



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CAUSE NO. 66 OF 2017**

**SILAS OKELO OWITI.....CLAIMANT**

**VERSUS**

**REGISTERED TRUSTEES OF NANYUKI SPORTS CLUB.....RESPONDENT**

**JUDGMENT**

1. The Claimant herein sued the Respondent seeking recompense for the alleged unlawful dismissal from employment. He averred that he was employed as a General Manager on 14<sup>th</sup> August 2016 earning a gross salary of Kshs. 180,000/- plus a business entertainment allowance of Kshs. 10,000/- among other allowances. He averred that the contract he entered into with the Respondent was for 2 years with 6 months probationary period. He averred that he received a letter terminating the contract at expiry of the probationary period a few days past the due date. He averred that the contract provided for 2 months notice or salary in lieu thereof after the expiry of the probationary period. He averred that the termination was contrary to the provisions of the law, without justifiable reason and without following due process and that his dismissal was despite his exemplary performance and increase of the Respondent's business. He averred that the termination letter he received was dated 4<sup>th</sup> March 2017 which was 16 days after the end of the probation period. He thus sought a declaration that his dismissal was unlawful, payment of 2 month's salary in lieu of notice, damages for unlawful termination – Kshs. 2,160,000/-, February 2017 salary, interest on the sums claimed, certificate of service and costs of the suit.

2. The Respondent filed a defence in which it averred that the Claimant's contract of employment was terminated on 13<sup>th</sup> February 2017 by effluxion of time in terms of the letter of appointment and notification given to that effect by the Respondent on the same date. The Respondent averred that it was within its rights to terminate the contract before the expiry of the probationary period and that the termination occurred within that period. The Respondent averred that the termination was justified as the Claimant's performance fell below expectations and in any case the right to terminate the employment was unfettered. The Respondent denied the particulars of illegality set out in the claim averred that the Claimant's performance during the probationary period was unsatisfactory and could therefore not proceed with the engagement of the Claimant. The Respondent denied that the Claimant was in any way instrumental in improving the fortunes of the club and added that the Claimant was unable, unwilling or incompetent in discharging his duties and responsibilities with the Respondent. The Respondent averred that the communication of the decision was communicated to the Claimant on 13<sup>th</sup> March 2017 and not 15<sup>th</sup> March 2017 by Mr. Mark Kirimi the chairman of the Respondent's human resources committee. The Respondent averred that the letter dated 4<sup>th</sup> March 2017 was not despite its heading a termination letter and that its contents were self-explanatory. The Respondent averred that the contract expired or came to an end by effluxion of time and the Respondent merely communicated that expiry to the Claimant. The Respondent averred that the Claimant failed to avail himself to receive the certificate of service which he was notified he could collect at his convenience from the Respondent or point out the address at which he can receive it. The Respondent thus urged the dismissal of the Claimant's claim with costs.

3. The Claimant and the Respondent did not call any witness. The Claimant testified that he was conducting interviews to engage a golf club administrator on 13<sup>th</sup> March 2017 when other committee members were looking for him. He stated that it was an informal meeting when the news of the contract termination was communicated. He stated that he got the letter on 15<sup>th</sup> and it was backdated to 13<sup>th</sup> February 2017. He stated that he was entitled to 7 days notice during the probation period and that he was supposed to receive the letter on 8<sup>th</sup> February. He testified that the 7 days notice was not given. He stated that he reported to the board through Francis Mathenge the Chair and that the backdated letter was signed by Mark Kirimi who was not the appointing authority. He was cross-examined and testified that the 6 months probationary period was to expire on 14<sup>th</sup> February at midnight. He stated that he received the letter on 15<sup>th</sup> February 2017 and that the letter has an endorsement of the date 13<sup>th</sup> February 2017. He denied that he endorsed it 15<sup>th</sup> February for purposes of this case. He stated that he signed the dues computation exhibited in the Respondent's bundle on 4<sup>th</sup> March 2017 and that he knew Mark Kirimi as a member of the management committee. In re-exam he admitted that he received an end of probation letter that showed he started work on 14<sup>th</sup> August 2016 and that the Chairman was the appointing authority and to his knowledge there was no delegation. He stated that he did not receive the February 2017 salary and that he got much less. He testified that he did not get the 7 days notice and that the act by the Respondent took a negative turn in his career and took a toll. He stated that he never got the certificate of service. That marked the end of oral testimony.

4. The Claimant and the Respondent filed submissions. In his submissions the Claimant submitted that the first issue for determination was whether he was on probation at the time of termination by the Respondent. He submitted that it was the Respondent's position that due to the Claimant's poor performance he was not confirmed in his appointment. He submitted that the probation period would have come to an end on 15<sup>th</sup> February 2017 and that he had a legitimate expectation that the company's decision would be communicated to him at least 7 days before the 15<sup>th</sup> February 2017. He asserts that this was not done and he continued working. He submitted that since the Respondent failed to adhere to the express provisions of the contract the Respondent cannot come to court and assert that the Claimant was not confirmed. The Claimant submitted that at the time the Claimant received the end of probation letter dated 13<sup>th</sup> February 2017, the Claimant had been confirmed by virtue of the Respondent's failure to communicate within the specified time as per the contract of employment signed between the parties. The Claimant submitted that the communication as to whether the Respondent would confirm the Claimant into employment should have been done 7 days prior to 7<sup>th</sup> February 2017, i.e. on or before the 8<sup>th</sup> February 2017. He submitted that the letter of 13<sup>th</sup> February

2017 was outside the notice period. The Claimant submitted that his performance was not appraised as the Respondent did not annex any appraisal report. He cited the case of **Narry Philemon Anay-Odeck v Technical University of Kenya [Formerly the Kenya Polytechnic University College] [2017] eKLR** where it was held that failure to have systems in place so as to have the claimant's employment reviewed in time before the probation period lapsed cannot be visited on the claimant as an employee. The Claimant submitted that the letter dated 13<sup>th</sup> February 2017 in itself was a termination letter. He relied on the case of **Agnes Yahuma Digo v Petroleum Equipment Ltd [2013] eKLR** where the court held that the company's decision would have been communicated to her at least seven days before 12<sup>th</sup> August 2011 and this was not done and she continued working. The Claimant also cited the case of **Wilson Simiyu v The Chairman B.O.G Friends School Bokoli & Another [2016] eKLR** in support of his arguments on the issue of probationary contracts. He submitted that his employment was not terminated within the law. He submitted that he had successfully negotiated a temporary hangar to be placed in the Respondent's premises thereby bringing revenue to the club and that reinforced the point that his performance was above par and did not warrant dismissal. He relied on the case of **Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) v Stanley Kinyanjui and Magnate Ventures Ltd (Industrial Court Cause No. 273 of 2010)** (unreported) where the court stated that 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. The Claimant submitted that Section 41 of the Employment Act sets out the procedure for handling the cases of misconduct, poor performance and physical incapacity. The case of **Anne Atieno Sadiada v Lavage Laundrette & Dry Cleaners [2011] eKLR** where Rika J. held that substantive justification does not take away the duty by employers to avail procedural fairness to affected employees. He submitted that the Respondent did not follow the procedure established in law and urged the court to find that he was entitled to the remedies sought together with costs and interest thereon.

5. The Respondent submitted that the termination was neither unlawful nor unfair as the contract expressly provided for the termination meted out. The Respondent submitted that the damages payable to the Claimant upon termination were as per the contract and that the Claimant could not claim damages outside those provided for by the contract of employment. The Respondent submitted that the Claimant admitted to having received emoluments up to the 13<sup>th</sup> February 2017 and that he signed a disclaimer that he had no further claims from the Respondent. The Respondent urged the dismissal of the claim in its entirety.

6. The Claimant was under a contract that had provided for 6 months probation and the contract provided for the manner of termination of the contract. The failure of the Respondent to communicate the termination 7 days prior to the end of the probation period is indicted as the unlawful termination of the contract. The Claimant upon termination was paid some dues on 4<sup>th</sup> March 2017 and the payment had a disclaimer to the effect that he had thereby accepted the computation as his final dues owed by the Respondent and that he had no further claims from the Respondent. He accepted the figures in the computation as true and accurate to best of his knowledge. There is no indication that the contract he signed discharging the Respondent was obtained by fraud, illegality or through mistake. He willingly executed it. It mattered not that the sum he received may have been less than what he would have desired to have. It matters not that without the contract he signed he could have made a claim for recovery which could be successful. His claim before me is a non-starter as he absolved the Respondent wholly. Suit is dismissed with costs to the Respondent.

It is so ordered.

**Dated and delivered at Nyeri this 7<sup>th</sup> day of October 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a

true copy of the Original

**Deputy Registrar**