



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 2306 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 16th October, 2019)

CAROLYNE LAGAT CHEPTUMO.....CLAIMANT

VERSUS

JAMII BORA BANK LIMITEDRESPONDENT

JUDGMENT

1. The Claimant, Carolyn Lagat Cheptumo filed a Memorandum of Claim dated 22/12/2015 for unfair termination and deliberate withholding of her lawful dues against the Respondent, Jamii Bora Bank Limited.
2. She avers that she was employed by the Respondent on 11/03/2015 on permanent and pensionable terms with all the attendant benefits and that she was subsequently posted to its branch office at Funzi Road as a Branch Manager.
3. That on 24/08/2015 she received a termination letter from the Respondent's Human Resources Manager on allegations of lack of cohesion and leadership abilities amongst others and that she was dismissed without a right of fair hearing as under the Staff Human Resource Policy Regulations.
4. That she did not receive any notice to show cause why disciplinary action should not be taken against her and that there was no evidence brought to her attention nor any complaint presented to her to support the allegations of the termination letter. That at the time of termination, she was earning Kshs. 223,571/=.
5. That her termination from employment was actuated by malice, unfairness and a breach of the Respondent's statutory duty owed to her and the Respondent's own Human Resource Policy/Manual. She particularises the malice by the Respondent which includes failing to issue her with the necessary warning letters; discriminating her by terminating her on wild allegations; and failing to avail crucial evidence such as the probation reports and complaints from fellow employees on her lack of leadership skills.
6. She also particularises the Respondent's breach of statutory duty including failing to give her a fair hearing by not offering her the opportunity to have a fellow employee or counsel during the disciplinary proceedings; acting in disregard of justice and equity in both the process of and decision to terminate her employment.
7. That she has tried seeking numerous alternative equivalent employment opportunities at various banks but all have been rejected at the final stages of signing off the employment contract on account of the Respondent's negative reference. That working in the banking industry calls for high levels of integrity and any allegation of impropriety on an employee's integrity leading to termination spells a death knell of such employee's career.
8. She avers that by the Respondent's actions, she has suffered loss and demands compensation from the Respondent for damages as follows:-

<i>i. Unpaid salary from September – December 2015 (223,571 x 4)</i>	<i>Kshs. 894,284</i>
<i>ii. 24 days unpaid leave</i>	<i>Kshs. 160,000</i>
<i>iii. Claim under section 49 of the Employment Act (223,571 x 12)</i>	<i>Kshs. 2,682,852</i>

9. She further avers that demand and notice on intention to sue have been given and acknowledged but the Respondent has declined to make good her claim and that she prays for judgment against it for:

- i. A declaration and finding that the termination of the Claimant's employment with the Respondent was unlawful and unfair.*
- ii. An order directing the Respondent to reinstate the Claimant to her employment without loss of position.*
- iii. Status or benefits or in the alternative, payment of $(223,571 \times 12 \times 25) = \text{Kshs. } 67,071,300/=$*
- iv. Special damages of Kshs. 3,737,136/= as pleaded in paragraph 12 of the Claim.*
- v. Costs and interest on (ii) and (iii) above at court rates from the date of filing this claim until payment in full.*
- vi. Any other relief that the Honourable Court may deem fit to grant in the interest of justice.*

10. The Respondent filed its Statement of Response dated 08/02/2016 averring that it was a term of her contract of employment that the Claimant would serve a mandatory probation period of three months and be retained subject to her successful completion of the period.

11. That the Claimant's major role as a branch manager of the Respondent entailed developing new opportunities by actively marketing for lending and/or deposit from current and prospective clients and overall operations of the branch while ensuring staff engagement, customer satisfaction, profitability and growth in line with the company's strategy. That being aware of her mandate, she failed to meet her performance targets by inter alia:-

- a. Failing to demonstrate an overall branch leadership;*
- b. Failing to meet performance targets;*
- c. Failing to report arrears and adhere to standards as regards management of said arrears; and*
- d. Failing to manage her business development.*

12. That it consequently conducted a performance appraisal review of the Claimant and noted that her performance was below par and with the Claimant acknowledging this fact herself, her supervisor recommended that her probation be extended further for three months.

13. That she persisted in her poor performance and the Respondent was left with no choice but to terminate her employment noting the sensitive position she held. That the Claimant was still on probation at the time of her dismissal and as such, the provisions of **Section 42 of the Employment Act** are applicable in this case.

14. It denies the particulars of malice and *mala fides* on its part and that the Claimant having admitted her poor performance during her appraisal, the issue of fair hearing and/or being issued with warning letters do not arise in the circumstances. It further denies that a demand and notice on intention to sue has been given and acknowledged and prays that the suit is dismissed with costs.

15. The Respondent filed a Witness Statement dated 29/01/2019 made by its Human Resource Operations Officer, Samson Mutembei who states that in April 2015, the Claimant executed a copy of job description manual certifying her comprehension of the responsibilities bestowed upon her as a branch manager of the Respondent bank.

16. That the process culminating in her termination from employment was fair and just and was a result of her failure to deliver and that having been done in accordance with the law, the Claimant is not entitled to damages as claimed. It also filed another Witness Statement dated 22/03/2019 made by its Chief Manager Human Resource, John Wamwati who reiterates the statement by Samson Mutembei.

Claimant's Submissions

17. The Claimant submits that under **clause 4 of the employment contract**, the probation period was to run for three months from the contractual date of 11/02/2015 and that the said contract did not stipulate that the probation would be subject to extension.

18. That the termination was nearly three months after the lapse of the probation period submitting that employers are only legally allowed to extend a probationary period subject to the express agreement of the employee.

19. That the Respondent has failed to tender any evidence in the form of any letter of extension of probation or any written agreement or correspondence indicating her acceptance of extension of the said probation period. That the decision to extend her probationary period was thus effected unilaterally without any consent from her.

20. She relies on the case of **Frank Zawadi Wanjala Mudibo & 5 others –v- Zircon Group Limited [2016] eKLR** where the Court held that it is the duty of the employer to ensure that the extension of the probationary period is obtained by full knowledge of and consent of the employee through issuance of personal and written notice, failure to which the employer cannot claim to have changed the terms of the

probationary contract *suo motto*. That in the case of **Benjamin Nyambati Ondibe –v- Egerton University [2014] eKLR**, the Court stated that Section 42 is couched in mandatory terms that an employee must consent to extension of probation period and that even where such consent is obtained, the period cannot be extended for more than one year in aggregate.

21. The Court went on to state that the Respondent's failure must be interpreted to the benefit of the Claimant in that case. The Claimant in the instant case thus urges this Court to consider the dates of the signatures as appended on the appraisal forms stating that she signed on 13/07/2015 while the performance manager signed the said forms on 15/07/2015. That it therefore follows that the performance manager's comments and unilateral extension of probationary terms were not within her knowledge when she signed the forms.

22. That had the Respondent intended to terminate her employment pursuant to **clause 3 of the contract**, it should have given her seven days' notice or seven days' pay in lieu of notice but which notice was not issued to her.

23. That the Respondent did not therefore did not properly discharge its duty to issue a proper and written notice to her and that in the absence of such evidence and the clear terms set out under the employment contract, she urges the Court to reject the Respondent's argument that the said termination fell within the bounds of section 42 of the Employment Act.

24. The Claimant submits that her termination of employment failed to protect her right to fair administrative action guarded under **Article 47 of the Constitution** and that the Respondent's actions failed to meet the tenets of procedural fairness under **Section 41 of the Employment Act**.

25. With regards to the mandatory process outlined under Section 41, she cites the case of **Kenya Union of Commercial Food & Allied Workers v Meru North Farmers Sacco Limited, Cause No. 74 of 2013**. That she is therefore entitled to the remedies sought in her claim pursuant to **Section 49 of the Employment Act** with **Section 49(3) of the Act** granting the Court powers to reinstate an employee who was unfairly dismissed or terminated. That being a discretionary remedy, the court should consider the factors outlined under **Section 49(4) of the Act** and reinstate her to her position without loss of status or benefits or alternatively be paid Kshs. 67,071,300/=.

26. That she is entitled to reinstatement and/or compensation whose measure is the proportionate unpaid or withheld salary throughout that period of unlawful/unfair suspension or termination as was reiterated by the court in **Kenya Union of Printing, Publishing, Paper Manufacturers & Allied Workers v Timber Treatment International Limited [2013] eKLR**. That since she had reasonable expectation she would be exonerated from the allegations if her representations had been duly considered, she is therefore entitled to compensation for the duration of the disciplinary and legal proceedings.

27. That this Court be pleased to grant her compensation for prospective earnings in the alternative to reinstatement and she relies on the case of **Beatrice Achieng Osir –v- Board of Trustees Teleposta Pension Scheme, Cause 665 of 2011** where the court held that the remedy for prospective earnings should be considered alongside the prayer for reinstatement.

Respondent's Submissions

28. The Respondent submits that **Section 42 (2) and (3) of the Employment Act** which governs probationary contracts gives an employer latitude to extend the probationary period provided it does not exceed 6 months.

29. That the essence of section 42 of the Act is to allow the employer terminate the contract of service where the employee's performance is found wanting as was held by the court in the **Benjamin Nyambati Ondiba** case.

30. The Respondent submits that denying the employer the right to extend the probationary period would defeat the purpose of section 42 and that the Claimant acknowledged her performance was not good by stating:-

“My performance was not good this quarter, but from the pipeline, there are good prospects and I am optimistic of improving. My team is also upbeat and expect better performance next quarter”.

31. It submits that it has established the Claimant was on probation as at the time of termination of her contract of employment and that the main purpose of a probationary period is for an employer to determine the suitability of an employee to the assignment given to them. That it distinguishes the Court's decision in **John Muthomi Mathiu –v- Mastermind Tobacco (K) Limited [2018] eKLR** where the Court held that the probationary part of a contract of employment is the period where an employee is tested and cannot therefore anticipate the same safeguards to be available for him/her like for an employee already confirmed to position.

32. It is submitted by the Respondent that **Sections 43 and 45 of the Employment Act** do not therefore apply to the Claimant having been on probation at the point of termination and that it relies on the case of **Danish Jalang'o & another –v- Amicabre Travel Services Limited [2014] eKLR** where Rika J held that:-

“There is no obligation under Section 43 and 45 for employers to give valid and fair reasons for termination of probationary contracts, or to hear such employees at all, little less in accordance with the rules of fairness, natural justice or equity. The termination of the probationary contract is strictly regulated by the terms of the contract. The only question the Court should ask, is whether the appropriate notice was given, whether the employee received pay in lieu of notice; and, whether the employee was, during the probation period, treated in accordance with the terms and conditions of the probationary contract. The employee has no expectation of substantive justification, or fairness of procedure, outside what the probation clause and Section 42 of the Employment Act 2007 grants...”

33. That the Claimant's employment contract allowed for termination of contract during probation, by giving seven days' notice or 7 days'

payment in lieu of notice which is an adoption of **Section 42(1) of the Employment Act.**

34. That the Court in the *Danish Jalang'o case above* also stated that employers have no obligation to hear employees serving probation for any of the reasons stated under Section 41, i.e. poor performance, misconduct or physical incapacity, before arriving at the termination decision.

35. That the Claimant's employment was thus solely governed by clause 4 of the employment contract and Section 42 of the Employment and the termination was fair and lawful.

36. The Respondent submits that should this Court find that the Claimant's rights were violated, it would only amount to breach of contractual rights and not statutory and constitutional rights as prayed for by the Claimant.

37. On reinstatement, it submits that under **Section 12 (3) (vii) of the Employment and Labour Relations Court Act**, the court can only order reinstatement of an employee within 3 years from the date of dismissal and that this was emphasized in the case of **Kenya Chemical & Allied Workers Union v National Cement Company Limited [2014] eKLR.**

38. It contends that clearly from the foregoing, reinstatement is not available to the Claimant herein. The Respondent also submits that it paid the Claimant's final dues in accordance with the contract of employment for the days worked in August 2015 and 7 days' salary in lieu of notice.

39. I have examined all the evidence and submissions of the Parties. The Claimant was employed by the Respondent vide a letter dated 11.3.2015 with effect from 16/3/2015.

40. Under Clause 4 of this contract, the Claimant was to serve 3 months on probation, which indicates that the probation period was ideally to end by 15/6/2015.

41. After 15/6/2015, the Respondent did not communicate their decision to extend the probation period for a longer term as would have been the case as envisaged under Section 42(2) of Employment Act 2007 which states as follows:-

(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".

42. The catch word here is that probation period "**may be extended with agreement of the employee**".

43. The Respondents contend that they extended the Claimant's probation period as per their Appendix CL. However Appendix CL was signed by the Claimant on 13/7/2015 and by the supervisor on 15/7/2015 meaning that there was no one sitting as Claimant signed the performance appraisal document on 13/7/2015 and the indication made to her that the Respondents were extending the probation period.

44. This in effect implies that there was no agreement or discussion with Claimant that the probation period was extended. This also came in too late after 15/6/2015 when the probation period was to end and silence on Respondent's part was meant to indicate that the Claimant was no longer considered to be on probation.

45. It therefore follow that the Claimant ceased to be on probation after 15/6/2015 and any action to be taken against her should have complied with the provision of Section 41 of Employment Act which states as follows:-

(1). "Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2). Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make".

46. From the evidence before me, the Claimant was dismissed without being given an opportunity to defend herself and therefore the termination was unfair.

47. The termination letter issued to the Claimant also pointed out reason for termination being performance related. The Claimant was also not given any opportunity to demonstrate the absence or presence of the reason attributed to the termination.

48. This Court therefore finds that the Claimant was terminated without due process and without the Respondent establishing the existence of valid reasons to warrant her termination. The termination was therefore unfair and unjustified and I declare it so as under Section 45(2) of Employment Act 2007 which states as follows:-

(2) "A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure”.

49. In view of my findings above, I find for Claimant and award her as follows:-

1. 1 Months' salary in lieu of notice = 223,571/=

2. Maximum 12 months' salary as compensation for the unlawful and unfair termination = 12 x 223,571 = 2,682,852/=

3. Prorata leave for 4 months = 4/24 x 223,571 = 37,262/=

Total awarded = 2,943,685/=

4. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this Judgement.

Dated and delivered in open Court this 16th day of October, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Njoroge holding brief Kihang'a for Claimant – Present

Sigei holding brief Macharia for Respondent – Present