairly terminate his services, the Claimant filed the instant Claim seeking the following reliefs:-

- i. Five (5) weeks' salary in lieu of notice of notice of Kshs.172,666.62/-
- ii. Accrued leave days due (8.75 days) of Kshs.40,833.28/-.
- iii. Salary for 8 unpaid days worked in February, 2017 Kshs.37,333.28/-
- iv. Interest on (i), (ii) and (iii) above at Court rates from the date of filing until payment in full
- v. Costs of this suit
- vi. Any other and further orders that this Court may deem fit to grant

The Respondent in its Statement of Response dated 7<sup>th</sup> October, 2019 and filed in Court on 8<sup>th</sup> October, 2019 admitted having engaged the Claimant in the manner alleged in the Memorandum of Claim. It however, maintained that the Claimant's termination was not unlawful and wrongful as alleged by the Claimant and that he absconded lawful duties.

The Respondent further averred that at the time of separation the Claimant had not completed one year of service and was still on probation when he absconded and therefore the Claim for unfair termination as pleaded is frivolous, vexatious, misconceived and untenable.

The Respondent further averred that the Claimant's contract of employment was dated 12<sup>th</sup> August, 2016 and not 7<sup>th</sup> April, 2016 as contended by the Claimant and was subject to a three (3) months' probation period that was extended for a period of three (3) months pursuant to clause 14.1 of his employment contract due to poor performance.

It is the Respondents' contention that the entire Claim is devoid of merit. It therefore urged this Court to dismiss the same with costs to the

Respondent.

Parties agreed to dispose of the Claim by way of written submissions.

### **Submissions by the Parties**

The Claimant submitted that his employment with the Respondent was unfairly and un-procedurally terminated without notice, justification or following procedure as provided under the mandatory provisions of Section 40(1)(b) Employment Act and that the termination was unfair and unlawful. The Claimant relied on the case of **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR** where the Court held that for a termination to pass the fairness test there must be both substantive justification and procedural fairness.

Further emphasis was made with reference to the case of **Agnes Yahuma Digo v PJ Petroleum Equipment Limited (2013) eKLR** where the Court emphasised on the need to ensure fair procedure prior to the termination of an employee on account of poor performance. The Court went on to hold that such an employee should be accorded an opportunity to improve within a reasonable length of time.

On the issue as to whether he was on probation at the time of his separation with the Respondent, the Claimant maintained that he was not on probation as of 8<sup>th</sup> February, 2017 given that the probationary period as provided under his Contract of employment was three (3) months which he successfully completed and no notice of extension of the same was issued by the Respondent. The Claimant relied on the case of **Lucy Wangui Wanyika v Nam Consult Limited (2016) eKLR** where the Court held that it would be unreasonable for an employer to let an employee continue working beyond her initial probation period without clear and documented communication.

It is on this basis that the Claimant maintained that he has proved his case on a balance of probabilities and was therefore entitled to the reliefs as sought in his Statement of Claim thereby urging this Court to allow the same as prayed.

### **Respondent's Submissions**

The Respondent on the other hand maintained that the Claimant was on probation at the time of his separation as his probation period was extended by dint of Clause 14.1 of his employment contract as well as Section 42(2) of the Employment Act, 2007 on account of poor performance.

The Respondent further submitted that the Claimant's employment was terminated on the last day of his probation period and is therefore governed by the provisions of Section 42(1) of the Employment Act, 2007 that provides that the provisions of Section 41 do not apply where a termination of employment occurs during the subsistence of a probationary contract.

The Respondent further maintained that the Claimant was indeed paid all her dues as provided under Section 42(4) of the Employment Act, 2007 as he was paid 7 days' wages in lieu of notice and therefore has no claim as against it. For emphasis the Respondent relied on the cases of **James O. Olaa v Tana and Athi River Development Authority (2016) eKLR** and **Narry Philemons Onaya – Odeck v Technical University of Kenya (Formerly, the Kenya Polytechnic University College) (2017) eKLR** on the entitlements of an employee whose contract is terminated during the probationary period.

The Respondent further submitted that the Claimant is barred from claiming unfair termination pursuant to the provisions of Section 45(3) of the Employment Act, 2007.

It is on this basis that the Respondent contended that the Claimant was not entitled to any of the reliefs he seeks in his Claim and therefore urged this Court to dismiss the Claim in its entirety with costs to the Respondent.

### **Analysis and Determination**

Having considered the facts of this cause, evidence adduced by the parties hereto, submissions and authorities cited by both parties, the issues for determination are: -

1. Whether the Claimant was on probation at the time of separation.
2. Whether the Claimant absconded lawful duties or was terminated and whether such termination was procedurally and substantively lawful and fair.
3. Whether the Claimant is entitled to the reliefs sought.

### **Whether the Claimant was on probation at the time of his separation with the Respondent**

The Claimant maintained that he had successfully completed the three (3) months' probation period at the time of his separation with the Respondent.

He further submitted that the probation period was thereafter not extended in writing and therefore the Respondent is estopped from claiming any extension of the said probation period.

The Respondent on the other hand maintained that following the conclusion of the Claimant's probation period his performance was poor prompting it to extend the Claimant's probationary period for a further three (3) months by dint of the provisions of Clause 14.1 of his employment contract and the provisions of 42(2) of the Employment Act, 2007.

I have considered the submissions by both parties and the evidence adduced in support of their respective cases and agree with the Claimant's submission that he was not on probation at the time of his separation with the Respondent having successfully completed his probation period on 12<sup>th</sup> November, 2016.

There is no written communication from the Respondent extending the said period beyond the said date of 12<sup>th</sup> November, 2016 only a verbal contention from the Respondent that the same was extended. The Claimant's contract of employment clearly provides at Clause 14.1 that the probation period was for a period of three (3) months from commencement date and that the length of the period may be extended if the Respondent deems it appropriate.

In the absence of any written communication extending the probation period, I find that the Claimant was at the time of his separation not on probation as alleged by the Respondent herein. In the case of **Lucy Wangui Wanyika v Nam Consult Limited (Supra)** the Court held as follows:

"It is a conventional practice in contractual relationships that where parties conduct their dealings in writing, the same mode of interaction should so far as possible be retained for avoidance of confusion. The Claimant herein was appointed in writing hence it was only reasonable that any issue concerning her contract which had the possible effect of modifying or bringing to close the contractual relationship be done in the same manner. It is curious that whereas the respondent claimed that the extension of the probation period and communication over non- performance of the Claimant was verbal.... in the circumstances, the Court finds that it was unreasonable to let the Claimant continue working beyond her initial probation period without clear and documented communication over the reasons for extension of the probation period and for how long the extension would be"

**Whether the Claimant absconded lawful duties or was terminated and whether such termination was procedurally and substantively lawful and fair**

The Claimant maintained that the Respondent unlawfully and unfairly terminated his employment verbally citing redundancy of his role as a Sales Manager. He further maintained that the alleged redundancy did not affect only him but several other members of staff, a position that was confirmed by Samuel Mudinyu in his witness statement dated 13<sup>th</sup> June, 2017.

The said witness confirmed having been invited to a meeting by the Respondent's Executive Officer one Caroline Kariuki on 8<sup>th</sup> February, 2017 where they were informed that the company did not have enough funds to employ everyone and therefore proceeded to terminate their employment contracts.

The Respondent on the other hand submitted that the Claimant's employment was never terminated. It further insisted that the Claimant was guilty of absconding lawful duty and as a result is not entitled to any of the reliefs sought in his Statement of Claim.

Based on the facts before this Court and in the absence of any letter of termination, I find that the Claimant's employment was indeed verbally terminated by the Respondent on 8<sup>th</sup> February, 2017 and that the termination in my view was tantamount to unfair summary dismissal.

Further, even if the Respondent's contention that the Claimant had absconded lawful duty is to be considered, he is by law entitled to a fair disciplinary process as set out in Section 41 of the Employment Act, 2007. No evidence was availed to the Court to support there having been any disciplinary process that was followed or notice issued prior to the termination on the allegation of absconding duty. It was up to the Respondent to show this Court it did accord the Claimant a fair hearing prior to his termination. In the case of **Felistas Acheha Ikatwa v Charles Peter Otieno (2018) eKLR** it was held:

"The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered."

The statutory burden for a complaint of unfair termination of employment or wrongful dismissal is contained in Section 47(5) of the Employment Act. The section provides that –

**For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.**

In the case of **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR** the Court held that:

"... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination."

I find the Claimant's termination unfair as he was not issued with any notice nor accorded a hearing prior to his termination.

## **Whether the Claimant is entitled to the reliefs sought**

### **i. Compensation for unfair and unlawful termination**

Having found that the Claimant's termination was unlawful and unfair, he is entitled to compensation for unfair termination.

The Court declared the provisions of Section 45(3) of the Employment Act, 2007 to the extent that a claim for unfair termination can only be made by an employee who has worked for a continuous period of not less than thirteen months immediately before his termination unconstitutional in the case of **Nelson Ogeto Mogaka & 15 others v Geothermal Development Company Limited (2013) eKLR**

In the circumstances the Claimant is entitled to claim for unfair termination. Taking into consideration the provisions of Section 49 of the Employment Act, I award the Claimant 2 months' gross salary as compensation for unfair termination in the sum of (Kshs.140,000 x 2 months) **Kshs.280,000/-**.

### **ii. Salary in lieu of notice**

The Claimant is also entitled to 5 weeks' salary in lieu of notice by dint of Clause 14.3 of his employment contract being **Kshs.172,666.62/-**.

### **iii. Accrued leave days due (8.75 days)**

The Claimant is further entitled to the Claim for accrued leave days the Respondent having failed to avail records to disapprove his entitlement to the relief. In the case of **Meshack Kiio Ikulume v Prime Fuels Kenya Limited (2013) eKLR** the Court held that it is the employer's duty to keep certain records including hours of work and produce the same in legal proceedings. I award the claimant the sum of **Kshs.40,833.28/-** as prayed.

### **iv. Salary for 8 unpaid days worked in February, 2017**

The Claimant is entitled to compensation under this head as the Respondent did not controvert his averment that he worked up to 8<sup>th</sup> February, 2017 when his employment was orally terminated by the Respondent and no evidence has been adduced to confirm payment for the days worked in February, 2017. I accordingly award the claimant the same in the sum of ( x Kshs.140,000) **Kshs.43,076.92/-**

**In conclusion, judgment is entered in favour of the Claimant against the Respondent in the total sum of Kshs.536,577/-.**

The Claimant is awarded costs of this suit plus interest at court rates from the date of this Judgment until payment in full.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13<sup>TH</sup> DAY OF NOVEMBER 2020**

**MAUREEN ONYANGO**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**