



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 812 OF 2016

KATUNGE KIILU.....CLAIMANT

VERSUS

NATIONAL AIDS CONTROL COUNCIL.....RESPONDENT

JUDGMENT

1. On 7th March, 2018 the parties agreed by consent to have the matter finalized by way of written submissions. The parties further agreed to have the documents filed adopted as evidence.
2. The Claimant averred that she was employed by the respondent on 17th April, 2015 and rendered her services diligently, honestly and unreservedly. She served as the Head of Communications, Public Relations and Knowledge Management Officer – Beyond Zero Campaign Secretariat.
3. According to the claimant she worked for over six months before her services were unfairly terminated. According to the claimant, the respondent failed to follow its HR Manual and Procedure. Further she was expectant at the time of dismissal, hence she contended that her dismissal was on account on pregnancy.
4. The respondent on its part alleged that it was not true that the claimant rendered excellent or acceptable services. There were numerous commissions or omissions on the claimant's part that militated against her continued employment. According to the respondent as early as her second month in employment the claimant already developed a difficult working relationship with her supervisor. Then further the claimant absented herself from work and attended activities out of work station without permission. The respondent further averred that the claimant failed to perform assigned duties leading to drop in visibility of the Beyond Zero Campaign. According to the respondent within the probation period, the claimant was evaluated by her supervisor and she scored 40.6%. A meeting was subsequently held and it was noted that the applicant had not met most of her targets despite her commitment to improve. The Council therefore decided to not to confirm the claimant to employment.
5. The respondent further averred that the claimant never informed the respondent of her pregnancy as required under the Employment Act hence the allegation of dismissal on account of pregnancy is untrue.
6. In his submissions, Mr Kurauka for the respondent submitted that the visibility of a campaign was the responsibility of the team members. The respondent failed to demonstrate how the claimant's services resulted in a drop in the campaign visibility. Further at no time was the claimant issued with a formal written communication from her supervisor indicating any complaints regarding her performance or insubordination.
7. Counsel further submitted that having been employed at Level 3 the claimant should have been invited in writing to appear before the Council and given an opportunity to defend herself before the Council.
8. Regarding the appraisal, the claimant submitted that appraisal she signed was served at 24.5% and not 40.6%. This score was maliciously altered without her knowledge.
9. Mr Kioko for the respondent submitted that the applicant was put under probation for a period of six months. It was after completion of the probation period that a confirmation letter was to be issued. The claimant was never issued with a confirmation letter. It was before she completed her probation period that on 20th November, 2015 a meeting was held between the claimant, her supervisor and the head of HR to review the claimant's appraisal which had been done earlier between her and her supervisor. The conclusion of the meeting was that the claimant's improvement was beyond salvage. Counsel further submitted that the claimant had earlier been appraised on 10th November, 2015 in which her appraiser had recommended that she be relieved of her duties and she signed the appraisal.

10. The claimant herein was appointed on 17th April, 2015. Her appointment was subject to a six months probationary period. The appointment letter further provided that upon satisfactory completion of the probation period the claimant shall be issued with a confirmation letter.

11. By a letter dated January, 2015 the respondent informed claimant that following a review of her performance which was found unsatisfactory, the respondent had decided not to confirm her appointment.

12. The claimant having assumed office on 17th April, 2015, her probationary period ended around 17th September, 2015. She did not get her confirmation letter immediately. An appraisal was done dated 12th October, 2015 for the period between June, 2015 and November, 2015 in which it was returned a score of 40.6% which the respondent considered did not meet expectations. It was therefore recommended that the claimant's services be terminated.

13. The Claimant's letter of appointment provided that her appointment would be confirmed upon satisfactory completion of the probation period. The only way the respondent could determine whether the claimant satisfactorily concluded her probation was through her appraisal. The appraisal unfortunately returned non-satisfactory performance. The respondent was therefore entitled either to extend the probationary period or terminate claimant's service. It opted for the latter option.

14. Probation period is a delicate but essential period in an employment contract. It is during this period that an employee is given an opportunity to practically exhibit the skills usually elaborately expressed in curriculum vitae submitted by job applicants. There is no obligation to hire if an employer is reasonably satisfied that an employee did not successfully complete the probationary period.

15. The claimant has submitted that the fact that the respondent did not confirm her appointment immediately on the expiry of the probation period meant her appointment was automatically confirmed. The respondent has explained that the Finance and Administration Committee at a special meeting held on 10th December, 2015 decided not to confirm the applicant. The implementation of the decision could only be done once the minutes were signed. The signature was delayed as the respondent's offices were closed until 5th January, 2016.

16. This could be held in the case of **Dinah Musindarweso V. Femnat [2012]eKLR** that parties to a contract may by their own conduct vary or extend a term or the entire contract. The Employment Act provides for extension of probation period but with the consent of the employer. The Act is however silent on how such consent should be expressed. Whereas it is desirable to express such consent in writing. The fact that an employer continues to work without asking for the confirmation immediately it matures may be taken as implied consent. The claimant did not produce any evidence to show that she sought the confirmation immediately it matured.

17. Whereas the claimant complained about malice and termination on account of pregnancy, material filed by both parties does not seem to support these allegations.

18. In the circumstances the court finds the claim without merit and the same is hereby dismissed with no order as to costs.

19. It is so ordered.

Dated at Nairobi this 24th day of May, 2019

Abuodha J. N.

Judge

Delivered this 24th day of May, 2019

Abuodha J. N.

Judge

In the presence of:-

..... for the Claimant and

.....for the Respondent