



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 65 OF 2017**

*(Before Hon. Lady Justice Maureen Onyango)*

**PROTUS WEKESA MUNIALO.....CLAIMANT**

**VERSUS**

**NZOIA SUGAR COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

Vide statement of claim dated 17<sup>th</sup> February 2017 and filed on 22<sup>nd</sup> February 2017 the claimant avers that the termination of his employment by the respondent was unfair and seeks the following orders –

- a) A declaration that the termination of the claimant's services by the respondent was unlawful.
- b) An order for the unconditional reinstatement of the claimant back to into the Respondent's service.
- c) Payment of Ksh.5,863,515 as particularized below –
  - i. Damages for unlawful termination .....Ksh.356,084 x 12 months Ksh.4,273,008
  - ii. Service pay Ksh.356,084 x 1 year.....Ksh.356,084
  - iii. Salary for 6 days worked in February 356,084 x 6/30.....Kshs.71,216
  - iv. One month salary in lieu of notice.....Ksh.356,084
  - v. 38 days' pay in lieu of leave earned and not taken.....Ksh.451,039
  - vi. Leave traveling allowance.....Ksh.356,084
- d) Certificate of service
- e) Costs of this suit plus interests.
- f) Any other or further remedy this court deems just and expedient to grant.

**Total.....Kshs.5,863, 515**

In its reply to the claimant's statement of claim dated 6<sup>th</sup> March and filed on 13<sup>th</sup> March 2017, the respondent denies the averments in the memorandum of claim and prays that the claim be dismissed with costs.

The claim was disposed of by way of written submissions at the request of the parties.

The facts of this case are not contested. The claimant was first employed by the respondent by letter of offer of appointment dated 21<sup>st</sup> September 2015 in the position of Senior Personnel Officer. The terms of appointment which are clearly set out in the letter included a probation period of 6 months subject to extension by a further period of 6 months. Confirmation after completion of probation period was subject to satisfactory progress during the probationary period and passing of a medical examination to be undertaken during the first month

of probation.

Before the probation period expired the claimant received a letter of promotion to the position of Human Resource Manager. The new position was also subject to a probationary period in similar terms as the original appointment. By letter dated 17<sup>th</sup> June 2016 the claimant's probation was extended by 3 months "to allow (you) improve your performance".

By letter dated 11<sup>th</sup> November 2016 the claimant received a letter titled "Review of Performance" setting out areas that he was required to clarify. The letter required the claimant to handover the responsibilities of his office to the Managing Director. The letter is set out below for emphasis of content thereof-

"11<sup>th</sup> November 2016

Protus W. Munialo Code No. 5295

**RE: REVIEW OF PERFORMANCE**

Management presented your case for confirmation into permanent employment to the Board of Directors meeting held today.

However, the following issues arose which you need to clarify before the Board of Directors on 2<sup>nd</sup> December 2016.

Lack of Management skills for Industrial Relations;

The following actions have caused disquiet among staff:-

a) Failure to have a clear policy on employment and/or lack of assertiveness to control employment that is not required.

The number of temporal (sic) casual employees has increased significantly from 138 people in October 2015 to 276 a year later, while overtime is also being paid for purportedly lack of enough staff. Protus has failed to guide Managers on their man-power requirements thus escalating the wage bill.

b) Failure to lay a policy on promotions: This is a major complain (sic) area both by line Managers and workers.

i) Management trainees are overlooked in promotions where less trained people are promoted. You overlooked staff who had completed their term as management trainees i.e. Kipsanaye Sumukwo and Spandrine Kawira Code No. 5189 and proposed to promote Benson Wekesa who has less qualifications,

ii) There is also a case of Davis Namunga who was moved from clerk 02 to 04 and then Management grade MG8 in seven months.

c) During the strike by cane transporters' workers, the advise Protus gave to management is that we sack the Company Union Officials, an act that would have completely paralyzed operations. It is expected that as a professional he should make decision/give advice that represent the best interest of the Company.

d) Not understanding the working environment - take the case of one Susan Opilo who is according to our records supposed to retire on 31<sup>st</sup> December 2016, She has an Identity Card that indicates she should retire in October 2017. The case is a duplicate of the one that led the former Chief Security Officer, Mr. Maurice Mang'oli to sue the Company for forced retirement. The Company has so far spent Kshs.2,098,972 on Mang'oli's case and yet Mr. Munialo is advising that we force retirement of Susan Opilo as well.

Meanwhile you are required to hand over to me the responsibilities of your office. You are also required to keep away from the office premises up to when you will be appearing before the Board of Director

SIGNED

GODFREY S. WANYONYI

MANAGING DIRECTOR"

By letter dated 5<sup>th</sup> December 2016 also titled "Review of Performance" the claimant was informed of extension of the period of his "stepping aside till further notice, to allow the committee of the Board look at all the issues."

The claimant was issued with a show cause/extension of period of stepping aside letter dated 27<sup>th</sup> January 2017 which he responded to by his letter of even date. In the letter he explained that he was not responsible for the matters he had been accused of, most of which according to his response occurred before he took over office as Human Resource Manager and as Senior Personnel Officer.

By letter dated 6<sup>th</sup> February 2017 the services of the claimant were terminated. The letter of termination offered the claimant the following -

- i.) Salary for the days worked up to and including 6<sup>th</sup> February 2017.
- ii.) One month's salary in lieu of termination notice.
- iii.) 38 (thirty eight) days' pay in lieu of leave earned and not taken.
- iv.) Leave travelling allowance equivalent to your basic salary.

In the submission the claimant states that he was no longer on probation at the time of termination of his employment citing Section 42(2) of the Employment Act which limits probationary period to 6 months with a further 6 months extension. It is further the claimant's submission that his probation having ended, he was supposed to have been subjected to the provisions of either Section 35 and 41 or 41 and 44 of the Act and that the respondent having failed to do so the termination of his employment was unfair. He prays for reliefs as set out in his claim.

In the submissions filed on 15<sup>th</sup> September 2017 the respondent argues that the letter of promotion was in fact a letter of appointment that replaced the original offer of appointment and probation period is reckoned from the date of the letter of promotion. It is the respondent's position that the probation period lapsed on 7<sup>th</sup> June 2016. It is the respondent's case that it is only guilty of delayed communication of extension of probationary period, which came 11 days late on 17<sup>th</sup> June 2016, that the claimant ought to have raised an objection to the extension of his probation and that Section 45(5)(b) of the Act invites the court to consider the conduct of the employee. Further that the claimant having not objected to the notice of extension of probation period, his conduct demonstrates acceptance.

It is the respondent's submission that the claimant responded to the notice to show cause which the respondent issued to the claimant out of abundance of caution as the claimant was not entitled to the same. The respondent relies on the case of ***Agnes Yahuma Digo –V- Pj Petroleum Equipment Limited (Cause No. 2049 of 2011)***.

The respondent further submits that should the court find that the claimant's probationary employment had lapsed by the time of the termination of his employment, the termination would still be lawful and within the confines of Sections 41, 43 and 45 of the Act as the claimant was "dismissed" because of his record of poor performance, which is valid reason under Section 45(2) of the Act, that the claimant failed to improve his performance even after this was brought to his attention, that the claimant was required to appear before the board to clarify the issues raised against him and was thus accorded a fair hearing under Section 41 of the Act.

The respondent relies on the case of ***Samson Owili –V- Kenya Ports Authority Cause No. Mombasa 131 of 2012***, in which the court stated that any employment contract presupposes the freedom to terminate the contract upon terms set out in the agreement.

## **Determination**

The issues for determination are whether the termination of the claimant's employment was unfair and if he is entitled to the prayers sought.

Section 42 of the Act provides for probationary contracts as follows –

### **42. Termination of probationary contracts**

- (1) The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.**
- (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.**
- (3) No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2).**
- (4) A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice.**

Probationary period may be defined as the period when an employer observes a new employee with a view to ascertaining the suitability of the new employee for the job. It makes it easy for the employer to release such employee during the probationary period where the employee fails to perform to the employer's expectation.

The Otario Labour Arbiter used these words in U.E

*“An employee who has the status of being on probation clearly has less job security than an employee who enjoys the status of a permanent employee. One is undergoing a period of testimony, demonstration or investigation of his qualifications and suitability for regular employment as a permanent employee and the other has satisfactorily met the test.*

*The standards set by the company are not necessarily confined to standards relating to quality and quantity of production, they may embrace consideration of the employee's character, ability to work in harmony with others, potentiality for advancement and general suitability for retention in the company. Although it is apparent that any employee covered by the agreement can be discharged for cause at any time, the employment of a probationer may be terminated if, in the judgment of the company prior to the completion of the probationary period, the probationer has failed to meet the standards set by the company and is considered to be*

*not satisfactory.”*

The Employment Act of Kenya sets that period at a maximum of 6 months with the option to extend it by a further 6 months following which the employee must either be confirmed or discharged from employment without the employer assigning any reasons, with 7 days' notice or payment of 7 days wages in lieu of notice.

In the instant case, the claimant was employed on a probationary contract of 6 months, but only 3 months into the probationary contract, the claimant was promoted to the position of Human Resources Manager.

This in my opinion, effectively brought to an end the initial probationary period of 3 months. For the respondent to have promoted the claimant to the much higher position of Human Resource Manager without him applying for the position, only three months into his probation employment, it must have been satisfied with his performance as Senior Personnel Officer.

I therefore find that the first probationary period came to an end upon the promotion of the claimant.

The next issue is what is the fate of the probationary period following the promotion that came to an end 6 months from the date of promotion which was on 6<sup>th</sup> June 2016? No indication was given by the respondent that the performance of the claimant was wanting up to the end of the probationary period while serving in the position of Human Resource Manager. He was thus not on probation on 17<sup>th</sup> June 2016 when the respondent purported to extend his probationary contract by 3 months.

Even assuming the probationary period was lawfully extended (which it was not), Section 42 would not apply to the termination of the claimant's employment. Section 42 only applies for the first 12 months of employment and not to probation upon appointment, as is expressly provided in Section 45(3) which provides that –

**(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.**

[Emphasis added]

The claimant was admittedly in the employment of the respondent for a period of more than 15 months from 21<sup>st</sup> September 2015 to 6<sup>th</sup> February 2017. The worst the respondent could do if he did not qualify for confirmation was to revert his position as Senior Personal Officer.

The next issue is therefore if the termination was unfair. The claimant was not given a hearing in terms of Section 41 of the Employment Act which requires that he is given the reasons for which the employer contemplates to terminate his employment, which is to be done in the presence of a fellow employee of his choice and both himself and the employee accompanying him are given an opportunity to make representations.

The respondent's argument that the claimant appeared before the Board and was thus given a hearing is not factual as no proof was submitted to that effect such as a letter of invitation to the meeting or minutes of the meeting. It is further not factual that the claimant's case was a disciplinary issue. Section 41 distinguishes misconduct, which is a disciplinary issue, poor performance, which is a capacity or performance issue; and physical incapacity.

It has been held by this court in several cases that for an employer to terminate the employment of an employee on grounds of poor performance the employer must demonstrate that the employee was put on a performance enhancement program with clear performance indicators over a defined period, and given all assistance necessary, but failed to improve. In *Jane Samba Mukala –V- Ol Tukai Lodge Limited (2013) eKLR*, the court observed as follows –

*“Even with this not having been complied with, there is no indication or evidence submitted before this court that the respondent had taken any measure to fairly evaluate the claimant based on a policy document or any other practice that they had adopted to arrive at the decision that the claimant was of poor performance.*

*The respondent having no evaluation measure for performance, then cannot be said to apply a measure for the same in this case. It has no basis. Majority of employers have now adopted various tools for performance appraisal every year to address matters of employee performance. This is set out as an elaborate system where an employee is given a chance for self-evaluation, then peers are invited to evaluate and a supervisor is given a chance to give their evaluation and comments. Where there are weak areas identified following this evaluation, the employee is given work target with a time plan on how to address these weaknesses. A follow up review is done and where such an employee is still found to be below the set criteria, then a warning and eventual termination may arise. Where such an employee show improvement, they are given a chance to demonstrate that indeed given time and the necessary support, they can give their best. This would constitute what is procedurally and substantively fair to an employee.*

*In this case, the respondent failed to consider or apply the appropriate test for judging the procedural and substantive fairness of a poor work performance termination with no objective criteria that provided for dismissal or termination as a reasonable sanction for failure to meet performance standards where the employee had been made aware of the standard and was given a reasonable opportunity to improve. No appraisal system was demonstrated to exist. The respondent did not have a criteria to use on any employee to assess their performance.”*

The same subject was considered in *Agnes Yahuma Digo –V- P. J. Petroleum Equipment (2013) eKLR* –

*“I will now deal with the issue of the Claimant's performance prior to her termination. The Claimant told the Court that she had done her best within a difficult background of the Respondent's dented image within the industry arising from failure to meet financial obligations to suppliers. The Respondent on the other hand maintained that the Claimant alongside other professional staff in the Petroleum Division had contributed to the Respondent's woes. Specifically, by failing to keep working hours the Claimant had rendered herself incapable of selling off existing stock and/or accessing fresh supplies.*

*Staff performance management is crucial for organizational success. In this case there was no evidence that there was any performance management system in place. Indeed the Respondent's witness, Peter Mugambi admitted that the Claimant had not been given any targets. Even worse, the Claimant had no written job description.*

*In the case of Kenya Science Research International Technical and Allied Workers Union (KSRLTAWU) Vs Stanley Kinyanjui and Magnate Ventures Ltd (Industrial Court Cause No. 273 of 2010) the Court stated thus: -*

*“The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In our view 2-3 months would be reasonable.”*

*There was no evidence of any appraisal of the Claimant's performance at any stage. An employer who fails to manage the performance of their staff lacks the moral authority to tell staff that they have underperformed. On this basis, I have rejected the Respondent's claim that the Claimant's performance was poor. Even if both the Claimant and the Respondent were to blame for the eventual closure of the Respondent's Petroleum Division, the bigger blame lay with the Respondent. That being the case, the only ground on which the Claimant could be indicted was her failure to keep working hours for which I have already found her culpable.”*

In the claimant's case there is no evidence that before the expiry of the probation period there was any issue brought to his attention over his poor performance.

There is further no demonstration that at the time of the purported extension of probationary period he was informed about his shortcomings and given indicators as to what was expected of him. The letter of extension of probation is a one sentence letter that states –

*“The 23<sup>rd</sup> Board meeting discussed your confirmation and resolved to extend your probation period for 3 months to allow you improve your performance.”*

The issues raised in the letter dated 11<sup>th</sup> November 2016 were presented to him for the first time in the letter. The first opportunity the claimant had to respond to the issues raised against him was through the show cause letter dated 27<sup>th</sup> January 2017.

After the response to the show cause letter he was not given a hearing but was instead issued with the letter of termination.

Section 41 is couched in unequivocal and mandatory terms. The Section provides that before an employer terminates the employment of an employee on grounds of misconduct, poor performance or physical incapacity the employer must explain to the employee in the company of either a fellow employee or union official of his choice, the reason for which the employer contemplates the termination and that the employer must give the employee as well as the persons accompanying the employee an opportunity to be heard.

In the instant case there was no hearing; the board sat without the claimant and decided to terminate his employment.

From the foregoing, there were no valid grounds for termination and neither did the respondent observe fair procedure. The termination was thus both substantively and procedurally unfair within the provisions of Section 45(2) of the Act. I find and declare accordingly.

The final issue for determination is whether the claimant is entitled to the remedies sought. He prayed for a declaration that the termination was unlawful. I have found the termination unfair and have declared so. He prayed for reinstatement. Taking into account the factors under Section 49(4), and further considering his very critical position as Human Resource Manager, it would not be practical for him to work with the respondent taking into account circumstances under which employment was terminated. Further Section 49(4)(d) permits reinstatement only in exceptional circumstances. I do not find the circumstances of the claimant exceptional. I therefore decline to order reinstatement.

The claimant prayed for maximum compensation of 12 months' salary. I have considered all the circumstances of the case especially the claimant's position, the history of his employment with the respondent, the manner in which he lost his employment and his reasonable expectations. It is my opinion that 6 months' salary would in the circumstances be reasonable compensation. I thus award him the same in the sum of Kshs.2,136,504.

The claimant prayed for service pay. He is not entitled to the same as he was a member of NSSF and is excluded from application of the same by virtue of Section 35(6) of the Employment Act. The prayer is thus declined.

The claimant is entitled to 6 days' salary worked in February 2017 at Kshs.82,173.20. He is also entitled to one month's pay in lieu of notice at Kshs.356,085.38/=, leave days at Kshs.520,430.50/= and leave travelling allowance of Kshs.256,084 being one month's basic salary provided in paragraph 3.5.2 of the Staff Administration Code.

The respondent shall also issue a certificate of service to the claimant and pay his costs of this claim. Interest shall accrue from date of judgment.

In summary therefore I enter judgement for the claimant against the respondent as follows –

1. Compensation.....Kshs.2,136,504.00
2. Salary for days worked.....Kshs.82,173.20
3. Pay in lieu of notice.....Kshs.356,084.00
4. Leave travelling allowance.....Kshs.256,084.00
5. Pay in lieu of 38 days annual leave not taken.....Kshs.520,430.50

**Total Kshs.3,351,276.90**

6. Certificate of service

7. Costs

8. Interest at court rates from date of judgment.

**DATED AND SIGNED AT NAIROBI ON THIS 15<sup>TH</sup> DAY OF MARCH 2019**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 29<sup>TH</sup> DAY OF APRIL 2019**

**MATHEWS NDERI NDUMA**

**JUDGE**