



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1550 OF 2015

EUNICE NJERI GACHERU.....CLAIMANT

v

GEORGE NAMASAKA SICHANGI

JOSEPHINE NAMASAKA

MWANGI KARIUKI t/a

SICHANGI PARTNERS ADVOCATES.....RESPONDENT

JUDGMENT

1. Eunice Njeri Gacheru (Claimant) is an advocate of the High Court of Kenya.
2. Around 17 June 2014, George Namasaka Sichangi, Josephine Namasaka and Mwangi Kariuki t/a Sichangi Partners Advocates (Respondent) admitted her into the Hill Team as an Associate Advocate.
3. The contract was subject to a three (3) months' probationary period which could be extended for a further three (3) months.
4. During the probationary period the contract could be terminated by the giving of 7 days' notice. After the probation, termination of membership could be effected by giving one (1) month written notice.
5. On 10 April 2015, the Respondent wrote to the Claimant giving her seven (7) days' notice of termination.
6. The notice indicated that the Claimant had not been confirmed into membership of the Hill Team.
7. According to the notice, the Claimant's last working day was stated as 17 April 2015.
8. On 20 April 2015, the Respondent wrote another letter to the Claimant noting that she had *absconded* work from 16 April 2015. The letter also forwarded the Claimant's salary for 15 days worked in April 2015.
9. The Claimant sought legal advice and on 5 June 2015, her legal advisers issued a demand letter to the Respondent alleging unfair termination of employment.
10. The demand was followed with the instant proceedings in which the Claimant stated the Issues in Dispute as
 - (i) Wrongful dismissal
 - (ii) Unfair termination
 - (iii) Remedies for wrongful dismissal and unfair termination.
11. The Respondent filed a *Statement of Response* on 3 November 2015 contending that the termination of the Claimant's membership was on account of *poor performance, failure to obey a lawful command* and that the Claimant still being *under probation*, the termination was in accord with the contract, and therefore provisions of section 41 of the Employment Act, 2007, were inapplicable.

12. On 31 March 2017, the Court dismissed an application by the Respondent seeking to strike out certain prayers by the Claimant.
13. The Cause was heard on 19 March 2019 and 20 March 2019. The Claimant and the Respondent's Managing Partner testified. They also adopted their written witness statements.
14. The Claimant filed her submissions on 23 April 2019 (should have been filed/served before 20 April 2019) while the Respondent filed its submissions on 23 May 2019.
15. The Court has considered the pleadings, evidence and submissions.

Was Claimant under probation at time of separation?

16. The contract of employment provided for a 3 month probationary period which could be extended for a further period of 3 months if the Respondent was not satisfied with the performance of the Claimant.
17. Considering that the contractual relationship started around 16 July 2014, the 3 months initial probation period lapsed around 15 October 2014.
18. Although the Respondent contended that the probation period had been extended, and that the Claimant was still under probation in April 2015 when her membership was terminated, the Respondent did not formally notify the Claimant that her probation period had been extended after the first 3 months.
19. The Respondent equally did not produce any notification issued to the Claimant at the end of the first 6 months (around 15 January 2015) extending the probation.
20. *Confirmation*, it is clear from the aforesaid clause was subject to performance.
21. However, even on the aspect of *performance*, the Respondent did not produce any formal records to suggest that the Claimant was evaluated/appraised at the end of the first 3 months, or at the end of 6 months.
22. *Probation and confirmation*, in terms of the contractual relationship between the Claimant and the Respondent had taken a formalistic context, and therefore the Court does not understand why the Respondent would contend in Court that the probation was extended informally (orally, if at all).
23. Section 42 of the Employment Act, 2007 sets out the basic *probationary conditions of employment* as a direct derivative of the right to fair labour practices as envisaged by Article 41 of the Constitution.
24. In terms of the *statutory probation period*, any probation period extending beyond 6 months must be made with the agreement of the employee.
25. The Respondent did not demonstrate that it had the Claimant's agreement to extend the probation beyond 6 months.
26. The Court therefore finds that the Claimant completed her probation after 3 months (or at the end of 6 months) and therefore was not on probation in April 2015 when the Respondent brought the relationship to an end.

Unfair termination of employment

Procedural requirements

27. Having concluded that the Claimant had completed/served out the probation period, the Claimant was entitled to 1 month *written notice of termination of employment* in terms of clause 11 of the contract as read with section 35(1)(c) of the Employment Act, 2007.
28. By not giving the 1 month notice, the Respondent was in breach of contract and statute.
29. Further, the Respondent should have afforded the Claimant a hearing as contemplated by section 41(1) & (2) of the Employment Act, 2007. There was no evidence that the Respondent informed the Claimant that the termination of her contract was under consideration and that her representations were called for.
30. There was no disciplinary hearing, and the Court so finds, in terms of section 41 of the Act.

Substantive requirements

31. Whenever an employee challenges the fairness of a termination of employment, the Respondent is now under a statutory burden to prove the reasons for termination of employment, and that the reasons were valid and fair. That is the import of sections 43 and 45 of the Employment Act, 2007.
32. The primary reason for the termination of the Claimant's membership was *performance*.

33. The Respondent had *Personnel Policies and Procedures Manual* which was not produced in Court, and therefore the Court is unable to address itself as to whether the Respondent complied with its requirements.

34. Despite the failure, an employer asserting *poor performance*, and more so an employer with *Personnel Procedures*, should be able to demonstrate that performance appraisals and evaluations were conducted.

35. The Respondent did not produce any *performance appraisals or evaluation records* in respect of the Claimant.

36. Although contending that various sessions were held with the Claimant to discuss her *performance*, not even notes of such meetings were produced in Court. The Respondent did not also file/produce copies of the poorly drafted documents by the Claimant.

37. The Court can therefore conclude that the termination of the Claimant's membership was not for valid and fair reasons.

Compensation

38. The Claimant served the Respondent for slightly under 1 year.

39. In light of the length of service, the Court is of the view that the equivalent of 2 months gross salary would be appropriate compensation (gross monthly salary was Kshs 180,000/-).

Pay in lieu of notice

40. The Respondent gave shorter notice than envisaged under the contract and statute, and the Court will in the circumstances find that the Claimant is entitled to 1 month salary in lieu of notice.

Breach of contract

Leave

41. Annual leave of at least 21 days is a statutory entitlement of each employee (clause 6 of the contract also provided for 21 days annual leave), and failure to allow an employee to take leave would amount to breach of contract/statute.

42. The Claimant sought 21 accrued leave days which she computed as being equivalent to Kshs 84,000/-.

43. The Respondent was aware of the Claimant's plea for leave and it filed leave records showing the Claimant had a balance of 11.5 leave days as of 24 March 2015.

44. The Respondent however did not compute the cash worth of the 11.5 days or interrogate the Claimant's computation(s).

45. Pursuant to the provisions of section 10(3) & (7) as read with section 74 of the Employment Act, 2007, the Court will allow the head of claim but in the revised sum of Kshs 68,400/- (in submissions).

Salary for 15 April 2015 and 16 April 2015

46. The Claimant did not report to work on 15 April 2015 and 16 April 2015 and by dint of section 19(1)(c) of the Employment Act, 2007, the Respondent was within its rights to deduct the wages for the 2 days.

Certificate of Service

47. A *certificate of service* is a statutory entitlement. and the Respondent should issue one to the Claimant within 15 days.

48. Before concluding, the Court observes that the Claimant did not lay any evidential or legal foundation for alleged violation(s) of constitutional rights, or prove a case for award of punitive or aggravated damages.

49. The Court declines jurisdiction on the tax questions raised as the same may be dealt with appropriately by the tax authority.

Conclusion and Orders

50. The Court finds and declares that the termination of the Claimant's employment was unfair and that the Respondent was also in breach of contract/statute.

51. The Claimant is awarded

(a) Compensation Kshs 360,000/-

(b) Pay in lieu of notice Kshs 180,000/- (c) Accrued leave Kshs 68,400/-

TOTAL Kshs 608,400/-

52. Respondent to issue Claimant with a *Certificate of Service* within 15 days.

53. Claimant to have costs on half scale for having filed/served submissions outside agreed timeline.

Delivered, dated and signed in Nairobi on this 5th day of July 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Kamotho instructed by Kamotho Njomo & Co. Advocates

For Respondent Mr. Gathua instructed by Sichangi & Partners Advocates

Court Assistant Lindsey